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***INDIA'S TRYST WITH ARBITRATION: ARE WE HEADING IN THE RIGHT DIRECTION?***

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# JOURNEY TO THE 'ONLY GAME IN TOWN'

J MARTIN HUNTER[6]

I consider it to be a great honour to have been invited to join the Editorial Advisory Board of this Journal, and to be associated with CARTAL.

It is clear that arbitration and, in particular, *international* arbitration,[1] will play an important part in the development of India's forthcoming role as a top-rank player in international commerce. International arbitration, which has been my own field of interest for almost fifty years, is indeed a separate and distinguishable 'animal' (to adopt Jan Paulsson's analogy) from other forms of arbitration.

*National* (often referred to as 'domestic') arbitration is a relatively simple process, in which all the elements are rooted in the same substantive and procedural *national* law and culture. The parties are (by definition) of the same nationality, or resident in the same country; the arbitrators and the parties' counsel are qualified as such in the relevant country; the applicable substantive and procedural laws (*lex causae* and *lex arbitri*, respectively) are common to all the players; and the local courts, which may have to rule on challenges to, or enforcement of, the eventual award are similarly equipped.

In short, while the subject-matter of a *domestic* arbitration may be complicated, there is nothing particularly complex about the *process* itself. The local national law applies to interpretation of the contract, the substantive issues in dispute, the jurisdiction of the tribunal, its powers and duties, and the procedure to be followed - as well as to any interlocutory issues and challenges to, and enforcement of, the award.

The motivation of parties in agreeing to resolve their existing or future disputes by *domestic* arbitration is usually either to avoid (a) the expense and delay that are thought (rightly or wrongly) to be associated with litigation in national courts, and/or (b) exposing the details of their dispute (and the evidence) publicly in

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[1] See Professor Jan Paulsson's apt reflections on 'elephants' and 'sea-elephants', in his lecture delivered at McGill University in 2008(published in Stockholm International Arbitration Review 2008:2, 1-20)

'open court'.[2] The choice between resorting to national courts or domestic arbitration for resolution of disputes which, for any reason, cannot be settled by direct or third-party assisted negotiation is usually dictated by the parties' desire to avoid expense and delay and/or to maintain confidentiality.

By contrast, *international* arbitration is by definition concerned with the resolution of disputes between parties of *different* nationalities, citizenship or places of business. This is a situation which must be analysed from a completely different perspective. If the parties to an international business transaction are to consider referring any disputes for resolution by a *national court*, how do they choose the court? Should it be the court of the country in which one of the parties resides, or operates? Should it be the court of a third, 'neutral', country? Or is there an appropriate *international* court?

It takes only a few seconds of reflection to conclude that none of these options are feasible. However well-regarded, in the 21st century, the national courts of either of the parties are clearly not to be considered as sufficiently 'neutral'. In the relevant context there is no available *international* court; and the choice of a 'third country' national court would be absurd, given that both parties would have to hire 'foreign' lawyers, with a 'right of audience' in the relevant court; translate all the documents into the language used in the chosen court; and that such court would probably have to decide the case applying a law that would be 'foreign' to its judges.

Then there is the question of *enforcement* of the result. While there are a number of bilateral treaties covering the recognition and enforcement of national court judgments in other countries, there are few (if any) *multilateral* international treaties. Therefore, unless the parties could find an acceptable 'third-country' court which has bilateral enforcement treaties with the countries of both parties, the 'third-country-court' notion is not a practicable solution.

It follows that *international arbitration* is the 'only game in town' for the resolution of business disputes in a manner that will lead to a binding result that will be enforceable[3] across national boundaries. Many countries, as well as their judiciary and legal professions, have embraced this concept. They have introduced legislation, and promoted the training of specialist lawyers to handle *international*

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[2] In most developed modern systems, justice must not only be done, it must be 'seen to be done'; only in exceptional situations will hearings (and the ensuing judgments) be held, and kept, *in camera*.

[3] By definition, *arbitration* is a process that is intended to lead to a binding, and enforceable, result.

disputes, which are resolved under various sets of rules, principles and guidelines developed by consensus within the international arbitration community.[4]

In summary, India must decide whether to pursue its own path, based on long-standing national procedural traditions, or to open its arms and join the majority of the international trading community, at grass-roots level, by embracing new legislation based as closely as practicable on the UNCITRAL Model Law;[5] and by creating a procedural culture for *international* arbitrations that is aligned with current practices recognised within the international arbitration community.[6]

[4] One of the most successful agencies of the United Nations is UNCITRAL, which has created and promoted a number of international instruments designed to increase the effectiveness and efficiency of the international arbitration process.

[5] The Indian Arbitration Act, 1996 is based on the UNCITRAL Model Law, but (a) it deviates from it in a number of material respects, and (b) has been interpreted by some Indian courts in a manner that does not accord fully with the way it has been interpreted in other leading Model Law jurisdictions.

[6] For example: by recognising the value as a precedent of the 2010 edition of the UNCITRAL Arbitration Rules; by introducing a system of evidence-gathering on the lines of the International Bar Association's Rules on the Taking of Evidence in International Arbitrations; and by encouraging the Indian judiciary, at all levels, to pay more than lip-service to the letter and spirit of modern international practice to the level of court intervention in the *international* arbitral process.

# INTERNATIONAL ARBITRATION AND INDIA: "A TRULY EXCELLENT JUDGMENT!"[1]

GARY B. BORN[G]& SUZANNE A. SPEARS[GG]

The inaugural edition of the Indian Journal of Arbitration Law could not have been published at a more auspicious time for international arbitration in India. As readers will know, India's Supreme Court gave the country's standing as a jurisdiction hospitable to international commercial arbitration a major boost last month. The Court's decision was an historic event, which both marks a turning point in the development of international arbitration and illustrates the complexity of the field's challenges.

As widely reported, the Supreme Court handed down a landmark judgment in *Bharat Aluminium v. Kaiser Aluminium*[2] ("Bharat Aluminium") on 6 September 2012. The Court held that Indian courts would no longer exercise authority to annul awards, or remove and appoint arbitrators in arbitrations seated outside India. In doing so, the Court relied on international authority to overrule three decades of domestic decisions in which Indian courts had claimed the right to set aside awards made outside India – notwithstanding the New York Convention and essentially uniform international authority to the contrary.

It is important to recall that India was one of the first signatories to the New York Convention in 1958 and that the Indian Parliament was one of the first national legislatures to give effect to the Convention, through its enactment of the 1961 Foreign Awards (Recognition and Enforcement) Act ("FARE Act"). The FARE Act was, in the words of the Supreme Court, calculated and designed

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[1] Peter Schlosser, *Comment*, 6 Arb. Int'l 86 (1990). The title is borrowed from the first line of a comment by Professor Schlosser on a decision by the German Bundesgerichtshof, *Judgment of 27 February 1970*, 53 BGHZ 315, 6 Arb. Int'l 79, 86 (1990) (German Bundesgerichtshof).

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[2] C.A. No. 7019/2005

to facilitate and promote international trade by providing for speedy settlement of disputes arising in trade through arbitration.[3]

Despite a generally supportive legislative framework, however, international commercial arbitration came to be regarded with a considerable measure of mistrust by the Indian courts in the decades that followed enactment of the FARE Act. Among other things, Indian courts were hesitant initially to refer cases involving Indian parties to arbitration outside of India, even where there was a valid agreement to arbitrate.[4] Moreover, in a series of widely publicized decisions, Indian courts also asserted the power to set aside or annul an arbitral award, under domestic Indian law, even if the award was made outside of India, provided that Indian law governed the arbitration agreement.[5] These decisions were contrary to the structure of the New York Convention (which generally permits annulment actions solely in the arbitral seat) and to the consensus of international authority; they attracted a considerable measure of domestic and international notoriety.[6]

With the advent of liberalization in India in 1991, there were calls to reform Indian law relating to international arbitration, as the 1961 FARE Act had originally been intended to do.[7] Thus, the Arbitration and Conciliation Ordinance of 1996 ("Act") was promulgated, with the objective of beginning a new era in alternative dispute resolution in India and reflecting the Government's new market-friendly policies. The Act consolidated and amended the law relating to domestic and international commercial arbitration in India (Part I), and the enforcement of foreign arbitral awards (Part II), and established the law relating to conciliation (Part III).[8] One of the Act's main objectives, as

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[3] Renusagar Power Co. Ltd. v. General Electric, A.I.R. 1985 SC 1156 (India).

[4] *See, e.g.,* RamjiDayawala v. Invest Import, A.I.R. 1981 SC 2085 (India). The Supreme Court largely rectified this problem in 1985, when it held that courts did not have the discretion to refuse enforcement of international arbitration agreements and could only refuse if conditions prescribed in the FARE Act were met. *See* Renusagar Power Co. Ltd. v. General Electric, A.I.R. 1985 SC 1156 (India).

[5] National Thermal Power Corp. v. Singer, A.I.R. 1993 SC 998 (India). *See also* Oil & Natural Gas Commission v. Western Co. of North Am., A.I.R. 1988 SC 674 (India). In particular, the Supreme Court held that the FARE Act could not govern the enforcement of such an award, and instead resort had to be made to the statute relating to domestic arbitration, the Indian Arbitration Act of 1940.

[6] *See e.g.,* J. Paulsson, *The New York Convention's Misadventures in India*, INT'L ARB. REP. (1992) (advising practitioners to avoid subjecting their contracts to Indian law as a result of the Singer and Oil & Natural Gas Commission decisions).

[7] *See e.g.,* V. Raghavan, *New Horizons for Alternative Dispute Resolution in India – The New Arbitration Law of 1996*, 13 J. INT'L ARB. 5, fns 94, 96 (1996) (citing commentators, associations of Indian industry, and the judiciary).

[8] Arbitration and Conciliation Ordinance of 1996 ("Act"), Preamble.

set forth in its General Provisions, was to minimize the supervisory role of courts in the arbitral process.[9]

Despite this proviso, courts continued to exercise wide-reaching supervisory authority over arbitrations, including arbitrations seated outside of India. In *Bhatia International v. Bulk Trading SA* ("Bhatia"), the Supreme Court held that all of Part I of the Act, which confers significant powers on Indian courts to grant provisional measures (Section 9), to make arbitral appointments in the absence of agreement by the parties (Section 11), to obtain evidence (Section 27) and to set aside arbitration awards (Section 34), applied to all arbitrations, including foreign arbitrations, unless expressly or impliedly excluded by agreement of the parties.[10] The holding in *Bhatia* paved the way for the Supreme Court's subsequent holding in *Venture Global Engineering v. Satyam Computer Services Ltd* ("Venture Global") that Indian courts were authorized to annul awards made outside India under Part I, Section 34 of the Act.[11] The *Venture Global* and *Bhatia* decisions led to renewed criticism of India for adopting an outlier position that was incompatible with the New York Convention.[12]

In the wake of *Venture Global* and *Bhatia*, new proposals were advanced to reform India's arbitration law to bring it into line with the New York Convention.[13] In response, the Indian Ministry of Justice released a consultation paper on proposed amendments to the Arbitration Act in 2010, in which it proposed that Part I of the Act be revised to expressly provide that it only applies to arbitrations seated in India except with respect to the provisions allowing for court-ordered provisional measures (Section 9) and the taking of evidence (Section 27).[14] Additionally, in early 2012, a five-judge constitutional bench of the Supreme Court agreed to hear consolidated appeals that presented the question whether to reconsider the Court's holding in *Bhatia* that the provisions of Part I of the Act apply to arbitrations seated outside of India except where expressly or impliedly excluded by the parties.

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[9] *Id.,* Section 5.

[10] A.I.R. 2002 SC 1432 (India).

[11] A.I.R. 2008 SC 1061 (India).

[12] R. Sharma, *Bhatia International v. Bulk Trading S.A.: Ambushing International Commercial Arbitration Outside India?,* 26 J. INT'L ARB. 357 (2009); S. Rai, *Proposed Amendments to the Indian Arbitration Act: A Fraction of the Whole?*, 3 J. INT'L DISPUTE SETTLEMENT 169, 172 (2011).

[13] *Id. See also,* F. S. Nariman, *Ten Steps to Salvage Arbitration in India: The First LCIA-India Arbitration Lecture*, 27 ARB. INT'L 115 (2011).

[14] *Proposed Amendments to the Arbitration and Conciliation Act, 1996, A Consultation Paper*, Ministry of Law and Justice, the Government of India (2010), http://lawmin.nic.in/la/consultationpaper.pdf

On 6 September 2012, the constitutional bench of the Supreme Court issued a meticulously-reasoned decision holding that Part I of the Act does not apply to arbitrations seated outside of India and that Indian courts therefore may not annul awards made outside of India under Section 34 of the Act.[15] In particular, the Supreme Court held that arbitrations seated outside India are dealt with only in Part II of the Act, which addresses the recognition and enforcement in India of foreign arbitral awards under the New York Convention and which provides for no judicial supervisory or annulment authority for foreign-seated arbitrations.[16]

In holding that Part I of the Act does not grant Indian courts supervisory authority with respect to arbitrations seated outside India, the Court in *Bharat Aluminium* expressly overruled both *Bhatia* and *Venture Global*. Relying on international authority and the New York Convention, the Court also clarified a number of other issues regarding the meaning of the Act. In particular, it affirmed that Part I of the Act adopted the territorial principle embraced by the UNCITRAL Model Law;[17] that the law of the arbitral seat governs the conduct of the arbitration,[18] and that an annulment action may be brought outside of the arbitral seat only in the very rare circumstance of the parties having agreed upon a procedural law other than that of the arbitral seat.[19]

At the same time, the *Bharat Aluminium* Court also declared that its holding would only "apply prospectively, to all arbitration agreements executed hereafter,"[20] leaving parties with arbitration agreements executed before 6 September 2012 subject to the Court's *Bhatia* decision and its progeny. Although the Court's prospectivity ruling was understandable, given the significance of the changes resulting from the *Bharat Aluminium* decision, purists will no doubt object that compliance with the New York Convention ought not to be delayed further.

Despite its effective date and challenges remaining in its implementation, *Bharat Aluminium* is of momentous significance. The decision represents a significant

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[15] Bharat Aluminium v. Kaiser Aluminium, C.A. No. 7019/2005. In *Bharat Aluminium*, the appellant had filed applications under Part I, Section 34 of the Act to set aside two ad hoc arbitral awards rendered by a tribunal seated in London.A.I.R. 2005 Chh. 21.

[16] *Id.*,

[17] *Id.* at pp. 69-75.

[18] *Id.* at pp. 72-74 (citing arbitration legislation in other countries and English court decisions); 105 (citing ALBERT VENN DICEY & LAWRENCE COLLINS, DICEY MORRIS & COLLINSON THE CONFLICT OF LAWS541-542 (11th ed. 1987)).

[19] *Id.* at pp. 138, 139, 142, 148-149 (citing G. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2333-2425 (2009)), 150-155 (citing courts of the United States and Hong Kong), 156, 158.

[20] *Id.* at 201.

affirmation by the Indian Supreme Court's commitment to the New York Convention and the international arbitral process. In looking to international authority and the Convention to overrule domestic precedent, the Court took an historic step, contributing significantly to the role of the Convention and the efficacy of the international arbitral process. Its decision will have substantial and continuing importance, not just in India but more widely; it can be expected to mark a genuine new beginning for international arbitration in the region.

On a practical level, knowing that 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. Consistent application of such an approach should also give parties more confidence in choosing India as a seat of arbitration and Indian law as a substantive law. And *Bharat Aluminium* may prompt the Indian legislature to act on proposed amendments to the 1996 Act, including suggestions that Part I's provisions relating to court ordered interim relief and taking of evidence be revised to apply to international arbitrations held outside of India. Such a change would further enhance the standing of India's arbitration law and reflect the objectives of the UNCITRAL Model Law and New York Convention.

# ARBITRATION AGREEMENT IN CONSTRUCTION CONTRACTS

S K DHOLAKIA[G]

In construction contracts, certain questions are often reserved for the Engineer which, after they are decided by him, are either declared to be final or may be reviewable by the arbitral tribunal.[1]

Where such questions are reviewable by the arbitral tribunal, it is generally accepted that the arbitral tribunal is empowered to review both the findings of fact and law made by the Engineer.

However, wherein the contract states that the decision of the Engineer is final, two questions arise: (a) whether the Engineer functioned as an arbitrator or as an expert; and (b) assuming that the Engineer functioned as an expert, whether the Engineer's decision is reviewable by courts and if so, what is the scope of such review.

The issue of whether the Engineer functioned as an arbitrator or as an expert will depend upon the language of the clause that requires him to decide the questions. If the language is susceptible to the interpretation that reference to the Engineer is in the nature of "arbitration agreement", then his decision would be an arbitral award; otherwise it would be an 'expert decision'.

Thus, what constitutes 'arbitration agreement' is of particular significance in construction and infrastructure contracts. Unfortunately the judgments of Indian courts are not always consistent as to whether such a term would be an 'arbitration agreement' or not.

This lack of clarity could lead to avoidable loss of time and costs. It could also lead to injustice as a court might set aside the award after it has been rendered on lack of arbitrability. This is hardly a good scenario, particularly in the Indian context where construction and infrastructure building contracts are multiplying exponentially. Finally, it could hurt the cause of arbitration. The question, therefore, needs urgent resolution.

For example, in *State of Orissa v. Bhagyadhar Dash,*[2] the court summarized the existing case law and laid down some general guidelines to enable the parties to

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[*] *Senior Advocate, Supreme Court of India.*

[1] Often, in modern times, the arbitral tribunal is empowered to review the Engineer's decision on facts and law. See for example clause 67 of FIDIC conditions of contract (now replaced by the NEC terms), or clause 66 of the ICE conditions of contract or relevant clause in the Frame Agreement under the JCT conditions of contract.

know if the clause concerned is arbitration clause or not. However, no consistent yardstick appears to exist among the cases cited.

An example of the decision of the Engineer acting pursuant to an "arbitration agreement" may be found in clauses such as the one found in Dash's case[3]:

"*Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of or relating to the contract, designs, drawing, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the work, or the execution, or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of a Superintending Engineer of the State Public Works Department unconnected with the work at any stage nominated by the Chief Engineer concerned. If there be no such Superintending Engineer, it should be referred to the sole arbitration of Chief Engineer concerned. It will be no objection to any such appointment that the arbitrator so appointed is a government servant. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to this Contract.*"

On the other hand, the example where some disputes are meant for the Engineer and some liable to be referred to arbitration is found in Suresh Chandra Panda's case[4]:

"*11. The Engineer-in-Chief shall have power to make any alterations or addition to the original specifications, drawings, designs and instructions that may appear to him to be necessary or advisable during the progress of the work, and the contractor shall be bound to carry out the work, in accordance with any instructions which may be given to him in writing signed by the Engineer-in-Charge, and such alteration shall not invalidate the contract and any additional work which the contractor may be directed to do in the manner above which is specified as part of the work, shall be carried out by the contractor on the same conditions in all respects on which he agreed to do the main work, and at the same rates as are specified in the tender for the main work.*

*Provided always that if the contractor shall commence work, incur any expenditure in regard thereof before the rates shall have been determined as lastly hereinbefore mentioned, then and in such case, he shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the determination of the rate as aforesaid according to such rate or rates as shall be fixed by the Engineer-in-Charge. In the event of a dispute, the decision of the Superintending Engineer of the circle will be final.*

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[2] (2011) 7 S.C.C. 406 (India).
[3] *Id.* at 419.
[4] Executive Engineer v. Suresh Chandra Panda (1999) 9 S.C.C. 92 (India).

*23. Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the work, or the execution, or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of a Superintending Engineer of the State Public Works Department unconnected with the work at any stage nominated by the Chief Engineer concerned. If there be no such Superintending Engineer, it should be referred to the sole arbitration of the Chief Engineer concerned. It will be no objection to any such appointment that the arbitrator so appointed is a government servant. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to this contract.*"

Does the Engineer function as arbitrator in such cases? What is the crucial element(s) that would help determine the answer. The chart below is a useful index of how the courts have approached the matter. The first column highlights the elements mentioned in the clause; the second gives the names of cases and the third indicates the result.

| **Elements** | **Case Name** | **Citation** | **Whether it is an Arbitration Agreement?** |
|---|---|---|---|
| Clause contains terms 'final', and 'binding', but not 'reference' or 'dispute' | State of U.P. v. Tipper Chand | (1980) 2 S.C.C. 341 (India) | NOT arbitration agreement. |
| Clause contains—'final' | Rukmanibai Gupta v. Collr. | (1980) 4 S.C.C. 556 (India) | YES, arbitration agreement |
| Clause contains—'final'; 'binding'; but not—'dispute'; 'reference' | State of Orissa & Anr. v. Sri Damodar Das | (1996) 2 SCC 216 (India) | NOT arbitration agreement |
| Clause contains—'final'; 'binding'; but not—'dispute'; 'reference. | K.K. Modi v. K.N. Modi & Ors. | (1998) 3 S.C.C. 573 (India) | NOT arbitration agreement |
| Clause contains —'final'; 'binding'; but not —'dispute'; 'reference. | Bharat Bhushan Bhansal v. U.P. Small Industries Corporation Ltd. Kanpur | (1999) 2 S.C.C. 166 (India) | NOT arbitration agreement |

| **Elements** | **Case Name** | **Citation** | **Whether it is an Arbitration Agreement?** |
|---|---|---|---|
| Clause contains—'final', 'binding', for some claims—supdt engineer; for others reference to arbitration to Chief Engineers | Executive Engineer v. Suresh Chandra | (1999) 9 S.C.C. 92 (India) | NOT arbitration agreement |
| Clause contains—'reference', 'binding' 'final' | State of Bihar v. Encon | (2003) 7 S.C.C. 418 (India) | YES, arbitration agreement (but not given effect to because of 'real bias' of the Managing Director)s |
| Clause contains—'final', 'conclusive' 'binding'—superintending engineer | Mallikarjun v. Gulbarga | (2004) 1 S.C.C. 372 (India) | YES, arbitration agreement |
| Clause contains—'final', 'binding', for some claims—Superintendent engineer; for others reference to arbitration to Chief Engineers | State of Rajasthan v. Nav Bharat Construction | (2005) 11 S.C.C. 197 (India) | YES—arbitration agreement |
| Clause contains—'final', 'binding', 'reference' to superintending engineer | State of Punjab v. Dina Nath | (2007) 5 S.C.C. 28 (India) | YES, arbitration agreement |
| Clause contains 'dispute' but not 'reference' nor 'adjudication' nor 'binding'. | State of Orissa &Ors. v. Bhagyadhar Dash | (2011) 7 S.C.C. 406 (India) | NOT arbitration agreement |

A careful study of these decisions reveals absence of consistency. The effect of a mistake in understanding whether the agreement relied upon is arbitration agreement could have serious consequences. In a large infrastructure contract, if the court finds that there is no arbitration clause the entire proceedings before the arbitrator and the award would become infructuous.

The 1996 Act does not permit either party to approach the court about the issue of existence of arbitration agreement until after the award.[5] Even when the issue is raised at the time of s. 11 applications, the court has no power to decide the question.[6] It is only after the award is made after prolonged proceedings, that the court has the power to examine whether the clause constituted "arbitration agreement" and whether the dispute in question was covered by the arbitration agreement.[7] In such cases the parties could end up losing very large and substantial sums, bringing them back to square one. This is undesirable.

Let us examine the clauses involved in the two or three of above cases and evaluate the reasoning of the courts.

(a) In the first of the cases listed above, *State of UP v. Tipper Chand,*[8] the relevant clause was as follows:

*"Except where otherwise specified in the contract the decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, design, drawing and instructions hereinbefore mentioned. The decision of such Engineer as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or things whatsoever, in any way arising out of or relating to the contract, designs, drawing specifications, estimates, instructions, orders, or these conditions, or otherwise concerning the works, or the execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment of the contract by the contractor, shall also be final, conclusive and binding on the contractor."*

The Supreme Court held that that agreement was not an arbitration agreement. In the case of *Governor General v. Simla Banking and Industrial Co. Ltd*[9] the clause was identical to the one before the Supreme Court. The Lahore High Court held that the clause did constitute an arbitration agreement.

The Supreme Court differed from the Lahore High Court and held that the clause cited above did not fulfil the requirements of an arbitration agreement. The reason given by the court was that the agreement should have either expressly stated that it was an arbitration agreement or at least there should have been a provision for making reference to enable the court to consider it to be an arbitration agreement.

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[5] The Arbitration and Conciliation Act, 1996, s.16.
[6] Indian Oil Corporation v. SPS Engineering (2011) 3 S.C.C. 507 (India).
[7] The 1996 Act, s. 34(29) (a) (iv).
[8] (1980) 2 S.C.C. 341 (India).
[9] A.I.R. 1947 (Lah.) 215.

As of end 2011, *Tipper Chand's*[10] case was followed in 8 other judgments.

(a) In *Rukmanibai Gupta v. Collector*,[11] the relevant clause was as follows: *"15. Whenever any doubt, difference or dispute shall hereafter arise touching the construction of these presents or anything herein contained or any matter or things connected with the said lands or the working or non-working thereof or the amount or payment of any rent or royalty reserved or made payable hereunder in the matter in difference shall be decided by the lessor whose decision shall be final."*

The Supreme Court held that the term of the contract constituted 'arbitration agreement'. The Court relied upon Russell on Arbitration[12] that stated that the arbitrator holds a 'judicial inquiry', and here the lessor is expected to hold such an inquiry (although the clause does not mention it). For that reason, the court held that the term constituted arbitration agreement.

It will be observed that the language of *Tipper Chand's* clause is essentially similar to that of *Rukamanibai's case*.[13] Neither uses the terms (i) arbitration agreement or (ii) reference or (iii) 'judicial inquiry'. However, in the two cases, coming only 8 months apart, the two benches took different views. In *Rukamanibai's case*,[14]*Tipper Chand's case*[15] was not cited.

In *State of Orissa v. Damodar Das,*[16] the relevant portion of the contract reads as follows:

"*25. Decision of Public Health Engineer to be final.— Except where otherwise specified in this contract, the decision of the Public Health Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications; drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work, or as to any other question, claim, right, matter or thing, whatsoever in any way arising out of, or relating to, the contract, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or the sooner determination thereof of the contract.*"

The court held the clause not to be an arbitration agreement because "*the arbitration agreement must expressly or by implication be spelt out that there is an agreement to*

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[10] (1980) 2 S.C.C. 341 (India).
[11] (1980) 4 S.C.C. 556 (India).
[12] DAVID ST JOHN SUTTON, JUDITH GILL& MATTHEW GEARING, RUSSELL ON ARBITRATION (Sweet & Maxwell, London) (23rd ed. 2007)
[13] (1980) 4 SCC 556 (India).
[14] (1980) 4 SCC 556.
[15] (1980) 2 SCC 341.
[16] (1996) 2 SCC 216.

*refer any dispute or difference for arbitration and the clause in the contract must contain such an agreement."*[17]

The principle approved in this decision was that of the arbitration agreement to cover the Engineer's decision there must be an agreement to refer disputes to arbitration.

These illustrative decisions which held that the Engineer would not be acting as arbitrator in respect of the disputes referred to him may be contrasted with those decisions that have held the contrary.[18]

Some of the contrary decisions are: (i) *Bihar State v. Encon;*[19] *Mallikarjun v. Gulbarga*;[20] *State of Rajasthan v. Nav Bharat*;[21] and *State of Punjab v. Dina Nath.*[22] They all contain similar language and none of them contain anything that would make it crucial to hold them as arbitration agreement. One example should suffice.

In *Bihar State v. Encon,*[23] the relevant clause was: "*60. In case of any dispute arising out of the agreement, the matter shall be referred to the Managing Director, Bihar State Mineral Development Corporation Limited, Ranchi, whose decision shall be final and binding.*"

The court formulated the following test: *"The essential elements of an arbitration agreement are as follows:(1) There must be a present or a future difference in connection with some contemplated affair; (2) There must be the intention of the parties to settle such difference by a private tribunal; (3) The parties must agree in writing to be bound by the decision of such tribunal; (4) The parties must be ad idem".*

Having laid down a principle in the most general terms, the court then went on to say that it, having regard to the facts and circumstances, would "*proceed on the basis that the clause constituted an arbitration agreement".* In effect, thus, the court laid down no clear principle and went on to say that the clause constituted an arbitration agreement.

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[17] *Id.* at 224.

[18] The question of how far the court would interfere with the discretion of the Engineer is a separate matter, examined below. The present analysis is on the assumption that the Engineer's decision is not reviewable by arbitral tribunal. In modern times, in international contracts, the arbitral tribunal is often empowered to review the Engineer's decision on facts and law. *See* for example clause 67 of FIDIC conditions of contract, or clause 66 of the ICE conditions of contract (now replaced by the NEC terms) or relevant clause in the Frame Agreement under the JCT conditions of contract.

[19] (2003) 7 S.C.C. 418 (India).

[20] (2004) 1 S.C.C. 772 (India).

[21] (2005) 11 S.C.C. 197 (India).

[22] (2007) 5 S.C.C. 28 (India).

[23] (2003) 7 S.C.C. 418 (India).

The group of clauses that contained the 'arbitration agreement' empowered the Managing Director to terminate the agreement if he thought it necessary to do so. The above clause empowered him to be the arbitrator. As the same person had the power to terminate as also to conduct the judicial proceedings in the form of arbitration, the court declined to allow the Managing Director to be arbitrator.

However, the *Encon case*[24] commenced in 1993 and ten years later, in 2003, the Supreme Court held that though the agreement was arbitration agreement, the arbitrator mentioned in the arbitration agreement was bound to be biased and hence the arbitration proceedings were inappropriate. The court did not mention what remedy the respondent could have pursued.

Thus, in several cases, there is no way to predict whether the court would hold a clause to be an arbitration agreement.

Different types of questions arise in respect of the remedy and its scope against the decision of the Engineer. For example:

(a) Some of the contracts provide that if a party is aggrieved the dispute can be taken to arbitration. In such a case, what is the scope of review of the Engineer's decision by the arbitral tribunal?

(b) Some contracts provide that such a challenge should be made before the arbitral tribunal within a specified time, failing which the arbitration would not lay. Does the time limit bind the party?

(c) Some contracts provide that the decision of the Engineer is final and binding and makes no reference to arbitration and either expressly or impliedly bars litigation. Is the aggrieved party without remedy?

(d) Some contracts declare the decision of the Engineer binding but do not state that his decision is final. Can the aggrieved party challenge the matter?

(e) Would the court allow a full trial or only seek to review the *errors* apparent in the decision of the Engineer?

With respect to (a) above, the only case decided by the Supreme Court on the issue is under the FIDIC condition no 67, which authorises the arbitral tribunal full review.[25] Clause 67.3 reads thus:

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[24] (2003) 7 S.C.C. 418 (India).
[25] NHAI v. Bumihiway (2006) 10 S.C.C. 763 (India).

*"67.3. Any dispute in respect of which the recommendation(s), if any, of the Board has not become final and binding pursuant to sub-clause 67.1 shall be finally settled by arbitration as set forth below. The Arbitral Tribunal shall have full power to open-up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the engineer and any recommendation(s) of the Board related to the dispute."*

Regarding (b) above, generally speaking, if the decision is not challenged within a specific time limit agreed to between the parties, then the court or the arbitral tribunal will not entertain the challenge belatedly made.[26]

However, Keating on Building Contracts suggests the following ways to fight it:[27]

1. the matters fall within the express exception to the conclusive effect of the certificate, e.g. fraud;
2. the issue is not within the range of matters upon which the certificate is stated to be conclusive evidence;
3. technical irregularity in the giving of the final certificate e.g. it was not issued by the person named as the architect in the contract; and
4. the architect was disqualified at the time when he gave his certificate.

Regarding (c), (d), and (e), there are few case laws in India dealing with these questions and none from the Supreme Court.

In view of the increasing number of cases of construction and infrastructure contracts in India, it is necessary to have a legislation that deals with these aspects with clarity. It would be ideal if the Engineer's decision (and now Dispute Resolution Board's decision) is made mandatory condition before resorting to arbitration and also empower arbitral tribunals to judicially review the decisions, whenever necessary.

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[26] CHEUNG KWOK KIT, TIME LIMITS FOR CONSTRUCTING ARBITRATION IN CONSTRUCTION CONTRACTS (Aug 20, 2012); http://www.deaconslaw.com/eng/knowledge/knowledge_100.htm

[27] VIVIAN RAMSEY, KEATINGON BUILDING CONTRACTS (Sweet & Maxwell Ltd., London) (7th ed.2000)

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

**BADRINATH SRINIVASAN***

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

* *B.A. (Law) LL.B. (S.D.M. Law College, Mangalore, India), LL.M. (West Bengal National University of Juridical Sciences Kolkata, India). The author is currently working in a Public Sector Undertaking. The views stated herein are his own and do not represent the views of anyone else.* *Special thanks to Mr. SumitRai, Ms.Roshni Rajiv, Ms. Madhavi Nalluri and Mr. Rohit Raj for their critical comments on a draft of this paper.*

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

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

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

[4] INDIA CONST. art. 136.

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

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

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

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

## II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## III

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

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[16] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## IV

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[50] CODE CIV. PROC., § 35(2).

[51] CODE CIV. PROC., § 35B.

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

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

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

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

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

## V

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# JUDICIAL TREND OF INTERVENTION IN SPORTS ARBITRATION AND ITS FUTURE IN INDIA

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## I. INTRODUCTION

Sports arbitration is a developing branch of alternate dispute resolution which provides for new ideas and mechanisms to cater to the unique requirements of sports disputes. It aims to provide satisfactory resolution of disputes in light of various superseding factors in sports law. This includes issues such as the need of speedy trials to maintain the dignity of sporting events,[1] the confidentiality required in such awards as well as reduced cost of dispute resolution.

Following this, various sports arbitral bodies under different federations have been set up to settle sports disputes through Alternate Dispute Resolution.[2] For the purpose of this paper, the researcher will focus on the Court of Arbitration for Sports ("CAS") which is being increasingly identified as the apex body in the field of sports arbitration.

## II. COURT OF ARBITRATION FOR SPORTS AS A DISPUTE RESOLUTION BODY

The CAS (1983) based in Lausanne, Switzerland, established by the International Olympic Committee ("IOC"), has been gradually dominating the international sports resolution scene.[3] It is often referred to as the 'sport's supreme court'.[4] Almost all International Sports Federations to the Olympic Movement require

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[1] Sports arbitral awards have been issued by arbitral bodies within 24 hours under institutional arbitration. For instance, Article 18 of the Arbitration Rules for the Olympic Games of the XXVII Olympiad in Sydney, 29 November 1999, stated that decisions were to be rendered within 24 hours of the application for arbitration is filed. This is a unique feature of Ad Hoc Division (ADH) of the CAS which is set up specifically for particular sporting events to deal with disputes arising during the event.

[2] The IABA, the World Governing Body of Amateur Boxing, for instance, established its own Arbitral Tribunal

[3] S. Gearhart, *Sporting Arbitration and the International Olympic Committee Court of Arbitration of Sport,* 6 JOURNAL OF INTERNATIONAL ARBITRATION 39 (1989).

[4] *Available at* http://www.wada-ama.org/en/Anti-Doping-Community/Court-of-Arbitration-for-Sport-CAS/ (Last visited on February, 2012).

sports disputes arising between themselves and sportspersons who come under their auspices to be settled by the CAS.[5]

*Functioning of the CAS:* The functions of the CAS, in relation to any dispute arising directly or indirectly from sports, include commercial disputes.[6] Hence, any natural or a legal person may refer a dispute to the CAS.[7] It is governed by its own set of rules and procedure. Under the CAS, the operative law is the Swiss law unless otherwise agreed upon by the parties.

*Jurisdiction of the CAS:* The CAS has a wide jurisdiction within the field of sports law to settle disputes between parties who have agreed to submit to its jurisdiction. Section 1 of the Code,[8] while establishing the jurisdiction of CAS, provides for arbitration *"only in so far as the statues or regulations of the said sports bodies or a specific agreement"*. It consists of two 'divisions', the Ordinary Arbitration Division, which handles matters of first instance and the Appeals Arbitration Division, which deals with appeals from the decisions of federations, associations and other sports bodies.[9]

An important jurisprudential principle as to the jurisdiction of the CAS arose from the Sydney Olympics (1999) through the decision of the Australian Courts in the case of *Raguz v. Sullivan.*[10] In this case, one of the two Australian 'Judokas' involved in arbitration, challenged an award by the CAS in the New South Wales Court of Appeal. The court refused to exercise its powers for the lack of jurisdiction. It stated that CAS Agreement for Arbitration form signed by the parties was not a 'domestic arbitration agreement' within the Commercial Arbitration Act 1984[11], but a foreign one. Hence, it was declared to be outside the jurisdiction of the Australian Courts. The court also made a distinction between the physical (Sydney, Australia) and the legal (as expressly stipulated by the agreement Lausanne, Switzerland- the seat of CAS) place of arbitration.

*CAS and its Interaction with National Courts:* Under the ambit of Sports Arbitration it is observed that national courts orders' have no binding authority upon non-

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[5] Simon Gardiner, SPORTS LAW (Cavendish Publishing Limited, Sydney, London, 3rd ed., 2006).

[6] CAS can also hear and settle disputes over sponsorship contracts, for instance.

[7] *supra* note 7.

[8] Code of Sports Related Arbitration. Most of the world's sports bodies have included such a statute or regulation into their rules except for the IAAF and FIFA.

[9] Paul H. Haagen, *Have the Wheels Already been Invented? The Court of Arbitration for Sport As A Model of Dispute Resolution,* (last visited on February 19, 2012), http://www.law.duke.edu/sportS.C.enter/haagen.pdf.

[10] *Raguz v Sullivan*, 2000 NSWCA 290.

[11] *Commercial Arbitration Act*, 1984 No. 160, as amended by the Act 1990 No. 100, *available at* http://www.austlii.edu.au/legis/nsw/consol_act/ca1984219.txt (last visited on February 29, 2012).

national parties but are binding upon parties who fall under the jurisdiction of the courts.[12] Such forays of the national courts in awards rendered by International Bodies may have the effect of invalidating them. This is reflected in the case of *Samoa NOC v. IWF,*[13] where an interim award granted by the Samoan Courts precluding the enforcement of a decision by the National Level Weightlifting Federation resulted in the CAS ultimately setting aside the International Weightlifting Federations' decision. This occurred because the National Federation's decision was the keystone to the IWF's. Thus, this indicates that finality of awards in case of International Tribunals, such as the CAS, is subject to the exercise of jurisdiction by national courts.

*CAS in the Indian Context:* In India, the international forum provided by the CAS has been scarcely utilized. However, recently the relevance of CAS as a global forum of dispute resolution in sports was realized in the case of four athletes, Ashwini A.C., Sini Jose, PriyankaPanwar and Tiana Mary Thomas. These athletes who represented India at the CWG and the Asian Games were suspended for a period of one year by the National Anti-Doping Disciplinary Panel ("NAADP") for steroid violations in December, 2011.[14] During the appeal before NAADP, World Anti-doping agency ("WADA") cited several rulings of the CAS while arguing for a more stringent punishment.[15] Further, in case of an unsatisfactory ruling either party can approach the CAS is appeal.[16] Therefore, it appears that the CAS is typically approached at an appeal stage when the dissatisfied party has exhausted remedies at the national level.

Hence, it is observed that the decision of the Australian Court in *Raguz v. Sullivan*[17] and other similar cases, preserving and affirming the jurisdiction of the CAS, have established its position as a global dispute resolution body. However, in the Indian context, the finality of the decisions of international arbitration

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[12] Richard H. McLaren, *Sports Law Arbitration by CAS: Is It the Same as International Arbitration,* Pepperdine Law Review, 29 PEPP. L. REV., (2001-2002).

[13] *Samoa NOC v IWF,* Arbitration CAS ad hoc Division (O.G. Sydney 2000) 002, awards of Sept 12, 2000 *Also See* Sierocki v IOC, Arbitration CAS Ad Hoc Division (O.G. Sydney 2000) 007, award of Sept. 21, 2000.

[14] K.P. Mohan, *Athletes' lawyer rebuts WADA's contentions*, *available at* http://www.thehindu.com/todays-paper/tp-sports/article2921779.ece (last visited on March 1, 2012).

[15] *WADA appeal another setback for four quarter milers*, *available at* http://indiatoday.intoday.in/story/wada-appeal-another-setback-for-four-quarter-milers/1/172803.html (last visited on March 1, 2012).

[16] *WADA seeks two-year ban on Ashwini& Co.*, *available at* http://timesofindia.indiatimes.com/sports/more-sports/others/WADA-seeks-two-year-ban-on-Ashwini-Co-/articleshow/11815497.cms(last visited on March 1, 2012).

[17] *Raguz v Sullivan*, 2000 NSWCA 290, *Also See Raducan*, Arbitration CAS Ad Hoc Division (O.G. Sydney 2000) 011.

institutions, such as the CAS, is doubtful after the Indian Supreme Court's decision in the *Venture Global* case. Here, the court held that Indian courts could exercise their jurisdiction to set aside foreign arbitral awards in pursuance of the ratio of *Bhatia International* case.

## III. THE JURISDICTION OF INDIAN COURTS WITH RESPECT TO FOREIGN ARBITRAL AWARDS

The Arbitration and Conciliation Act, 1996[18] (the "Act") was enacted with the purpose of reconciling the law of dispute resolution with the international economic scenario.[19] Part I of the Act is largely based on the structure of the UNCITRAL Model Law and is applicable to arbitrations for which "the place of arbitration is India".[20] Whereas Part II contains provisions to give effect to the Geneva Convention[21] and the New York Convention,[22] on enforcement of foreign arbitral awards. Part II of the Act was enacted as a sign of reassurance to foreign investors that the enforcement of foreign awards will be quicker, clearer and more in line with the New York Convention.[23] Therefore, as per the initial format of the Act, there existed a clear division between 'domestic' and 'foreign' awards. Further, due to non-application of Part I to Part II and in absence of any provision in Part II empowering the Indian Courts to claim jurisdiction to accept an application to challenge foreign awards, there existed no provision to set them aside in India. Though foreign awards could be set aside or suspended in the country in which or under the laws of which the award was made.[24]

However, this distinction between 'domestic' and 'foreign' awards has been eroded subsequent to the Indian Supreme Court's decision in the *Bhatia International* case. In this case, the court ruled that Section 9 could be invoked to support foreign arbitral proceedings. Therefore, the application of Part I of the Act was no longer limited to domestic arbitral awards but also extended to foreign awards. The court reasoned that in the absence of the word 'only' in

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[18] *Arbitration and Conciliation Act, No. 26 of 1996, India Code (1996).*

[19] B Srinivasan, *Public Policy and Setting Aside Patently Illegal Arbitral Awards in India*, (March 27, 2008). *available at* SSRN: http://dx.doi.org/10.2139/ssrn.1958201 (last visited on February 19, 2012).

[20] Section 2(2) of the *Arbitration and Conciliation Act, No. 26 of 1996, India Code (1996).*

[21] The Convention on the Execution of Foreign Arbitral Awards (Geneva, 26 September 1927) ('the Geneva Convention'). India became a signatory to this Convention on 23 October 1937 (one amongst six Asian nations to become a signatory).

[22] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) ('the New York Convention'). India became a signatory to this Convention on 13 July 1960.

[23] T.T. Arvind and Zia Mody, *Bombay Gas Company Ltd v Mark Victor Mascarenhas—Challenge to a Foreign Award*, 1 INT. A.L.R. 180 (1980).

[24] The 1996 Act, s 48(1)(e), corresponding to Art V(e) of the New York Convention.

Section 2(2) of the Act[25] an inclusive interpretation applies which confirms Part I application to domestic awards but does not rule out its application to foreign awards. However, such application is not permissible where Part I has been expressly or impliedly excluded by the parties in the arbitration agreement.

At this juncture it is relevant to note the decision of the Supreme Court of India in *Oil and Natural Gas Corp v. Saw Pipes Ltd.*[26] In this case, the court broadly interpreted the ground of 'public policy' under Section 34 and expanded its scope so as to allow scrutiny of an arbitral award on merits. It held that an award can be challenged on the ground that it contravenes the provision stated under the Act, any other substantive law governing the parties or is against the terms of the contract. Further, the court stated that an award will conflict with the public policy of India if it is 'patently illegal' and contrary to the 'interest of India' and its 'justice or morality'. However, the court restricted its opinion to domestic awards mindful of the decision of a larger bench in the earlier case of *RenuSagar Power Co v. General Electrical Corp*.[27] The Supreme Court, in this case, had narrowly construed the ground of public policy in relation to foreign awards as being limited to 'fundamental policy of Indian law'.

Subsequently, in 2008, the Supreme Court applied the principle of the *Bhatia International* case in the *Venture Global* case for a Section 34[28] application to set aside a foreign award. Hence, the court deviated from the scheme of the Model Law under which the domestic court has no jurisdiction to set aside a foreign award. The Supreme Court held that in case of an award made by an international commercial arbitration tribunal which required performance in India but was contrary to the Indian law, the Indian courts could allow a challenge under Section 34 of the Act. The court further held that such a challenge under Section 34 will have to meet the grounds specified therein as well as the ground under the expanded scope of 'public policy', as laid down in *ONGC v. Saw Pipes.*

This line of thought adopted by the Supreme Court faces fierce censure for weakening the 'certainty of the finality' of an arbitral award by an arbitral tribunal to whose jurisdiction both the parties had agreed to submit to.[29] Further, this verdict is considered to subvert the well established policy of minimum judicial

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[25] This section lays down the extent of application of the act.

[26] 2003 (5) S.C.C. 705.

[27] 1994 Supp. (1) S.C.C. 644.

[28] This section sets out limited grounds on which an arbitral award can be set aside. These include : the invalidity of the arbitration agreement, a failure to comply with the arbitration agreement, a failure of due process during the arbitration, a conflict with public policy etc.

[29] SaroshZaiwalla, *Commentary on the Indian Supreme Court Judgment in Venture Global Engineering v. Satyam Computers Services Ltd.,* 25 (4) J INT. ARB 507 (2008).

intervention in the arbitral process.[30] It is also argued that the decisions of *Bhatia and Venture Global* have incorporated a new procedure for recognition and enforcement of a foreign award which were not envisioned earlier under the Act. Now, for enforcement in India a foreign award has to face two tiers of judicial scrutiny. This includes one under the application of enforcement of Section 48 of the Act[31] and the other under Section 34 of Part I of the Act. Moreover, pursuant to Venture Global and the court's interpretation of the *ONGC v. Saw Pipes* therein, enforcement of foreign award involves fulfilling the requirements of a broad 'public policy' ground created under Section 34 of the Act.[32] Hence, it is said to have replaced the statutorily envisaged mechanism with 'judge-made law'.[33]

Consequently, the principle of Bhatia International and Venture Global has been applied and affirmed in the case of *Citation Infowares Ltd v. Equinox Corporation*[34] and more recently, in *Yograj Infrastructure Ltd v. Ssang Yong Engineering and Construction Co Ltd.*[35]

Though the decision of the court in Venture Global case has been vehemently criticized for being contrary to the spirit of the Act and the jurisprudence behind it, it should be noted that the decision might have made room for certain positive implications.

The practice of national courts to claim jurisdiction over challenge to a foreign award may allow courts to make finding under its own legal system as to illegality of the underlying contract, the extent of such illegality and whether it can be

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[30] *supra* note 21.

[31] Section 48 of the Act states the conditions for enforcement of foreign awards. These include 7 grounds on which enforcement may be refused by the court, incapacity of the party, inadequate notice, award beyond the scope of the arbitration, composition of arbitral authority or procedures not in accordance with the agreement, award not binding or is set aside or suspended by the foreign court having jurisdiction, subject matter not arbitrable and against public policy of India.

[32] The S.C. while explaining the ambit of Public Policy held that an "award which is, on the face of it, patently in violation of statutory provisions" is against public policy. It further clarified that an illegality to be patent "must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against public policy".

[33] Summet Kachwaha, *Enforcement of Arbitration Awards in India*, 4 (1) ASIAN INTL. ARB 64 (2008).

[34] **(**2009)7 S.C.C. 220. The court held that it has the jurisdiction to appoint arbitrators in all international commercial arbitrations irrespective of the substantive law governing the arbitration agreement and the seat of arbitration as cited in Raghav Sharma, *Citation Infowares Ltd. v. Equinox Corporation: A Retrograde Ruling for International Commercial Arbitration, available at* http://ssrn.com/abstract=1422446.

[35] Yograj Infrastructure Ltd v Ssang Yong Engineering and Construction Co Ltd, ('Yograj Infrastructure), A.I.R. 2011 S.C. 3517.

enforced under the legal regime of the country.[36] Such inquiry is especially relevant if the underlying contract is closely connected with the country and the recognition and enforcement of award is likely to be sought in that country.[37]

The crux of the reasoning in Venture Global was based on the court's conviction that in no circumstance the public policy of India should be bypassed. Through the application of Part I to foreign awards the courts have ensured that a party to arbitration does not circumvent the "legal and regulatory scrutiny" it would have been otherwise subject to in India by seeking enforcement in another country. Further, the court in Venture Global adopted a supervisory role in view of the fact that there existed a close nexus between the award rendered and India.[38]This would further facilitate the promotion of the legal policy of the countries closely related with the underlying contract which otherwise would have been evaded.[39] Moreover, it is in consonance with the one of the fundamental objectives of the act, that is, to make certain that the arbitral tribunal remains within its jurisdiction[40] and does not flout considerations that every tribunal has to undertake solely because the award is a foreign one. Thus, the judgment sends out a strong message that arbitrators or the parties cannot overreach themselves to ignore any obvious illegality involved in the performance of the award in India.[41]

This is also supported by the fact that degree of interference of the courts in private law matters is dependent on the freedom of contact in a particular country.[42] In India, such legal freedom of parties is not impeded unless the parties disregard the legal policy of India. Therefore it is only logical for the courts to ensure that arbitral awards arising out of an agreement parties and requiring enforcement in India do not breach the legal and public policy of India. Further, if an award disregards the substantive law of a country and the courts subsequently fail to intervene then they indirectly allow subversion of societal aims and endanger public good.[43]

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[36] Koji Takahashi, *Arbitral & Judicial Decisions: Jurisdiction to Set Aside A Foreign Arbitral Award, In Particular An Award Based On An Illegal Contract: A Reflection On The Indian Supreme Court's Decision In Venture Global Engineering*, 19 AM. REV. INT'L ARB. 173.

[37] *Id.*

[38] In *Venture Global*, the shares to be transferred were those of an Indian company and that the transfer would have required steps to be taken in India under the law of India such as FEMA,1999 and the Companies Act.

[39] *supra* note 38.

[40] *Statement of Objects and Reasons, Arbitration and Conciliation Bill, 1995*.

[41] *supra* note 31.

[42] *supra* note 21.

[43] OP Malhotra & Indu Malhotra, *The Law And Practice Of Arbitration And Conciliation, (*Lexisnexis, Butterworths, 2nd ed.,) (2006).

The judgment in Venture Global has also been disapproved of because it is argued that the court misinterpreted the reasoning in Bhatia International. It is claimed that in Bhatia International the Supreme Court expressly held that the Part I general provision will apply to Part II to the extent that there existed no corresponding provisions in Part II. Hence, the correct interpretation of Bhatia International is considered to be that Part I will not apply where special provisions exist in Part II, more specifically regarding definition of a foreign award and its enforcement.[44] As per this approach it is asserted that solely Section 48 of Part II applies to foreign awards instead of Section 34 of Part I and Section 48 as was held by the Supreme Court in Venture Global.

However, this apparent conflict between the two can be reconciled through a literal reading of the two sections. While Section 34 refers to the grounds of setting aside of an award, Section 48 enumerates conditions of enforcement of foreign awards. Further, it can be seen that the scope and effect of both the sections is distinct. On one hand Section 34 allows for the remission of the award to the arbitral tribunal to cure the defects[45] while on the other, Section 48 does not envisage any such modification on application. Therefore, the researcher believes that it cannot be said that Section 48 being a special provision of Part II prevails over prevails of Part II over Section 34 because the purpose fulfilled by Section 34 is not similar to that of Section 48 and hence, there appears to be no misconstruction of the principle in Bhatia International. Moreover, the application of Section 34 actually encourages the enforcement of awards after remission and modification by the arbitral tribunal.[46] On the other hand, under Section 48 a party which approaches the court for enforcement might be rejected outright with no recourse to remission as provided under Section 34.

Further, an analysis of the enforcement statistics (including grounds of challenge) of foreign awards reveals that the courts favor enforcement of awards in spite of its interventionist nature and expanded judicial scrutiny. An evaluation of the High Court and Supreme Court judgments between the years (1996-2007) reveals that in spite of the grounds enumerated under Section 34, Section 48 as well as the expanded scope of 'public policy' the courts have maintained the

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[44] Raghav Sharma, *Sanctity of Foreign Awards; Recent Developments In India* , 75 ARBITRATION 148 2009.

[45] Section 34(4) of the Act.

[46] Further, the practice of remitting awards under Section 34 as a rule is being increasing followed by many High courts. Only in cases where it is unfeasible to remit the award to the tribunal the courts set aside such awards. This practice is reflected in the case Union of India v. Prem Kumar Lihala, 2005(Suppl.) Arb. LR 506 (Del.). *Also See,* Gayathri Projects Ltd. V. Airport Authority of India, 2007(3) Arb. LR 416 (Del.) Such an approach is in consonance with the principles of party autonomy and judicial supervision as cited in *supra* note 21.

integrity of a foreign award save for setting aside a lone case.[47] Therefore, this indicates that concerns about India being an unviable enforcement jurisdiction might be overstated as the courts have chosen to exercise their powers of regulation of enforcement of foreign awards discretely.[48]

Lastly, the courts in these judgments have given due consideration to the requirement of party autonomy in arbitration proceeding. This is done by allowing parties to exclude the application of Part I provisions (both derogable and non-derogable) in case of a foreign arbitration by an agreement stating the same.[49] Recently, in *Yograj Infrastructure*the Supreme Court clearly demonstrated their intention to uphold this principle and restrict unwarranted judicial intervention in foreign awards. Herein, the court held that once the parties have specifically agreed that the arbitration proceedings were to be conducted according to the SIAC rules, including Rule 32, the decision in Bhatia International and subsequent similar decisions will no longer apply.[50]

## IV. CONCLUSION

Traditionally, the judicial trend has been against judicial review and in favor of finality of arbitral awards by tribunals. However, it is not simple to strike a balance between the requirement of privacy, speed and finality of the arbitral process as well as wider public interest through judicial control.[51] In India, where a sport is equated to religion and successful sportspersons achieve the status of demigods, it is imperative that sports disputes are provided all the legal protection available against enforcement of agreements which are violative of the legal policy of the country. While the ideas of party autonomy in arbitration should be upheld to the extent feasible, the approach adopted by the courts to supervise enforcement of foreign awards is in consonance with the higher aim of maintaining equality, fairness and justice in legal relationships.

In sports arbitration it is observed that there exists a disparity of bargaining power between the parties to the dispute. It is usually characterized by a sports federation on one side and a penalized athlete or an official on the other (other cases might include two legal persons at loggerheads). In such a case, judicial scrutiny by national courts becomes relevant to prevent victimization of the

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[47] *supra* note 35, the decision being one of the Korean Commercial Arbitration Board.

[48] Nicholas Peacock, *Arbitrating in "Developing" Arbitral Jurisdictions: A Discussion of Common Themes and Challenges Based on Experiences in India and Indonesia,* Reprinted from INTERNATIONAL ARBITRATION LAW REVIEW, Sweet & Maxwell, (Issue 6, 2010).

[49] Bhatia International v Bulk Trading, 2002 (4) S.C.C. 105; Venture Global v Satyam Computer Services, (2008) 4 S.C.C. 190.

[50] Yograj Infrastructure Ltd v Ssang Yong Engineering and Construction Co Ltd, A.I.R. 2011 S.C. 3517, ¶38.

[51] *supra* note 45.

weaker party and ensuring justice. Therefore, as per the decisions of the judgments discussed above, the position stands that any award by an international arbitral tribunal can be set aside by the Indian courts under Section 34 of the Act. In light of this, an award (including a sports arbitral award) has to undergo the scrutiny by Indian courts for enforcement in India. However, as seen earlier, Indian courts implement their supervisory powers with great circumspection. In light of this, the future of sports arbitration appears fairly bright and therefore, efforts should be made to foster such mechanism of alternate dispute resolution.

# THE SCOPE OF COPYRIGHT ARBITRATION IN THE INDIAN FILM INDUSTRY

MEGHNA AGARWAL[G] & NISHTHA GUPTA[GG]

## I. INTRODUCTION

With the advent of globalisation and merging borders, the scope of arbitration as a dispute resolution mechanism has increased manifold. Various industries are realising its significance in resolving disputes in a cheap, amicable, efficient and speedy manner. Indian film industry is a multi-million dollar industry, with the most expensive productions amounting to 100 crore rupees (approximately USD 20 million). Today, the Indian film industry is the highest producer of movies, producing approximately one thousand movies annually.[1] It provides employment to over two million people. By 2001, India's entertainment industry had attained 30% growth in the economy.[2] This gigantic industry faces a plethora of legal disputes each day. However, the cases which involve complex issues of copyright, performance rights and distribution rights are rarely pursued as the Indian legal system cannot guarantee any efficacious remedy in such matters whereas arbitration, on the other hand, can play a crucial role in solving these disputes.

Bollywood is often accused of copying films, scripts, music or ideas from domestic as well as international cinema. Some are inspired, some are copied, and some are adapted while others are sheer replication of the original work. Few notable examples include "*Mere Yaar Ki Shaadi Hai*"[3] which can be termed as a cultural copy of "*My Best Friend's Wedding*"[4], "*Wanted*"[5], which copied "*Pokiri*"[6], "*Kaante*"[7], which was the Indian version of "*Reservoir Dogs*"[8] or "*Ghajini*"[9], which took inspiration from "*Memento*"[10]. The music industry is also not untouched by

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[1] Stefan Lovgren, *Bollywood: Indian Films Splice Bom.bay, Hollywood* (July 1, 2012), http://news.nationalgeographic.com/news/2004/01/0121_040121_bollywoodfilms.html.

[2] UK Film Council, *The Indian Media and Entertainment Industry* (June 11, 2012), http://www.ukfilmcouncil.org.uk/filmindustry/india/.

[3] Mere Yaar Ki ShaadiHai (Yashraj Movies 2002).

[4] My Best Friend's Wedding (TriStar Pictures 1997).

[5] Wanted (Eros International &Sohail Khan Productions 2009).

[6] Pokiri (Vaishno Academy 2006).

[7] Kaante (White Feather Films 2002).

[8] Reservoir Dogs (Miramax Films 1992).

[9] Ghajini (Geetha Arts (India) & Reliance Entertainment (Overseas) 2008).

[10] Memento (Summit Entertainment (USA) &Pathé (UK) 2000).

this phenomenon. The evident examples include the copying of "*Pungi*" song by Pritam[11] from a music composition of an Iranian band and songs of film "*Ashiq Banaya Apne*" composed by Himesh Reshammiya. Until now, the mainstream Indian film industry escaped litigation suits due to lack of awareness amongst the Hollywood or foreign film or music industry and lack of profit in a suit instituted though Indian legal system. Bollywood is now being viewed as a lucrative market by the foreign producers. They have started investing in the Indian film industry and are likely to pursue legal suits against the Indian film producers. Earlier, Hollywood, Bollywood and Kollywood had separate and distinct audience, one being unaware of the other. With merging borders and technological advancement, Bollywood and other industries have come closer now and Indian audiences also acknowledge foreign movies and music.

The Hollywood producers are also aware of these copyright infringements; however, they choose not to initiate litigation as it would require great amount of time, money and energy.[12] Nevertheless, recently some Hollywood producers have pursued legal suits against Indian film makers. Fearing possible litigation, the Indian film producers have started purchasing music and film rights of the original work. These contracts deal mainly with copyright issues. It is contended that the breach of such contractual obligations will attract litigation and would cost time and money to the parties in dispute. Moreover, since the Indian Copyright Act favours imitation over originality, it is difficult for this evolving law to do complete justice to the pleader. A viable alternative would be to incorporate arbitration clauses in these contracts. This would not only save the parties time and money but would also ensure that their reputation in the market remains unharmed, leading to a win-win situation for them. Thus, arbitration is an effective solution to create a balance between the rights of the creator as well as the rights of the purchaser. If drafted carefully, the agreement can protect the sanctity of the original work, creating a well-defined demarcation between imitation and inspiration in the industry.

The arbitration mechanism comes as a blessing in disguise for the Indian filmmakers who play a safe bet on successful works in the field. They usually defend their lack of creativity by shields of financial uncertainty, insecurity of success and adaption of western values in the Indian society.

Arbitration, in general terms, is a settlement presided by a third party on a dispute between two or more conflicting parties. The resolution is based on a case by case approach with many types of relief accessible such as monetary compensation, specific performance and restitution, injunctions and declaratory

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[11] Bansal Robin, *Pritam To Take Legal Action Against Iranian Band* (June 10, 2012), http://www.hindustantimes.com/Entertainment/Bollywood/Pritam-to-take-legal-action-against-Iranian-band/Article1-832141.aspx.

[12] Badam Ramola, *Is Bollywood A Hollywood Clone?* (July 3, 2012), http://www.cbsnews.com/stories/2003/06/04/entertainment/main557012.shtml.

suits. To support the international economic development and adapt to the emerging global scenario, the Arbitration and Conciliation Act, 1996 was enacted. The law provides a cheap, efficient and speedy alternative to litigation. The present Act applies both to international and domestic arbitrations, unlike the UNCITRAL Model Law. It, further, goes beyond the UNCITRAL Model Law in the area of minimizing judicial intervention.[13]

The arbitration mechanism helps in reducing the risk of transactional commerce and improving international economic relations. While entering into a business relationship, the business houses do not foresee its failure. However, no agreement is perfect and unforeseen contingencies may occur anytime. To deal with such circumstances, it is important to enter into arbitration agreements. These agreements ensure reliability, pragmatism, promptness and fairness in the process of dispute resolution.

A process like arbitration assumes special importance for a developing country like India. If India could develop a strong arbitration base, then it would take care of the speedy disposal of copyright cases, thus allowing filmmakers or music composers to efficiently protect the rights over the original work. It would also provide them with an easy recourse at their disposal.

Choosing litigation as a settlement process is a complex and tedious procedure followed in courts that requires signing and registering numerous documents, even for instituting a simple suit.[14] In a country like India, where the courts are filled with backlog cases, proceedings are time-consuming and matters go on for years, with the film-making industry involving millions of dollars, pursuing copyright litigation would be a daunting task. The copyright law in India is liberal in its construction of the definition of 'copyright' itself ; ADR in such situation comes as an efficacious remedy for the parties that cannot afford to lose time in 'avoidable litigation' and are eager to settle the matter, forget it and move forward in their respective pursuits without any waste of time.[15]

Another key point in the copyright issues is confidentiality. Since Indian filmmakers are alleged with charges of copying the plots, ideas and music from their original creator, it can be a matter of goodwill and market reputation for the maker and can place work, worth millions of dollars, at stake. The claim could make or break one's professional existence in the industry. Hence, confidentiality and privacy are the biggest advantages of arbitration, together with party autonomy, speed and informality that makes it a better alternative dispute resolution mechanism for Indian filmmakers. Privacy is a deeply

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[13] S.K. Dholakia, *Analytical. Appraisal of the Arbitration and Conciliation (Amendment) Bill, 2003*, 39 ICA's ARB. QUAT. 3 (2005).

[14] Law Commission of India REP. NO. 131, at 7 (1988).

[15] G Gandotra, "*Arbitration and Conciliation Act, 1996: Need for a few Amendments*", 51(1) SEBI& CORPORATE LAWS 188 (2004).

established custom in arbitral proceedings which concerns the right of the parties to not divulge confidential facts or any other information to third parties and not to make the dispute public which is a legal obligation on the part of their representatives and the arbitrator. Arbitration is essentially a private dispute settlement mechanism that does not attract media attention or hurt the feelings or reputation of the parties.

The paper makes an attempt to investigate the possible legal discourse in the current scenario to settle the dispute wisely by opting for an arbitration agreement for buying rights of the movie or music. It further observes the effect of litigation in the light of recent legal controversies surrounding Bollywood. It also analyzes how arbitration can rescue the producers, directors, writers and music composers of Indian film industry, if they choose to incorporate arbitration clauses in the contracts entered by them to buy the rights in the original work.

## II. COPYRIGHT LAWS IN INDIAN FILM INDUSTRY

Bollywood has time and again copied and imitated film scripts from both national and international cinema. The recent controversy between Kollywood and Bollywood surrounding *Ladies v. Ricky Bahl* is yet another example.[16] In cases involving copyright issues, the producers can take benefit of various legal provisions under the Indian Copyright Act, 1957 to escape liability.

An inspired creation is not an infringement of the copyrighted work.[17] Neither the Act of 1911, nor the Act of 1957, defines, whether inclusively or otherwise, what a copy is. According to the courts in India, the expression 'to make a copy of the film' would mean to make a physical copy of the film itself and not another film which merely resembles the film.[18]

Moreover, it is believed that 'a copy is that which comes so near to the original as to give to every person seeing it the idea created by the original'.[19] Cultural copy[20] of regional cinema is considered a valid excuse to justify the acts of plagiarism by the Indian filmmakers.

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[16] "NaanAvanIllai", a hit Tamil movie in 2007; a lawsuit was filed in Madras High Court on 8 December 2011.

[17] *See*TIMMNEU, *Bollywood is Coming! Copyright and Film Industry Issues Regarding International Film Co-Productions Involving India,* 8 San Diego INT'L L.J. 123 (2006).

[18] *Refer* S. 14 (d) (i), Copyright Act 1957.

[19] *See* Bayley, J., West v. Francies, [1969] (1) Queen's Bench 349 referred in Barbara Taylor Bradford v. Sahara, TV I.L.R. 1 (Cal.) 15.

[20] Cultural copy of regional film would mean to adapt or change the original work by adding or substituting certain scenes, fight sequences, songs, comic situations,

The presence of songs, dramatic sequences, language and varying situations definitely alters the original concept to a great extend. Thus, it creates legal difficulties for Kollywood[21] or Hollywood studios to initiate copyright infringement proceeding against a Bollywood film producer.

The Bollywood film producers are acquainted with these prevailing copyright standards and they often regard it as an excuse to copy and culturally imitate regional and international films.

Plagiarism is a well accepted norm in Bollywood; they add comic scenes, songs, fight sequences to stretch a two hour script to one that lasts around three hours.[22] Thus, this evades evading their liability for copyright infringement, as it can be easily argued that the film is no more a replica of the regional work and the very expression in which the copyright subsists has been changed.

In India, the copyright protection that is accorded to film[23]or sound recordings[24] is narrower than that for literary[25], dramatic[26] or artistic work[27]. The reason, perhaps, could be that they have to be original to satisfy the test of copyright ability, whereas the requirement of originality is absent for claiming copyright in cinematograph films or sound recordings. [28]

'Original' is the independent input of author from which others are derived.[29] It is one of the key determinants of copyrightabilty[30]. Originality is not a key requirement for subsistence of copyright in a cinematograph film or a sound recording.[31] It is a combination of one's skill, labour and judgment.

The courts have enumerated the substantial and material similarity tests. *R.G. Anand v. Delux Films*[32] was the first case in India where the Supreme Court dealt with the issue of copyrightability in an idea. In this case, the author of the play *Hum Hindusthani* sued a production company for making a movie that was

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characters amongst others in order to make the remake acceptable to prevalent conditions in the Indian Society.

[21] Kollywood is the name used for Tamil film industry.

[22] *See* VikramdeepJohal, *Plagiarism as an Art-form* (June 25, 2012), http://www.tribuneindia.com/1998/98nov08/sunday/bolywood.htm.

[23] *Refer* S. 2(f), the Copyright Act.

[24] *Refer* S. 2(xx), the Copyright Act.

[25] *Refer* S. 2(o), the Copyright Act.

[26] *Refer* S. 2(h), the Copyright Act.

[27] *Refer* S. 2(c), the Copyright Act.

[28] Star India Private Limited v. Leo Burnett (India) Private Limited, 2003 (2) Bom.CR 655.

[29] *See* Hariani Krishna & Hariani Anirudh, *Analyzing "Originality" In Copyright Law: Transcending Jurisdictional Disparity,* 51 IDEA 491 (2011).

[30] *Id.*

[31] *See* S. 13 (b) and (c), the Copyright Act.

[32] [1978] 4 S.C.C. 118.

allegedly an "exact copy" of his play. However, the court held that copyright doesn't exist in an idea but in an expression. Therefore to determine whether or not there has been a violation of copyright, one has to see if the reader, spectator or viewer, after having read or seen both the works, is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.[33] The court would look into both the quantitative and qualitative similarities before determining the violation of copyright infringement.

The above tests have guarded the interests of the Indian producers who tested scripts in lieu of negligible payments to their script-writers. The Copyright Act does not protect any theme or idea. It only gives protection to the expression of such idea or theme. In *Barbara Taylor Bradford v. Sahara TV,*[34] the complaint was filed against a serial called "*Karishma -The Miracle of Destiny*" which had been financed by a public limited company, 'Sahara'. The plaintiff, Barbara Taylor, a renowned author, claimed that the said serial infringed her copyright in her authored book named "A Woman of Substance". However, the Calcutta High Court, relying on the judgment laid down in *R.G. Anand v. Delux Films,*[35] held that there was no infringement of copyright as a theme is not protected under the copyright law. The theme does not sell by itself; it requires significant amount of money and then it starts selling[36]. If the two works have the same theme, but are developed differently, then there is no copyright infringement because the second work constitutes a new work. Since the theme was adapted and developed for an Indian audience, there was no substantial and material similarity between the book and the television serial.

The industry also faces similar issues when dealing with music compositions. Originality in a musical composition consists not just of melody or harmony, but also the combination of these two, in addition to any other elements, such as rhythm or orchestration.[37] A copyright subsists only in original works. Thus, even using a relatively small portion of an original work is enough to constitute substantial similarity for copyright infringement actions.[38]

A derivative work, on the other hand, is a work based upon one or more pre-existing works. It may include abridgement, musical arrangement, dramatization, translation, fictionalization, sound recording, amongst others. A work consisting

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[33] R.G. Anand v. Delux Films and Ors., A.I.R. 1978 S.C. 1613.
[34] (2004) I.L.R. 1 Cal. 15.
[35] [1978] 4 S.C.C 118.
[36] *See* Timm *supra* note 17.
[37] Tempo Music, Inc. v. Famous Music Corp., 838 F. Supp. 162, 168 (S.D.N.Y. 1993).
[38] *See* Bridgeport Music v. UMG Recordings585 F.3d 267, 272 (6th Cir. 2009).

of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a derivative work.[39]

Under the Indian Copyright Act the derivative works are referred as "adaptations"[40]. The Indian music industry clearly is in an advantageous position as the Act protects the adaptation of musical works.[41] Thus, if a song noticeably borrows a harmony from an earlier song it can be termed as a "derivative work"; however, it would be considered harmful by the society only when its material similarity to the original adversely affects the demand for the original.[42] But, "to invoke copyright protection in a derivative work, variation must be substantive in nature than merely trivial."[43] This interpretation of law acts as a shield to protect Bollywood which shamelessly borrows tunes from famous songs of South-Indian film industry. The absence of penalties for copycats in the music industry has encouraged them to copy existing music works. The public is mostly unaware of these acts and these infringements often go unnoticed.[44] Eminent music directors have been seen to observe these unethical practices.

For instance, when one of the rights holders of *"NaanAvanIllai",* sued the producers of "*Ladies v. Ricky Bahl"* in the Madras High Court, the court would first apply the lay observer test. The complainant would have to show that there is enough of a similarity between the two films that an ordinary person would recognize as a copy. Would people watching "*Ladies v. Ricky Bahl"* and *"NaanAvanIllai"* feel that one was a copy of the other? Although there might be some plot differences and the inclusion of several song and dance numbers, "*Ladies v. Ricky Bahl"* could be unmistakably based on the latter. The plots may be largely parallel with nearly identical scenes, characters, and even dialogues.

A work "inspired" by another copyrighted work is not necessarily a copyright infringement.[45] Thus, the courts may ignore the presence of imitation and regard such work as another form of expression. As a result, such cases mostly end up in out of court settlement. Thus, efforts to litigate may not be worthwhile. However, if a similar case is submitted for arbitration, the arbitrators may judge all the equities concerned and allow the balance of such equities in administering their decisions.

Distribution rights are also similarly exploited. When the agreements for distribution rights are signed and contracted for, issues relating to the collection

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[39] *See* Jishnu Guha, *Time for India's Intellectual Property Regime to Grow Up,* 13 CARDOZO J. INT'L& COMP. L. 225 (2005).

[40] *Refer* S. 2(a) (iv), the Indian Copyright Act of 1957.

[41] S. 14(a)(vi) and (e).

[42] *Refer* Hariani *supra* note 29.

[43] Eastern Book Company and Ors.v. D.B. Modak and Anr., A.I.R. 2008 S.C. 809.

[44] *See* Harini Ganesh, *The Need For Originality: Music Infringement In India,*11 J. MARSHALL REV. INTELL. PROP. L. 170 (2011).

[45] *See* Tim *supra* note 17.

of total revenue and the extent of distributor's rights often come into picture. Sometimes, distributors are not given their due share in the profits and sometimes distributors stay the release of the project causing damage to the production-houses.[46] The industry consists of individuals dealing with the distribution of prints and films. The executors, producers and distributors can make a film financially successful only after collaborating with each other. The "exclusivity clause"[47] in the distribution contracts plays a crucial role in determining the rights of the film in the commercial market. Issues relating to professional marketing, distribution of materials, holding of exhibitions or fests are common, pertaining to distribution rights. In the recent judgment of *Moserbaer India Limited v. Movie Land,*[48] the Hon'ble Delhi High Court discussed the significance of possession of copyright with distributors in cinematograph films. In order to avoid long delays and maintain the flow of revenue through a project's profit in market, arbitration provides a great opportunity to settle the dispute as soon and as amicably as possible.[49] Arbitration assists the Indian film-maker in protecting their rights in distribution processes and protects them from incurring major losses in the valuable market, if the project loses its audience.[50]

In *Star India Private Limited v. Leo Burnett (India) Private Limited,*[51] the Court held that "contrasting Sections 14(d) and (e) on the one hand and Sections 14(a), (b) and (c) on the other, in the latter case the owner of the copyright has exclusive right to reproduce the work in any material form. This is absent and excluded in so far as the former case (cinematograph film or sound recording)". There is an exclusive right in the former to copy the recording of a particular film or sound recording. It is only when actual copy is made of a film by a process of duplication. The expression 'to make a copy of the film' would mean to make a physical copy of the film itself and not another film which merely resembles the film[52]. The production of another film is not included under Section 14(d)(i) and such other film, even though it resembles completely the copyrighted film, does not fall within the expression 'to make a copy of the film'. Therefore, if the film has been filmed or shot separately by a person and it resembles the earlier film,

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[46] Eric Ervin, *Arbitration in the Independent Film Distribution Contract: An Independent Filmmaker's Tool to Battle Large Litigation Budgets,* 3 CARDOZO ONLINE J. CONFL. RESOL. 5 (2002).

[47] JAY KENOFF, ENTERTAINMENT INDUSTRY CONTRACTS: NEGOTIATING AND DRAFTING GUIDE, 2 (Donald Farber ed., Matthew Bender & Co., Inc., 1999).

[48] IA Nos.10052/2007 and 10722/2007 in CS(OS) No. 1625/2007.

[49] Gerald F. Phillips, Survey, *The Entertainment Industry is Accepting ADR*, 21 LEGAL AFFAIRS 1 (1999).

[50] Shawn K. Judge, *Giving Credit Where Credit is Due: The Unusual Use of Arbitration in Determining Screen Writing Credits*, 13 OHIO ST. J. on DISP. RESOL. 221, 231-232 (1997).

[51] 2003 (2) Bom. CR 655.

[52] *Id.*

the subsequent film is not a copy of the first film and, therefore, does not amount to infringement of whole of the copyright of the first film.[53]

## III. LITIGATION V. ARBITRATION

There have been numerous conflicts in the past pertaining to copying of plots, scenes, songs or ideas between Hollywood producers and Indian film makers. In October, 2010, Century Fox filed a suit for the stay of release of "*Knock Out*" as it was believed to be based on the movie "*Phone Booth*". The division bench of the Bombay High Court reversed the stay, differentiating between "ideas" and concept of "expression of ideas".[54] In 2009, American Studio, Twentieth Century Fox, filed Rs. 70 million suit against the Mumbai-based, B.R. Films, for copying "*My Cousin Vinny"* in "*Banda Ye Bindass Hai*" which was settled out of court to release the film on time.[55] Warner Bros. filed a suit against the makers of *"Hari Puttar"* claiming it to be a copy of the *"Harry Potter"* franchise which it lost, though it's a rare case for a claim to succeed. Makers of Will Smith starrer *"Hitch"* also started talking about a 30 million dollar law suit against producers of *"Partner"*.[56]

Fearing million dollar suits, shutting down of projects mid-production and stay order that might prevent the movie or song release, many producers and composers have started complying with the copyright laws by buying the rights of re-producing original work. Examples include securing rights to remake Hollywood movie *"Wedding Crashers"* in "*Jodi Breakers*" by Orion Pictures in 2008, Vidhu Vinod Chopra signing a contract to adapt Chetan Bhagat's novel into a film[57] and Karan Johar buying rights of "*The Immortals of Meluha*" for adapting it into a film.

The controversy surrounding "*3 Idiots*" for curbing due credit of its author demonstrates the current Indian situation where a copyright issue is governed by loose copyright laws, inefficient judicial system, backlogged courts and time consuming procedure. It is this picture of Indian legal system that prevents one from bringing an action against the film-makers who infringe the rights of others. If, on the other hand, the work is borrowed with a legal sanction, it can

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[53] *Id.*

[54] Janwalkar Mayura, *Judge watches films to decide if rip-off slur valid* (July 1, 2012), http://www.dnaindia.com/mumbai/report_judge-watches-films-to-decide-if-rip-off-slur-valid_1452255.

[55] Blakely, Rhys, *Plagiarism case could stop Bollywood borrowing from Hollywood* (July 5, 2012), www.thetimes.co.uk/tto/arts/film/article1865287.ece

[56] Krishna Sonali, *Partner may face $30 Hitch* (July 13, 2012) http://articles.economictimes.indiatimes.com/2007-08-08/news/27673674_1_hitch-indian-films-bollywood.

[57] *Upset Aamir Khan hits out at novelist Chetan Bhagat* (July 15, 2012), http://www.dnaindia.com/entertainment/report_upset-aamir-khan-hits-out-at-novelist-chetan-bhagat_1329677.

save the film-maker the loss of reputation and the monetary loss in market when a film is hit with such allegations.

Copying or borrowing ideas from other original works is nothing new and may not be a bad phenomenon if proper authorization is sanctioned from the owner. Rich Taylor, the Vice President of Public Affairs for the Motion Picture Association of America, concedes, "borrowing ideas, scripts and remaking them in different cultural contexts are a part of international cinema" but the right way to obtain the work and rights over it is through a license or an assignment.[58] An arbitration agreement in such conditions can make the task easier to a great extent.

Arbitration has certain advantages over litigation[59] that makes it the preferred mechanism for solving dispute concerning matters of copyright infringement in films or albums which puts goodwill at risk and involves high monetary stakes.

1. Mutual relationship remains intact: Since in arbitration, parties are encouraged to participate and determine the structure and process of resolution, they are more likely to work amicably towards the same rather than being hostile towards each other, as in the case of litigation. Bollywood is a market of competition. Success of the project is very crucial but if the successful project is revealed to be based on unethical practices, it would definitely taint the relationship between the owner of the original work and the Indian filmmaker who derived profit from it.[60] Arbitration tries to settle this angst of the parties and assists them in reaching an acceptable solution.
2. Cheap: Arbitration is a cheaper mechanism than litigation, not because the arbitrators charge less but because the process is quicker and less complicated than litigation proceedings, leading to the total expense being less[61]. When millions of dollars are already at stake and suits claiming approximately the total profit claimed by the project, arbitration, being a cheaper mechanism, helps the producers rather than litigation which can entail liability of millions of dollars on the filmmakers, if found guilty.[62]

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[58] Aseem Chhabra, *How Original is Bollywood?* (June 23, 2012), http://www.rediff.com/entertai/2002/oct/31bolly.htm.

[59] Julia A. Martin, *Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative DisputeResolution,*49 STAN. L. REV. 917 (1997).

[60] Like in the case of '3 Idiots.'

[61] Anita Stork, Note, *The Use of Arbitration in Copyright Disputes: IBM v. Fujitsu*, 3 HIGH TECH. L.J. 241, 254 (1988).

[62] Gregg A. Paradise, *Arbitration Of Patent Infringement Disputes: Encouraging The Use Of Arbitration Through Evidence Rules Reform*, 64 FORDHAM L. REV. 247 (1995).

3. Speedy: Unlike litigation, arbitration is a speedy process and does not involve tedious litigation procedures which consumes a lot of time before the dispute is finally settled. Most of the time the damage to the reputation or the project has been done already and the parties are only left with a choice of monetary compensation that can be claimed.[63] The choice of the author or creator to allow or disallow the person to replicate the work is no longer vested with him. Situations where an agreement is made and arbitration is chosen as a settlement mechanism, speedy justice[64] can be ensured and the creator can claim royalty for the infringement done. He may also stay the release of the infringed product into the market. The arbitrator has the power to issue interim orders which may give parties temporary relief.
4. Flexible: The process of arbitration is flexible and the parties can choose the manner, law, procedure, time, date and the arbitrator itself. Choosing an experienced veteran from the field as an arbitrator can assist the filmmakers in proving their point and understanding the issue of copying work[65]. Unlike litigation, which works according to calendar dates, rigid judges, complicated laws, legal formalities and documentations, arbitration is a smooth process which can be worked out according to the convenience and consent of the parties.[66]
5. Confidential: Confidentiality clause is one of the most important features of arbitration process. When a project's profit depends majorly on market reputation and credibility of the producer and any harm or allegation on the project can sham the gross profit at box-office, no film-maker would want bad publicity for its product slated for release. In such situations, if a dispute arises, arbitration maintains the privacy of its parties along with settling the matter. It does not tamper with the public position of the parties either by revealing the dispute or by divulging private information.[67]
6. Quality of Judgement: The quality and fairness of court judgments can be questioned on the basis of bias or unreasonableness.[68] Due to involvement of numerous technicalities in these complex copyright matters, the judgments are often unpredictable because the judges lack

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[63] Michael Pryles,*Assessing Dispute Resolution Procedures*, 7 AM. REV. INT'LARB. 267 (1996).

[64] Tom Arnold, *Suggested Form of Contract to Arbitrate a Patent or Other Commercial Dispute*, 2 TEX.INTELL. PROP. L.J. 205, 208 (1994).

[65] Kerr J., *International Arbitration v. Litigation,* J. Bus. L. 164 (1980).

[66] DAVID W. PLANT, ALTERNATIVE DISPUTE RESOLUTION IN PATENT LITIGATION 197, 255 (PLI Patents, Copyrights, Trademarks & Literary Property Course Handbook Series No. 258 (1988) (1988).

[67] Bryan Niblett, *Intellectual Property Disputes: Arbitrating the Creative*, DISP. RESOL. J. 65 (1995)

[68] *supra* note 62.

requisite technical experience in the field. In such cases, adjudication by arbitral tribunals can ensure the higher quality of award because the arbitrator can be of the same specialized field with the knowledge of the relevant laws, language, conditions and technology involved.

7. Neutrality: An issue involving copyright can take a graver form due to rapid increase and exploitation of the global technological advancement. Copyrights can be exploited from various locations simultaneously and the suit can be favouring one party over the other. In such situations, arbitration provides a neutral mechanism[69] for solving of the dispute where both the parties are familiar and the institution is not biased towards one party.

As such, arbitration and litigation are substitutes for each other[70] but arbitration allows parties to avoid the costliness and delays of litigation. It is a convenient way to amicably solve commercial disputes. The parties are free to choose an arbitrator of their own choice. They can also select the number of arbitrators, the venue for arbitration and the rules of arbitration. However, it has been observed that the arbitrators often overstep their authority. In a U.K. case, the arbitrator exceeded his jurisdiction and penalized a third party (who was not a signatory to the license agreement) after relying on an oral testimony.[71] Thus, a producer who is not experienced in ADR should preferably use the services of an arbitration institution.[72] For instance, the arbitration proceedings against the Yash Raj Films were quashed by the Bombay High Court[73] when the plaintiffs (who provided software solutions for the film "*Tashan*") filed for both litigation and arbitration. Filmmakers should emphasis on formulating uniform rules of arbitration, specific to the film industry.

In *Tandav Films Entertainment P. Ltd. v. Four Frames Pictures and Ors.*,[74] an exclusive license agreement was entered into between the parties. The scripts of certain songs and the writer's rights for the film '*Khosala ka Ghosla'* were exclusively licensed to Tandav Films. Thereafter, Tandav Films signed several license agreements for the underlying works including dialogues, screenplay, music etc. All rights excluding the music rights were further licensed to UTV Software by Tandav Films for a period of fifteen years. The agreement contained an

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[69] ALAIN PLANTEY, INTERNATIONAL ARBITRATION INA CHANGING WORLD, IN International Commercial Arbitration, International Arbitration in a Changing World 67, 70 (Albert Jan van den Berg ed., 1993)

[70] 25 OHIO ST. J. DISP. RESOL. 433.

[71] Jonesfilm v. Lions Gate Films, *et al.*, IFTA Arbitration No. 03-08 referred in *Judicial Review of Arbitration Awards After Cable Connection: Towards a Due Process*MoDel. 17 UCLA Ent. L. Rev. 1

[72] *supra* note 46.

[73] Onyx Musicabsolute.com Pvt. Ltd. and Ors. v. Yash Raj Films Pvt. Ltd. and Ors., Onyx Mobile Pvt. Ltd. and Virtual Marketing India P. Ltd., 2008 (5) ALL MR 26

[74] 2009 (41) P.T.C. 515(Del.)

arbitration clause. Consequently, UTV Software assigned the musical rights of the film to Big Music, for a Tamil film. The plaintiff contended copyright infringement and argued that since the dispute (over music rights) was unrelated to the agreement signed by the parties, they would not be governed by arbitration. However, the court held that the parties must appoint arbitrators to settle the dispute in question.

The above decision can be attributed to the popular conception that where ever two contradictory constructions are possible, construction that gives effect to the arbitration agreement should be preferred.[75]

In *Nasir Husain Films Pvt. Ltd. v. Saregama India Pvt. Ltd. and Anr.*, the petitioner was a well-renowned producer of Hindi cinematograph films and film songs.[76] The petitioner owned all copyrights in certain films, film songs and sound recordings.[77] An assignment deed was signed between the petitioner and the respondent for assignment and exploitation of the works in question.

The petitioner's songs, music, lyrics and sound recordings were being circulated by the respondent through various modes, including ring tones, though they were not authorized to do so under any previous agreements. The petitioner alleged that such unauthorized exploitation not only amounted to breach of the terms of the previous agreements but also was in violation of the petitioner's copyrights in the songs and the music. The petitioners claimed all outstanding amount or royalties under the previous agreement and demanded further to cease and desist from making use of the petitioner's works/songs/music/lyrics, *inter alia,* through or by way of ringtones downloadings thereof. The court observed that "the settlement of draft itself cannot be treated as valid and binding agreement".[78] Unless accepted in writing or communicated, the draft of agreement cannot be treated as final and agreed agreement of arbitration.

## IV. HOW TO DRAFT AN EFFECTIVE ARBITRATION CLAUSE?

The arbitration clause in a contract is separate from the other clauses in the contract. Courts have held that repudiation of the contract, ipso facto, does not put an end to the arbitration clause contained therein.[79] Therefore, drafting an arbitration agreement which clearly reflects the intention of the parties is considered a herculean task. Since an arbitration clause is an agreement in itself, the contract survives even when all the further performances undertaken by the

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[75] Oil & Natural Gas Commission v. Sohanlal Sharma I.L.R. 1969 (2) Cal. 392.
[76] (2010) 2 Comp. L.J. 412 (Bom..).
[77] *Id.*
[78] (2010) 2 Comp. L.J. 412 (Bom..).
[79] Damodar Valley Corporation v. K.K. Kar, A.I.R. 1974 S.C. 158.

parties have ceased. The arbitration agreement is often regarded as a collateral and ancillary contract in relation to the main contract, of which it forms a part.

The arbitration clause should reveal the intention of the parties to arbitrate. The use of permissive language allows the parties with an option to choose arbitration. The Ontario Court of Appeal held that a clause which provided that the parties may refer any dispute to arbitration was a binding arbitration agreement.[80] However, in India, the Supreme Court took a different position, observing that an agreement which states that the parties may go to suit or to arbitration, does not amount to arbitration agreement.[81] Therefore, a contract signed between a foreign production house and an Indian film maker must clearly state that the parties have agreed to arbitration in case of any disputes.

While interpreting the correspondence between the parties, the court has to examine whether there was an agreement to arbitrate and whether there was meeting of the mind between the parties which could spell out a binding contract between them, but the court is not empowered to create a contract by going outside the language.[82] It is suggested that the parties must clearly mention the venue and rules of arbitration to be followed in case of any possible disputes. The parties being free to appoint their own arbitrators, can appoint arbitrators from the entertainment industry, thereby, giving them the advantage to effectively deal with technical issues involved in the disputes.

The film makers must be aware of the basic concepts of arbitration in India. "A license in respect of any copyright has to be in writing and the document should reflect the intention to grant the license or assign the particular copyright".[83] A mere understanding that the dispute would be referred to the arbitrator does not suffice to be an arbitration agreement if the agreement is not in writing.[84] The agreement must be written to ensure predictability and accountability.

The courts have generally held that an arbitration agreement must be in writing[85] but need not be signed.[86] But the Maharashtra High Court[87] took a contrary view, stating that the arbitration agreement in writing must be signed by both the

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[80] Canadian National Railway Co. v. Lovat Tunnel Equipment Inc., 3 Int ALR N-5 (2000), 174 DLR (4th) 385 (Ontario Court of Appeal, 8th July 1999)

[81] Wellington Associated Ltd. v. Kirit Mehta, A.I.R. 2000 S.C. 1379.

[82] M/s. RickmersVerwaltung GMB H v. A.P. Industrial Infrastructure Corporation Ltd. A.I.R. 1998 S.C.W. 3672.

[83] PVR Pictures Ltd. Vs. Studio 18 2009(41)P.T.C.70(Del.)

[84] Jayant N. Sheth, Proprietor Struet Mast Engineers v. Gnaneshwar Apartment Co-op. Housing Society Ltd, 1999 (2) Arb. L.R. 115 (Bom.).

[85] Section 7(3) of the Arbitration and Conciliation Act, 1996 requires that the arbitration agreement shall be in writing. An oral agreement of arbitration is not legally recognized.

[86] Satish Chandra v. State of UP, A.I.R. 1983 S.C. 347.

[87] PramodChimanbhai Patel v. Lalit Constructions and Anr., 2002(6) Bom. CR 72.

parties to have a binding force. Preferably such agreements must be signed by the parties to avoid any ambiguity.

The arbitration clause may be incorporated either in the main contract or in a separate agreement.[88] The conduct of the parties is vital in determining the nature of the arbitration agreement. A bill containing arbitration clause, even though not signed by either party, binds the parties for arbitration.[89] Even the acceptance of invoices containing an arbitration clause and making payments thereunder constitutes an arbitration agreement.[90] Similarly, exchange of letters, emails and tele-fax can also constitute a valid arbitration agreement. It is not necessary that the terms of the agreement must find place in one document only. The arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.[91] They may also be ascertained from the correspondence consisting of a number of letters.[92] The intention of the parties in such cases is to be gathered only from the "expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement upon all material terms, then and then alone, can it be said that a binding contract was capable of being spelt out from the correspondence".[93] Such specific arbitration provisions should be included in all contracts of the film industries including employment agreements (between filmmakers and artists), license agreements and distributorship agreements.

It is noteworthy that such transactions often require the parties to enter into multiple contracts but it is well-settled law that "the arbitration clause in the original contract would not cover the dispute arising from fresh or subsidiary contract."[94] The parties must formulate separate arbitration clauses for each fresh contract. They can also opt for arbitration by inserting reference clauses in the contract.

Ideally, clear words should be incorporated to demonstrate the intention of the parties in a contract.[95] However, if any kind of ambiguity arises in the arbitration clause, it should be addressed by expert determination. In such cases, efficacy must be given to the contract rather than to invalidate it.[96] It is not necessary that

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[88] Bihar State Mineral Development Corpn. v. Encon Builders (P) Ltd, (2003) 7 S.C.C 418.

[89] M/s. Oriental Fire and General Insurance Co. Ltd v. M/s. New Suraj Transport Co. (P) Ltd, A.I.R. 1985 All 136.

[90] Asia Soft (India) Pvt. Ltd v. Globesyn Technologies Ltd, 2005 (2) RAJ 163 (Del.).

[91] Section 7(2) of the Arbitration Act, 1996.

[92] Union of India v. A.L. Rallia Ram, A.I.R. 1963 S.C. 1685 (1690).

[93] Dresser Rand S.A. v. Bindal Agro Chem Ltd., A.I.R.2006 S.C. 871.

[94] M/s. Umrao Singh and Co. v. State of Madhya Pradesh, A.I.R. 1976 M.P. 126.

[95] J.K. Jain v. Del.hi Development Authority, A.I.R. 1996 S.C. 318.

[96] Union of India v. M/s. D.N. Revri& Co., A.I.R. 1976 S.C. 2257.

the clause uses the term 'arbitration' or expressly states that the decision rendered should be final and binding.[97] The intention of the parties[98] and the essence of the clause should be made apparent by the words used in the agreements. Incorporation of such clauses in the license agreements by the filmmakers would be significant in protecting the interests of the investors.

## V. CONCLUSION

Until recently, arbitration was only confined to traditional industries. As discussed above, by resorting to arbitration, the filmmakers can avoid unnecessary delay and costs to settle a dispute. Unlike litigation, arbitral proceedings can be scheduled as per the convenience of both the parties. The parties can discontinue fulfilling their obligation under the contract after the initiation of the arbitral proceedings. In order to avoid exercise of excessive jurisdiction by the arbitrator, the parties should incorporate rules of arbitration in the original contract. It is suggested that parties should choose arbitrators within the film industry who possess requisite technical knowledge in the field. Since confidentiality and privacy are guaranteed in the arbitral proceedings, the film-makers can protect their goodwill and market reputation, thus, saving millions of rupees that is at stake.

Since the Hollywood producers are now investing in Indian cinema, there is a possibility that numerous copyright law suits would be filed in future. To avoid such circumstances Indian filmmakers have started purchasing the film and music rights in foreign films. Since the stakes are high in such ventures, it is advised that the parties include the arbitration clause in such contracts. Such clauses can also be incorporated in employment[99] and distribution contracts. These clauses are vital in securing the interest of the investors. Such an arbitration agreement should only cover subject matters which the parties can settle in a private settlement agreement.[100] They should not defeat the laws currently prevailing in the country. The Indian Copyright Act hardly provides any protection to the original author of the cinematographic film, but with the help of a well-drafted arbitration agreement, the original author can easily secure his commercial interests. For example, the parties may by mutual agreement decide not to change the original name of the movie. Such a stipulation would have a binding effect in law. Thus, the parties can formulate their own contractual laws without crossing the boundaries of copyright law in India.

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[97] Sushila Seth v. State of MP, A.I.R. 1980 Del.hi 244.

[98] New India Erectors v. ONGC, 1997 A.I.R. S.C.W 941.

[99] There are various copyright issues which can arise between a film-maker and his employees (music-director, composers, script-writers, etc.).

[100] William Grantham, *The Arbitrability of International Intellectual Property Disputes*, 14 BERKELEY J. INT'L L. 173 (1996).

# ARBITRAL IMMUNITY: JUSTIFICATION AND SCOPE IN ARBITRATION INSTITUTIONS

PRATHIMA R. APPAJI[G]

## I. INTRODUCTION

Arbitration as a form of dispute resolution mechanism has existed from centuries ago and was used extensively in the area of commercial and labour-management sectors.[1] Traditionally, entities with relatively equal bargaining power used arbitration primarily in specialised industries.[2] Arbitration relationship is hybrid in nature.[3] Though it arises from a contract, the parties to the contract waive their right to come before a competent court and bestow the power to resolve the dispute to a neutral third party and agree to abide by decision rendered by the third party(s).[4] This makes arbitration more than a simple contractual relationship, converting it into a true jurisdictional relationship.[5] The process of arbitration is relatively faster, simpler and less expensive within a neutral council. Most importantly, arbitration provides for internationally recognized method for enforcing awards, which is the New York Convention.[6] Hence with the advent of the global economy and the increasing number of international commercial transactions, arbitration has become an important dispute resolution option.[7] It is being increasingly used as a mechanism of dispute resolution in the form of arbitration contracts between corporate entities and their customers, patients, or employees.[8]

With the rise of the use and demand for arbitration, there rose a corresponding market of professional arbitrators and an industry of private businesses that

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[1] *Refer* Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion under the Federal Arbitration Act,* 77 N. C. L. REV. 931, 969 (1999). (Describing the genesis of origin of arbitration in Europe and the United States) as cited in Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*,88 MINN. L. REV. 449 (2003-2004).

[2] *See Id.,* 449

[3] Bernardo M Cremades, *Should arbitrators be immune from liability?* 10 INTL FIN. L. REV. 32 (1991).

[4] *Refer Id.,*

[5] *Id.,*

[6] Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis And Proposal for Qualified Immunity,* 20 N.Y.L SCH. J. INT'L& COMP. L. 1 (2000).

[7] *Id.,*

[8] *Refer Id.,*

provide arbitration support and administrative services.[9] However, because of the perceived misconduct of the arbitrators, the arbitration process has come under increasing attack through civil actions against arbitrators.[10] This has resulted in the questioning of justification and ambit of arbitral immunity. Currently, different countries and arbitration institutions deal with arbitral immunity in their own myriad ways and even the watershed, United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Arbitration, does not contain any provision in detail regarding the immunity of arbitrators.[11] Thus, there is a startling lack of international harmonization regarding the scope of liability for arbitrators.[12]

## II. EVOLUTION OF ARBITRAL IMMUNITY AND ITS RELEVANCE TODAY

Arbitral immunity developed from the concept of judicial and quasi-judicial immunity. It was argued that this is so because of the inherent similarities between arbitrators and judges and hence arbitrators must be extended the same privilege. In common law countries the doctrine of judicial immunity can be traced to Lord Coke's 1607 judgement in *Floyd & Barker,*[13] which held that judges of England's principle common law court, the King's Bench[14], were immune from being sued in competing courts for acts performed in their judicial capacity.[15] This rule of immunity is subject to two important caveats.[16] It was held in the *Marshalsea Case*, when actions are taken in complete absence of jurisdiction the judge can be subject to personal liability.[17] In *Floyd & Barker*, the court came to the conclusion that a judicial immunity is only for "judicial actions" and does not extend to acts which are administrative, legislative or personal.[18] Also, immunity is not extended to protect the judges for their

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[9] *Refer Id.*,

[10] *Refer supra* note 6, at 2

[11] *See Model Law of International Commercial Arbitration,* U.N. Commission on International Trade Law, 18th Session, Annex I, U.N. DOC. A/40/17 (1985): *see infra* notes 208-9 and accompanying text (discussing the legislative history of the Model Law and why it avoided addressing the issue) as cited in *supra* note 3

[12] *Refer supra* note 3

[13] Floyd & Barker, 12 Co. Rep. 23, 77. Eng. Rep. 1305 (1607) as cited in Michael D. Moberly, *Immunizing Arbitrators from Claims for Equitable Relief,* 5 PEPP. DISP. RESOL. L. J. 325, 328 (2005).

[14] *See Pulliam,* 466 U.S. at 546 as cited in *Id.,*

[15] *See Pulliam,* 466 U.S. at 530 (discussing *Floyd & Barker)*, as cited in *Id.,*

[16] Dennis R. Nolan & Roger I Abrams, *Arbitral Immunity,* 11 INDUS. REL. L. J. 228, 230 (1996) as cited in *supra* note 6, at 16

[17] The Marshalsea Case, 10 Coke's Kings Bench Rep. 68, 77 Eng. Rep. 1027 (K.B.) as cited in *supra* note 6, at 16

[18] Floyd v. Barker, 12 Coke's Kings Bench Reports 23, 77 Eng. Rep. 1305 (K.B.) as cited in *supra* note 6, at 16

criminal acts. The principle was subsequently expanded to afford comparable immunity to all judges.[19] The policy justifications underlying the doctrine are to ensure finality of judicial decisions, to preserve judicial independence, and to protect the integrity of the judicial process by preventing interference in judicial decision making that arises from harassment or intimidation by parties.[20] Another set of justifications given is the remedies that are available against judicial decisions are impeachment and appeals. In civil law jurisdictions, judges are liable for wrongful acts and parties can recover damages caused from judicial wrongdoing.[21] Judicial immunity existed not just to protect people holding judicial offices but also to protect litigants and litigation process.[22] It is a means to an end and not an end in itself.[23] In line with these principles, the courts have extended judicial immunity to arbitrators due to the functional similarities between the two positions. Arbitrators are neutral parties that are appointed to adjudicate on disputes submitted before them and render binding and final decisions. In this process, arbitrators determine the rights of the parties to the arbitration agreement. Similar to the public policy argument given to justify judicial immunity, the grounds of independence and finality holds true for arbitral immunity. Thus, the courts have justified the granting of judicial immunity to arbitrators.

However the analogy is not perfect and eventually the functional similarity between the two break down.[24] An arbitrator derives his powers from private contracts and receives remuneration in return for his professional service; however, a judge is appointed by the State from which they derive their power and remuneration.[25] The judiciary is one of the three limbs of the government and is essential for the working of a democracy; the profession of arbitrators is less noble.[26] Arbitrators need not follow precedents and do not create it.[27] Arbitration proceeding are not public like courts, but are private and confidential.[28] Also, unlike court proceedings, arbitration proceedings cannot

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[19] *See Pulliam,* 466 U.S. at 531 (discussing *Floyd & Barker)*, as cited in *supra* note 13, at 328

[20] *See* Pierson v. Ray, 386 U.S. 547, 554 (1967); *Bradley*, 80 U.S. at 347-49 ; *Also see* J. Randolph Block, Stump v. Sparkman *and the History of Judicial Immunity*, DUKE L.J. 879, 897-920 (1980) as cited in *supra* note 1, at 477

[21] *supra* note 6, at 17-18

[22] *Refer* Dennis R. Nolan, & Roger I Abrams, *Arbitral Immunity*, 11 INDUS. REL. L. J. 228, 232 (1989)

[23] *Id.,*; *supra* note 6, at 23

[24] *supra* note 22, at 234

[25] Arenson v. Casson, [1975] 3 All. E. R. at 918-19 as cited in *supra* note 6, at 23

[26] *Baar*, 140 Cal. App. 3d at 984; *Refer* Mark A. Sponseller, *Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators,* 44 HASTINGS L.J. 421, 430 (1993) as cited in *supra* note 6, at 23

[27] Arenson v. Casson, [1975] 3 All. E.R. at 918 as cited in *supra* note 6, at 24

[28] *See Baar,* 140 Cal. App. 3d at 984, as cited in *supra* note 6, at 24

determine the rights and obligations of non-parties to the arbitration contract.[29] They lack rigid procedural formality[30] and arbitral awards are subject to very limited judicial review.[31]

However, despite all these differences arbitrators are bestowed with blanket immunity, which even judges performing a noble profession are not honoured with. Thus, this near absolute immunity renders them more powerful than judges in specified areas. Also, today, due to great demand for arbitrators, it has developed into a profession like doctors, lawyers, accountants, where they are hired for their professional services.[32] There are situations where arbitrators, like other professionals, act negligently or even maliciously.[33] In other professions such misconduct would result in liability.[34] Yet the blanket immunity granted to arbitrators' shields them from any accountability for their wrongful conduct and denies the aggrieved parties any remedies for the damage suffered.[35] Without any form of substantial liability imposed on them, arbitrators are most likely to commit or fail to commit an increasingly diverse array of acts which will test the limits of parameters arbitral immunity in new ways.[36] Hence, there is a need to question not only the ancient justifications but also the relevance of arbitral immunity in light of today's globalised economy where arbitration is an important dispute resolution mechanism in the international scene.

## III. SCOPE OF ARBITRAL IMMUNITY UNDER VARIOUS ARBITRATION INSTITUTIONS WITH REFERENCE TO 'SERIOUS MISCONDUCT' AND 'BIASES'

Under most arbitration institutions, neither 'serious misconduct' nor 'bias' is defined. They state that the arbitrator would be merely removed and replaced in case of existence of justifiable doubts of the arbitrator's independence or impartiality. All the institutions impose the duty to disclose on the arbitrator of any circumstances that is likely to result in justifiable doubts. Few of them have

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[29] *See Baar,* 140 Cal. App. 3d at 984, as cited in *supra* note 6, at 24

[30] *Refer See* Richard J. Mattera, *Has the Expansion of Arbitral Immunity Reached its Limits After United States v. City of Hayward?*, 12 OHIO ST. J. ON DISP. RESOL. 779, 785 (1997) and Mark A. Sponseller, *Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators,* 44 HASTINGS L.J. 421, 436-37 (1993) as cited in *supra* note 6, at 24

[31] *See* Corey v. New York Stock Exch., 691 F. 2d 1205, 1210 (6th Cir. 1982) as cited in *supra* note 6, at 24

[32] *Refer* Peter B. Rutledge, *Toward A Contractual Approach for Arbitral Immunity*, 39. GA. L. REV. 151, 154 (2004-2005).

[33] *Refer Id.,*

[34] *Id.*,

[35] *Id.,*

[36] *supra* note 32, at 156

an exclusion liability clause that affords immunity to the arbitrators. Thus, the extent of this arbitral immunity is different under different institutions.

Under the International Centre for Alternative Dispute Resolution, India (ICARD), the institute is under the duty to obtain a confirmation from the potential arbitrator that under no circumstance would there be justifiable doubts with regard to the arbitrator's independence or impartiality.[37] Also he should possess other qualifications as specified in the arbitration agreement.[38] Under the rules, it is also given that a challenge to the arbitrator can be made only when the above stated rule is not complied with.[39] There is no question of liability of the arbitrator and 'serious misconduct' or 'bias'.

As per the Singapore International Arbitration Centre (SIAC) Rules 2010, challenge to the appointment of the arbitrator can be made only on the ground of justifiable doubt with respect to his impartiality and independence or when the arbitrator does not possess the qualifications that the parties agreed upon.[40] They also have a blanket immunity clause under Rule 34.1, wherein arbitrators, among officers, employees and directors shall not be held liable for any arbitration proceedings governed under these rules.[41] The SIAC has also adopted the Rules of Ethics for International Arbitrators drafted by the International Bar Association (IBA). Though there is absolute arbitral immunity, in the Rule of Ethics, bias is discussed under Rule 3.[42] Bias here is considered on the terms of impartiality and independence.[43] Partiality occurs when the arbitrator favours one party over the other or when he is prejudiced about the subject matter of dispute, and dependence refers to a close relationship between one of the parties and the arbitrator or with someone close to the parties.[44] The relationship can be a personal, direct or indirect professional business relationship and past relationships are important only if they are of a high magnitude that could

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[37] Rule 6 (i) of Appointment of Arbitrators, ICADR, (Feb. 27, 2012); http://icadr.ap.nic.in/services/services2.html

[38] Rule 6 (ii) of Appointment of Arbitrators, ICADR, (Feb. 27, 2012); http://icadr.ap.nic.in/services/services2.html

[39] ICADR, (Feb.27, 2012); http://icadr.ap.nic.in/services/services2.html

[40] Rule 11.1 of SIAC Rules 2010 (Feb. 27, 2012); http://www.siac.org.sg/index.php?option=com_content&view=article&id=210&Itemid=130#siac_rule11

[41] Rule 34.1 of SIAC Rules 2010 (Feb. 27, 2012); http://www.siac.org.sg/index.php?option=com_content&view=article&id=210&Itemid=130#siac_rule11

[42] Rule 3, Code of Ethics For An Arbitrator, SIAC (Feb. 27, 2012); http://www.siac.org.sg/index.php?option=com_content&view=article&id=59&Itemid=79

[43] Rule 3, Code of Ethics For An Arbitrator, SIAC (Feb. 27, 2012); http://www.siac.org.sg/index.php?option=com_content&view=article&id=59&Itemid=79

[44] Rule 3.1, Code of Ethics For An Arbitrator, SIAC (Feb. 27, 2012); http://www.siac.org.sg/index.php?option=com_content&view=article&id=59&Itemid=79

eventually affect arbitrator's judgment.[45] The arbitrator is under an obligation to disclose all facts and circumstances which might lead to such justifiable doubts.[46]

Under the China International Economic Trade Arbitration Centre (CIETAC), the arbitrator is under a similar duty to disclose in writing any facts or circumstances that are likely to lead to justifiable doubts with regard to his independence and impartiality.[47] On being successfully challenged before the Chairman, the arbitrator will be withdrawn by the Centre.[48] There is no rule on 'serious misconduct', 'bias', arbitral immunity or a general exclusion of liability clause.

Pursuant to Article 11 of the Hong Kong International Arbitration Centre, (HKIAC), Arbitration Rules, the arbitrator is under a duty to disclose existence of facts leading to justifiable doubts regarding impartiality or independence.[49] They also have under Article 40, exclusion of liability, where arbitrators are to be liable for any act or omission in connection with arbitration conducted under these Rules, save where the act was done or omitted to be done dishonestly.[50] Though this section does not refer to serious misconduct or bias, liability still exists for acts or omissions done dishonestly, hence, there is no blanket arbitral immunity as under other arbitration institutions.

The Arbitration Rules of the Arbitration Institute of Stockholm Chamber of Commerce, 1999, (SCC) states that the arbitrator is under a duty to be independent and impartial and should immediately disclose such circumstances if and when they arise.[51] And on finding the arbitrator disqualified the SCC Institute would only remove him.[52] The SCC Institute grants itself absolute

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[45] Rule 3.2, Code of Ethics For An Arbitrator, SIAC (Feb. 27, 2012); http://www.siac.org.sg/index.php?option=com_content&view=article&id=59&Itemid=79

[46] Rule 2, Code of Ethics For An Arbitrator, SIAC (Feb. 27, 2012); http://www.siac.org.sg/index.php?option=com_content&view=article&id=59&Itemid=79

[47] Article 26, CIETAC Arbitration Rules, (Feb. 27, 2012); http://www.cietac.org/index.cms

[48] Article 25, CIETAC Arbitration Rules, (Feb. 27, 2012) ; http://www.cietac.org/index.cms

[49] Article 11, HKIAC Arbitration Rules, (Feb. 27, 2012); http://www.hkiac.org/index.php/en/aribtration-rules-a-guidelines/hkiac-administered-arbitration-rules/45-hong-kong-international-arbitration-centre-administered-arbitration-rules-1#11

[50] Article 40, HKIAC Arbitration Rules, (Feb. 27, 2012); http://www.hkiac.org/index.php/en/aribtration-rules-a-guidelines/hkiac-administered-arbitration-rules/45-hong-kong-international-arbitration-centre-administered-arbitration-rules-1#11

[51] Article 17, Arbitration Rules, SCC,(Feb. 27, 2012); http://www.jurisint.org/doc/html/reg/en/2003/2003jiregen3.html

[52] Article 18 (4) , Arbitration Rules, SCC, (Feb. 27, 2012); http://www.jurisint.org/doc/html/reg/en/2003/2003jiregen3.html

immunity under Article 42 of the Rules.[53] However, this absolute immunity is only granted to the Institute itself whereas an arbitrator under the Rules is liable for damages caused due to wilful conduct or gross negligence.[54]

The London Court International Arbitration, (LCIA), Rules 1998, impose a similar duty on the arbitrator to remain independent and impartial at all times.[55] The arbitrator should not act in the capacity of an advocate to any party and should not advice any party on the merits or outcome of the case, either before or after appointment.[56] The arbitrator is liable to be removed in the event he acts in deliberate violation of the arbitration agreement or the LCIA Arbitration Rules or acts unfairly or impartially.[57] A party can also challenge the appointment of arbitrator in an episode of impartiality or independence.[58] Though there is an exclusion of liability clause in the Rules, it does not endow the arbitrator with blanket immunity.[59] The arbitrator remains liable, when he acts or omits to act with the intention of conscious or deliberately wrongdoing.[60]

As per Articles 14 and 15 of the International Chamber of Commerce (ICC) Arbitration Rules, 2012, the arbitrator can be challenged and removed on the grounds of lack of impartiality and independence.[61] The allegation has to be made in writing.[62] Liability of the arbitrator is limited under Article 40.[63]

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[53] Article 42, Arbitration Rules, SCC, (Feb. 27, 2012); http://www.jurisint.org/doc/html/reg/en/2003/2003jiregen3.html

[54] Article 42, Arbitration Rules, SCC, (Feb. 27, 2012); http://www.jurisint.org/doc/html/reg/en/2003/2003jiregen3.html

[55] Article 5.2, Arbitration Rules, LCIA, (Feb. 27, 2012); http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article32

[56] Article 5.2, Arbitration Rules, LCIA, (Feb. 27, 2012); http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article32

[57] Article 10.2, Arbitration Rules, LCIA, (Feb. 27, 2012); http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article32

[58] Article 10.3, Arbitration Rules, LCIA, (Feb 27, 2012); http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article32

[59] Article 31.1 Arbitration Rules, LCIA, Feb. 27, 2012); http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article31

[60] Article 31.1 Arbitration Rules, LCIA, (Feb. 27, 2012); http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article31

[61] Articles 14 and 15, ICC Arbitration Rules, 2012, (Feb. 27, 2012); http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf

[62] Articles 14, ICC Arbitration Rules, 2012, (Feb. 27, 2012); http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf

[63] Articles 40, ICC Arbitration Rules, 2012, (Feb. 27, 2012); http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf

However, it is clearly stated in the Article that where limitation of liability is prohibited by law, there the arbitral immunity under Article 40 would not apply.[64] Hence, it does not provide for blanket immunity to the arbitrator. The Common law approach followed by institutions such as the ICC and the LCIA, have adopted rules seeking to exclude the liability for arbitrators. However, even under them, arbitrators can only be held liable for proved bad faith and not even negligence.[65]

The IBA has also come up with a set of Rules and Rule of Ethics with respect to international arbitration. The elements of 'bias' has already been discussed under SIAC. Similar to the Rules examined above, the Rules also impose a duty on the arbitrator to disclose all facts or circumstances leading to the factors that may give rise to clouding his impartiality or independence.[66] Along with this, the introductory note to these Rules (1987) provides that international arbitrators should in principle be granted immunity from suit under national laws, except in extreme cases of wilful or reckless disregard of their legal obligations.[67] The IBA has also drafted Guidelines in situations where there arise conflicts of interest in international arbitrators. The purpose of these guidelines is to ensure that the arbitrator knows what facts to disclose and the different choices of disclosure that would result in the least conflict of interest.[68] There was a need felt for these guidelines as there was an increase in challenges by parties to delay arbitration.[69] Part II of the Guidelines enumerates concrete examples of possible conflicts of interests, which are classified into three lists; Red List which is further divided into waivable and non-waivable, Orange List and Green List.[70]

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[64] Articles 40, ICC Arbitration Rules, 2012, (Feb. 27, 2012); http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf

[65] NIGEL BLACKABY & CONSTANTINE PARTASIDES With ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 330 (Oxford University Press 5th ed. 2009)

[66] Rule 4, Rules of Ethics for International Arbitrators, (Feb. 27, 2012); http://www.int-bar.org/images/downloads/pubs/Ethics_arbitrators.pdf

[67] A/CN.9/WG.II/WP.143/Add.1 para 40 as cited in DR. PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNICITRAL MODEL LAW JURISDICTIONS 11-26, 11-27, 11-28, 522-523 (Sweet and Maxwell, 3rd ed. 2012)

[68] Introduction, IBA Guidelines on Conflicts of Interest in International Arbitration, (Feb. 27, 2012); http://www.int-bar.org/images/downloads/guidelines%20text.pdf

[69] Introduction, IBA Guidelines on Conflicts of Interest in International Arbitration, (Feb. 27, 2012); http://www.int-bar.org/images/downloads/guidelines%20text.pdf

[70] JEAN-FRANCIS POUDRET, SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL LAW 417, 349, (Stephan V Berti & Annelte Ponti trans., Sweet & Maxwell 2nd ed., 2007)

The UNCITRAL also came up with Arbitration Rules popularly known as Model Law in 1976. It was recently revised in 2010. Under the Model Law, the arbitrator's duty to disclose is given under Article 11 and in Article 12, whereby parties can challenge the mandate of the arbitrator on grounds justifiable doubts of partiality or dependence.[71] Though there is a provision for arbitral immunity, it has been limited to the laws applicable and to intentional wrongdoing.[72] The working group shared the view that a certain degree of immunity or exoneration from liability in favour of arbitrators was advisable to reinforce the independence and impartiality of the arbitrators with a free spirit rather than being concerned about later liability lawsuits.[73] These sanctions though act to spurn on the indolent arbitrator, they do nothing to compensate a party who has suffered financial loss as a result of delay in proceeding with the arbitration.[74]

## IV. CURRENT SCENARIO IN INDIA

Arbitration in India is governed by the Arbitration and Conciliation Act, 1996.[75] This Act replaced the existing regime of three legislations, namely the Arbitration and Conciliation Act of 1940, the Foreign Awards (Recognition and Enforcement) Act, 1961 and the Arbitration (Protocol and Convention) Act, 1937. The Act is based on the UNCITRAL Model Law, 1985.[76] No provision under the Act of 1996 explicitly defines either 'serious misconduct' or 'biases' though misconduct was the basis for challenge to arbitrators under the Act of 1940. However, its implication can be inferred from a reading of sections 12, 13, 14, 15 and 34 of the Act.

Though there is no direct provision or case law on arbitral immunity in India, a combined reading of these provisions and relevant case law, gives us a clearer picture of the extent of this protection in India. Under these sections suspicion by itself could not be made a ground for conclusion that the arbitrator would not act impartially or fairly.[77] The court also said that there must be minimum

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[71] Articles 11 and 12, UNCITRAL Arbitration Rules (as revised in 2010), (Feb. 27, 2012); http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf

[72] Article 16, UNCITRAL Arbitration Rules (as revised in 2010), (Feb. 27, 2012); http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf

[73] A/CN. 9/646.para 38 as cited in *supra* note 67

[74] *supra* note 65, 66, at 334

[75] Hereafter referred to as the Act

[76] Hereafter referred to as the Model Law

[77] V.K. Dewan& Co. v. Delhi Jal Board, (2004) 3 Raj. 32 (Del.). The position would have been different if the offer had been accepted. As cited in K. K. VENUGOPAL, JUSTICE R S BACHAWAT'S LAWOF ARBITRATION& CONCILIATION 622-23 (Wadhwa& Company, 4th ed., Volume 1, 2005)

intervention as per section 5 of the Act and hence must be slow in terminating the mandate of the arbitrator.[78] Hence, termination of the mandate is not allowed only on the basis of apprehension of bias.[79] To apply for a termination of a mandate, there must be actual bias.[80] In *Ranjit Thakur v. Union of India,*[81] this court laid down that "the test of likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias as "likely" and whether the person concerned "was likely to be disposed to decide the matter only in a particular way".[82] This test could also apply to an arbitrator.[83] But while considering the reasonable ground for apprehension that the arbitrator will be biased, the court should be satisfied that substantial miscarriage of justice will take place in the event of its refusal of the said application.[84] The same principle was reiterated in *Maheshwari Eng. & Associates v. Union of India,*[85] *International Airports Authority of India*[86] and *Sachinandan Das*[87]. In the former, the court said that there must be acceptable evidence to substantiate the indictment of bias for it to accept it.[88] In the latter cases, the court said that "the apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person".[89]On this issue, the Supreme Court said with prudence that not every mistrustful thought of a party should be taken into account.[90]

However, the remedies against this misconduct are the removal of the arbitrator, setting aside the arbitral award or the non-payment or partial payment of the arbitrator's fees. Reasonable apprehension or likelihood of bias of the arbitrator

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[78] s*upra* note 77, at 643

[79] *supra* note 77, at 643

[80] *supra* note 77, at 643

[81] A.I.R. 1987 S.C. 2386 (India).

[82] Ranjit Thakur v. Union of India , A.I.R. 1987 SC 2386 (India), as cited in *supra* note 77, at 645

[83] Ranjit Thakur v. Union of India , A.I.R. 1987 SC 2386 (India), as cited in *supra* note 77, at 645

[84] Ranjit Thakurv. Union of India , A.I.R. 1987 SC 2386 (India), as cited in *supra* note 77, at 645

[85] A.I.R. 2000 A.P. 57 as cited in *supra* note 77, at 561

[86] International Airports Authority of India v. K.D. Bali and Anr, (1988) 2 S.C.C. 260 (India).

[87] *Refer* Sachinandan Das v. State of West Bengal, A.I.R. 1991 Cal. 224 (India) as cited in *supra* note 77, at 648

[88] AIR 2000 A .P. 57 as cited in *supra* note 77, at 561

[89] International Airports Authority of India v. K.D. Bali and Anr, (1988) 2 S.C.C. 260 (India);*Refer*Sachinandan Das v. State of West Bengal, A.I.R. 1991 (Cal.) 224 as cited in *supra* note 77, at 648

[90] *Refer* Sachinandan Das v. State of West Bengal, A.I.R. 1991 (Cal.) 224 as cited in *supra* note 77, at 648

is sufficient ground for the removal of the arbitrator[91] while actual bias must be proved for the setting aside of the award.[92] The standard of a reasonable and average point of view should be taken into consideration and not the ramblings of a fanciful person.[93] If there is reasonable ground for the apprehension of the applicant that the arbitrator will be likely to be biased[94] or if there is little chance of receiving impartial justice from him[95] or if there would be failure of justice if the arbitration was allowed to proceed[96] or if the arbitrator has disclosed actual bias against a party[97], the mandate of the arbitrator may be terminated. However, relationships to a party are not a disqualification if the arbitrator is not likely to be biased.[98] Also, there can be no interference if the appointment is made with full knowledge of the relationship.[99]

## V. CONCLUSION

In no manner can the position of arbitrators be equated to that of judges. Hence though arbitral immunity has its roots from judicial immunity, it can in no situation supersede judges' immunity. In the process of arbitration, private arbitrators, not necessarily skilled in law, render final and binding determinations as to not only the parties' contractual rights, but also statutory rights and liabilities, including the possibility of collective and class action claims.[100] Where the lapse is serious like that of bias, it seems right that the party who has suffered loss should be entitled to recover that loss from the offending arbitrator, even in countries that traditionally confer immunity from liability of arbitrators.[101] On

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[91] *See* s.12(3) of the 1996 Act, which uses the expression "justifiable doubts as to his independence or impartiality" as cited in *supra* note 77, at 643

[92] State of Orissa Ltd. v. Modern Construction Co., A.I.R. 1972 (Ori.) 219. The case was remanded. The matter was under the cooperative societies act, 1972. R. SangeetaRao v. Krishi Co-Operative Group Housing Society Ltd., (1989) 1 ARB L. REV. 9 (Del). As cited in *supra* note 77, at 643

[93] *Refer* Sachinandan Das v. State of West Bengal, A.I.R. 1991 (Cal.) 224 as cited in *supra* note 77, at 648

[94] Union of India v. Beant Singh 1998 SLJ 137, when malice was established and the court is satisfied of the apprehension that nominated arbitrator may not do justice; court can use its discretion to ask both parties to submit to a panel of arbitrators. As cited in *supra* note 77, at 646

[95] Gangaram Gurnah v. Sumangal Bhikaji, A.I.R. 1933 (Sind.) 347 as cited in *supra* note 77, at 646

[96] Gaya Prasad v. MathulalBudhaLal, A.I.R. 1925 All 202 as cited in *supra* note 77, at 646

[97] Roshan Lal Sethi v. Chief Secretary, A.I.R. 1971 (J&K.) 91 646

[98] Nehalchand v. Shantilal, A.I.R. (Oudh.) 349 (relationship to a member of a joint family of which a party is a member) as cited in *supra* note 77, at 616

[99] *supra* note 77, at 616

[100] *See* Green Tree Fin. Corp. v. Bazzel, 123 S. Ct. 2402, 2406-07 (2003) as cited in *supra* note 1, at 511

[101] *supra* note 65, at 337

the flipside, it is equally important to protect the arbitrators from harassing parties and also to ensure their independence and impartiality in the interests of the public. Such a fine distinction has been drawn in the Indian law where the arbitral immunity though wide is not absolute and there exists recourse against the arbitrator when he is biased under arbitration law and under tort law in all circumstances. Such is the case in most of the arbitration institutions discussed above with the exception of ICADR. Hence, ultimately a balance must be struck between imposing sanctions on arbitrators to deter them from wilfully and recklessly abusing their functions and simultaneously making it possible for them to fulfil their quasi-judicial role without fear of non-meritorious attacks.[102]

[102] *supra* note 6, at 59

# ARBITRATION CLAUSE IN THE ARTICLES OF ASSOCIATION OF A COMPANY: SCOPE AND AMBIT

PRASANTH V.G.[G]

## I. INTRODUCTION

Whether arbitration as a branch of our procedural laws has failed to serve as an effective alternative to litigation is a concern that seems to be gaining voice recently. Even after the legislative efforts to minimize the role played by courts in the matter of arbitration, witnessing invariably time-consuming arguments by parties who devise legal defenses in support of their unwillingness to submit themselves to arbitration procedure, despite the existence of express arbitration agreements, is a routine affair in our court rooms these days.

## II. STATUTORY PROVISIONS AND SEEMINGLY EASY INFERENCES

The relevant question is whether the Articles of Association of a Company ("Articles") constitute a contract for the purpose of section 7(2) of the Arbitration & Conciliation Act, 1996 ("Arbitration Act") so that an arbitration clause contained therein could validly be treated as an "arbitration agreement" under the said provision. A bare reading of section 36(1) of the Companies Act, 1956("Companies Act") leads to the impression that the Articles necessarily constitute a valid contract to which the company and its members are parties.

However, such an easy and seemingly effortless inference is indeed not fully shielded from some valid and compelling legal concerns as sought to be voiced in this paper.

## III. THE INVOCATION OF ARBITRATION CLAUSE IN THE ARTICLES INTER-SE ITS MEMBERS

There is one manner in which an arbitration clause found in a usual commercial contract could differ from an arbitration clause found in the Articles of a company. It is usually a matter of customary practice and norm to specify in a commercial contract that the arbitration clause therein can be invoked in relation to disputes arising out of or in relation to any breaches of the terms of such commercial contract. However, considering that Articles of a company are a set of general guidelines in the matter of administration of a company, it is possible that such a limitation may be absent in the express language of an arbitration clause contained in its Articles. Under such circumstances, a natural doubt that

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arises is whether a broad construction bringing all the disputes between the members including their private disputes which unrelated to the company within arbitration is desirable or not. The Bombay High Court in *Mohanlal Chhaganlal v. Bissessarial Chirawalla*[1] favoured the broad construction whereas the Kolkata High Court in *Khusiram v. Honutmal*[2] favoured a restrictive interpretation stating that the arbitration clause could be invoked only in the matter of disputes between the members within their company relationship. The Bombay High Court in the later decision of *Shiv Omkar v. Bansidhar Jagannath,*[3] favoured the broad interpretation by holding that the main object of including an arbitration agreement in the Articles may be frustrated if the said agreement is not held to apply to the commercial dealings between the members *inter se*, but qualified it by further stating that such enforcement of arbitration clause would be unjustifiable when such private transactions are "*in respect of commodities not within the purview of the association but outside it*." In such a qualified context, the Hon'ble Court held that the enforcement of the arbitration agreement in respect of private commercial dealings between members *inter se* could be seen as a matter in which the company is interested.

It is therefore clear that the matter is capable of raising confusion which would demand enormous time of our judiciary for reaching a determination. Yet another distinct dilemma would be when a member of a company acts in dual capacities. Such a question would not be easy to be resolved and is left open for determination from time to time.

Even in cases where the aforementioned predicaments are absent, the issue of applicability of arbitration clause may still not be fully out of controversy. The question whether members *inter se* can subject themselves to arbitration without impleading the company and giving an opportunity for it to be heard is an issue that has significant bearing on both our procedural laws as well as our substantive laws.

Therefore, it will not be erroneous to point out that the enforceability of arbitration clauses found in the articles even *inter se* members of a company is a matter seeped in controversies, confusions and debates thereby capable of demanding large number of hours in each before reaching a resolution.

## IV. INVOCATION OF AN ARBITRATION CLAUSE BY/AGAINST AN OUTSIDER

A bare reading of the relevant provisions of the Companies Act, most particularly section 36 mentioned above, leads to the logically sound conclusion

[1] A.I.R. 1947 Bom. 268 (India)
[2] 53 CWN 505 (H)
[3] A.I.R. 1956 Bom. 459 (India)

that an outsider cannot be bound by the Articles of a company and therefore cannot be subjected to or take the benefit of an arbitration clause that may be found in the Articles. Therefore, even if the Articles of a company stipulate that disputes that may arise with outsiders, say for example with contractors that the company may engage, will be subject to arbitration, it may be an uncomplicated conclusion that such third parties cannot be bound by or take the benefit of the arbitration clause since they are not parties to the Articles.

One of the main grounds in this regard could also be that the third party will be entitled to legitimately claim ignorance to the provisions of the Articles, including the one dealing with arbitration. It is true that the "doctrine of constructive notice" regarding the internal affairs of a company has faded away much in the history of common laws and the Indian laws.

However, even such a seemingly uncomplicated and secure conclusion may be found to be on an unsteady foundation on a deeper analysis. Following the mandate of section 7(5) of the Arbitration Act, if a contract that the company enters into with an outsider has a seemingly inconsequential clause that states that it would also be subject to the rights and liabilities of the company embedded in its Articles and memorandum of association, a question can arise whether an arbitration clause provided in the Articles of the company could be invoked to govern a dispute arising under such contract. It could always be a possible argument that the arbitration clause stood incorporated by reference and this is capable of invariably leading to a time consuming exercise of judicial determination.

## V. THE CONCERNS WHEN THE SUBSEQUENT CONTRACTUAL DOCUMENTS DON'T CONTAIN AN ARBITRATION CLAUSE

It is a possible scenario that disputes concerning the members may arise out of documents other than the Articles. In today's world innumerable disputes cloud the court rooms and arbitration chambers as arising out of agreements between the shareholders. This is most typical when the company invites an investor whose introduction into the membership of the company in most cases would lead to the execution of shareholders' agreements setting out the terms and conditions concerning the administration of the company. Such agreements, by its sheer volume, nature and contents in most cases would act as a second set of Articles.

It is a very common scenario these days that various *lis* arising out of such shareholders agreements are submitted to litigation by taking such agreements as a complete code and without much recourse to the Articles of the company. Under such circumstances it becomes a matter of doubt whether an arbitration clause that may find place in the Articles and may be absent in such subsequent

agreements, would still govern the members. This is therefore yet another dilemma that invocation of an arbitration clause in the Articles of a company is vexed with.

## VI. IMPLEADING AND HEARING ON MEMBERS WHILE ADJUDICATING A DISPUTE

It would be relevant to mention herein about another practical problem that could arise while trying to invoke the arbitration clause found in the Articles of a company.

The party who is unwilling to participate in the arbitration may contend that the dispute involves even third parties who are outsiders as far as the Articles are concerned and therefore the invocation of the arbitration clause cannot be valid. For example if a member seeks to institute an arbitration action against the company or against the majority shareholder of a company stating that the company ought not have entered into a certain loss-making and financially unviable commercial contract with a third party, a counter argument could be raised that such third party will have to be heard to determine the issues under dispute and that such third party not being a party to the Articles, no invocation of the arbitration clause is possible.

A large body of judicial precedents has dealt with the issue of impleadment of third parties to circumvent an arbitration clause. The Andhra Pradesh High court in the case of *M/s. Srivenkateswara Constructions and others v. The Union of India,*[4] observed as under:

"*It often happens that in order to circumvent an arbitration clause a plaintiff adds some unnecessary parties to the suit and in such cases it has been held that the Court can grant stay of proceedings.* In *Cekop v. Asian Refractories Ltd.*[5]*, it was laid down that a party to an arbitration agreement cannot defeat the agreement between the parties merely by joining a third party in the suit against whom no relief is claimed. Following the said decision, a Bench of this Court, of which one of us (Krishnarao, J.) was a member in C.M.A. No. 467 of 1966, D/-18-12-1969 (Andh.Pra.) held that though the plaintiff added a prayer as against an unnecessary defendant who was not a party to the agreement it was nevertheless a case for granting stay….The addition of the 3rd plaintiff in the present suit does not introduce a different cause of action or a different subject matter at all. This is, therefore a clear case where the plaintiffs adopted the ingenious devise of bringing in unnecessary parties into the arena of dispute, obviously for the purpose of preventing the 1st defendant from invoking the arbitration clause."*

[4] A.I.R. 1974 A.P. 278 (India)
[5] (1969) 73 Cal WN 192 (India)

The Hon'ble Supreme Court on the other hand held in *Sukanya Holdings v. Jaiyesh Pandya*[6], that when the where the gamut of the dispute is such that some partly fall within the domain of the arbitration and some others can be tried in civil court and also in which the parties are not the same as in the arbitration agreement, the court should continue with the entire suit instead of splitting the causes of action.

Therefore, it is clear that the possibility of invoking an arbitration clause in the Articles even to cover disputes between members of a company and concerning the affairs of a company would vary on a case to case basis.

## VII. CONCLUSION

The above analysis is only a brief synopsis of many possible difficulties and concerns that exist even while trying to invoke an arbitration clause that is clearly stipulated in the Articles of a company. As mentioned in the beginning of this paper, the time and effort which are invariably spent on resolving even the fundamental doubt as to whether or not certain disputes are necessarily governed by arbitration procedure itself could be significant. This reality is therefore capable of snuffing out the intended charm of a quicker relief from our arbitration laws. There seems to be no easy remedy to save the charm of the intended savior.

[6] (2003) 5 S.C.C. 531 (India)

# REVIEW OF GARY BORN, INTERNATIONAL ARBITRATION: CASES AND MATERIALS (WOLTERS KLUWER, 2011)

MALLIKA RAMACHANDRAN[G]

Arbitration is a preferred mode of settlement of international disputes, be it between states or business undertakings, particularly as it provides an 'expeditious, efficient and expert' mechanism for resolving disputes. As the author of the book under review points out, the 'striking success' of arbitration as a means for resolution of disputes is evidenced by the growing numbers of arbitrations, use of arbitration clauses, preference for arbitration by businesses, adoption of international conventions and national legislations and the application of arbitration to newer categories of disputes.[1] The casebook under review entitled *International Arbitration: Cases and Materials* seeks to provide an introduction to the 'contemporary constitutional structure', law, practice and policy of international arbitration. The book focuses on international commercial arbitration but also covers inter-state and investor-state arbitrations.

The author, Gary Born, is 'the world's pre-eminent authority on international commercial arbitration', has participated in over 550 international arbitrations including ICC and ad hoc arbitrations[2]. He has served as an arbitrator in over 150 institutional and ad hoc arbitrations and has vast teaching experience.[3]

A significant feature of the book is that it does not focus on any particular jurisdiction; rather it deals with the subject from an international perspective, covering international standards and practices, including cases, rules and legislative provisions from various jurisdictions, highlighting their contributions to international law and practice. The author is of the opinion that national legal systems' treatment of international commercial arbitration "forms a common corpus of arbitration law", and emphasises the need for national courts to continue to consider each other's decisions in this regard.[4]

The book comprises of an introduction and 15 chapters classified into three parts, dealing respectively, with arbitration agreements (chapters 2-6), arbitration proceedings (chapters 7-13) and arbitral awards (chapters 14-16). In addition, a

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[1] GARY BORN, INTERNATIONAL ARBITRATION: CASES AND MATERIALS 36 (Wolters Kluwer, 2011) [hereinafter BORN].

[2] Gary Born-Biography, WILMER HALE, http://www.wilmerhale.com/gary_born/ (last visited Mar. 12, 2012).

[3] BORN, s*upra*note 1.

[4] *Id.*

documentary supplement is provided which contains the texts of various international conventions and national arbitration statutes as well as texts and extracts from institutional arbitration rules and other rules, guidelines and notes of the UNCITRAL, IBA, etc., referred to in the main volume.

The introductory chapter sets out the historical development of arbitration as well as provides an overview of the major international conventions and instruments forming the 'constitutional framework of international arbitration', domestic legislation (both 'supportive' and 'less supportive' of international arbitration), basic provisions of arbitration agreements, and choice of law issues, highlighting basic provisions, distinctive features and their contributions to the development of the international arbitration framework. The chapter commences with an interesting account of the historical usage of arbitration which has been utilised in the resolution of international disputes, both commercial and inter-state, since antiquity[5] and many features and reasons behind the use of which share similarities with the current system. The author also points out that in certain periods in the 19th century, there was hostility towards arbitration in many jurisdictions including England and the US, resulting in limitations, both judicial and legislative, being imposed. The chapter provides an overview of the features, pros and cons, of institutional and ad hoc arbitration. Another helpful tool for both students and researchers is the overview of sources of information on international commercial arbitration.

The first section, which addresses 'international arbitration agreements' looks into a range of issues relating to the legal framework, fundamental principles such as separability and competence-competence, the role of reciprocity; formation and validity of agreements, their interpretation, non-signatory issues and the allocation of competence in dealing with non-signatory issues. Arbitration proceedings are the focus of the second section which covers various aspects regarding the arbitral seat (such as meaning, importance, and selection), the selection, qualifications and removal of arbitrators; procedural issues (including exercise of procedural authority, evidence, discovery, confidentiality and judicial review); choice of substantive law on the merits of the dispute; representation, and standards and supervision of professional conduct. The final section of the book covers arbitral awards: their framework, amendment and revision, recognition and enforcement. This section discusses presumptive finality, grounds for annulment, grounds for refusal of recognition and the issue of reciprocity.

Each chapter discusses several issues through relevant extracts from international conventions, domestic legislations, treatises, case law and arbitral

[5] In fact, the author also cites instances in Greek mythology where arbitration was used for settlement of disputes.

awards from different jurisdictions. Each section is followed by detailed notes by the author highlighting issues and questions and posing hypotheticals arising from the legislative provisions and case law enabling the reader to critically evaluate the principles of international arbitration, legislative provisions and interpretation and approach adopted by the judiciary and arbitrators in that regard. These notes reflect the author's impressive practical experience and scholarly analysis of arbitration law.

The author identifies deficiencies in the current framework and areas where the position of law is not clear, such as the lack of guidance under international conventions and national legislation on what constitutes arbitration agreements[6];non-specification in the New York Convention as to what nation's law or international standards would apply in determining Article (V)(1)(b)'s exception for procedural unfairness;[7] absence of provisions on the preclusive effects which are mandated by Article III or cognitive provisions of the New York Convention with fewer authorities, addressing the preclusive effects of the New York Convention or other international conventions;[8] confidentiality of international arbitration proceedings (which is controversial, unclear, and on which there are no specific provisions in international conventions and also leading arbitration statutes);[9] uncertainty as to the meaning of Article XIV of the New York Convention;[10] absence of provisions in most arbitration statutes, UNCITRAL rules and institutional rules on issues of joinder, consolidation and intervention;[11] lack of express definitions of 'arbitral awards' in international conventions and arbitration legislations;[12] absence of specific provisions in international conventions and national legislations on lack of independence or impartiality or misconduct of the arbitrator as a ground for non-recognition of awards[13] etc.

He also points out areas where although the principle in question has been recognised and accepted in most jurisdictions, the specific implications remain unsettled, for instance, while the positive effects of arbitration agreements, i.e., good faith and cooperation in participating in the arbitration proceedings is recognised, the precise duties implied by it, such as participating in selection of the tribunal, payment of fees, no obstructions or delays in proceedings,

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[6] BORN, *supra* note 1, at 104.
[7] *Id.*at 1169.
[8] *Id.*at 1048.
[9] *Id.*at 971.
[10] *Id.*at 1030.
[11] *Id.*at 893.
[12] *Id.*at 1003.
[13] *Id.*at 1179.

cooperation on disclosure requests, etc is unsettled.[14] Again, though the principle of competence-competence has been accepted in many jurisdictions, there are divergent approaches to allocation of competence to decide jurisdictional issues between arbitrators and courts; although it is agreed widely that awards have binding *res judicata* effects, the precise nature of the effects and the legal sources are debated,[15] while requirements on independence and impartiality of arbitrators are found in most statutes, there is significant variation in the content of these requirements[16] etc.

The importance of various principles and issues in international arbitration law and rationales behind different approaches and principles is also discussed. For instance, the 'profound legal and practical consequences' of location of the arbitral seat on internal matters (party autonomy on substantive and procedural issues, pleadings and evidentiary issues, etc.) and external matters such as setting aside the award[17], rationale for reciprocity reservations under Article I(3) of the New York Convention with regard to enforcement of awards,[18] importance of selection of counsels as there may be restrictions in some laws[19] etc.

The book highlights different approaches taken in various jurisdictions to particular issues, such as divergent approaches to allocation of competence[20], application by some authorities of general choice of law clauses to 'separable' arbitration provisions and refusal by other authorities to do so, particularly, when the choice would invalidate the action; laws applicable to the agreement in the absence of choice of law clauses (most significant relationship and closest connection standards, substantive law of the arbitral seat, cumulative application of all potentially applicable laws, validation principle and international principles)[21]; authorities holding that the arbitral clause may be valid though the underlying contract is not and those taking the opposite view;[22] approaches in different national laws as to consequences of failure to nominate arbitrators[23] etc.

While pointing out the different approaches or principles applied by courts in different jurisdictions, the author does not express specific opinions on their correctness or otherwise but raises issues as to their pros, cons and effects so that the readers may be able to examine the same.

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[14] *Id.*at 265.
[15] *Id.*at 1048.
[16] *Id.*at 653.
[17] *Id.*at 535-36.
[18] *Id.*at 1029.
[19] *Id.*at 965.
[20] *Id.*at 252-55.
[21] *Id.*
[22] *Id.*at 388-89.
[23] *Id.*at632.

Issues that arise in practice, such as differences in terminology used in framing arbitration clauses; 'standard formulae' used in arbitration clauses to describe their scope, such as 'relating to', 'arising under' and their interpretation;[24] practical functioning of leading arbitration institutions including fee structures, appointment of arbitrators, degree of interference on proceedings,[25] etc. are discussed.

In dealing with most issues, as mentioned above, the author views the subject from an international perspective and refers to materials from various jurisdictions. As such, the book may not be relevant for readers seeking to study the subject as treated by a specific jurisdiction. However, it may be mentioned here that the position of law in the US courts is discussed with regard to most issues.

As the book provides an exhaustive analysis of most issues (for instance, in dealing with the issue of choice of a 'foreign' procedural law by parties, the author discusses issues of validity raised by such choice, potential consequences of the parties' choice, meaning of the parties choice of procedural law governing arbitration, potential conflicts from selection of foreign procedural law, etc.[26]), it is not recommended for beginners or those seeking to get a quick overview of arbitration. However, it is of great relevance and forms a 'must read' for researchers and practitioners who need an in depth understanding of the subject and the difficulties and issues arising in practice.

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[24] *Id.*at 475.
[25] *Id.*at 25.
[26] *Id.*at 562-77.

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