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INDIA'S ARBITRATION LEGISLATION: DOES THE SINGLE ACT SERVE THE PURPOSE

J Martin Hunter[*]

Internationally, India is generally considered to be 'on the brink' of enacting new legislation to govern arbitrations that take place within the territorial jurisdiction of the nation's courts. One question that must be addressed by the legislators is whether there should be one Act or two. The international arbitration community is watching with interest.

Approximately sixty countries have enacted new arbitration legislation since the UNCITRAL Model Law was published in 1985. They are divided between those that adopted the 'one Act' and 'two Act' solutions. A third approach, which may be described as a 'hybrid', is where particular jurisdictions have elected to adopt separate regimes to cover domestic and international arbitrations, but to incorporate both (sometimes in separate chapters) in a single Act, or Code. This 'hybrid' solution is effectively a sub-division of the 'two Act' approach.

Various considerations must be taken into account by legislators in states contemplating the enactment of statutory regimes designed to govern *international* arbitrations that will take place within their territories. At a 'drafting level' the national legislator is confronted by two potentially conflicting objectives.

The first is to retain the 'cultural' aspects of arbitration that have been applied over many centuries, if not millennia, within the jurisdiction in question. These are often regarded as essential. The second is to 'harmonise' the juridical regime to be applied in the country in question in order to treat domestic and international arbitrations in a reasonably consistent manner, and (in the interests of the state in question) to create a regime that is in accordance with modern international norms. For states that are close to becoming really major players in international commerce, such as India and Brazil, it must surely be important to accept international dispute resolution processes that accord with international norms.

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[*] *Honorary Chairman*, *CARTAL*.

For New York Convention[1] countries (which, by the early 21st century, had become the significant majority), this meant ensuring that the national law should require that their courts should comply with their international treaty obligations, in particular those that are to be applied to the enforcement and recognition of 'foreign' arbitral awards.

Before embarking on an analysis of the *One Act or Two* dilemma, it is desirable to set out a brief historical account of the modern international commercial arbitration since the middle of the 20th century. The context is that the design objective of arbitration is to create a private quasi-judicial process that will achieve a *final, binding and enforceable* resolution of a dispute. This is not too difficult in a national/domestic context. However, it is not easy in a 'cross-border' context, where the executory powers of a state other than that at the seat of arbitration must be available and effective.

The first real attempt to create an enforcement regime for arbitral awards across national boundaries was made through the Geneva treaties[2] in the mid-1920s. However, this system did not work effectively, because of the so-called *double-exequatur*[3] problem. The solution was not found until 1958, when the legendary Professor Pieter Sanders produced the drafted document 'on the back of the proverbial envelope during a weekend break of the then relevant UN Committee (ECOSOC). This led to the creation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereinafter "NYC").

This Convention has been a remarkably successful international instrument – possibly the most successful ever in the field of private international law - ratified by around 150 countries by the second decade of the 21st century. One of the key provisions (which logically might have been in the title, although it could have made it too long!) was that

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, 330 UNTS 38.

[2] Geneva Convention on the Execution of Foreign Arbitral Awards, Sep. 26, 1927, 92 LNTS 301.

[3] An 'Exequatur' is a legal document issued by a sovereign authority allowing a right to be enforced in the courts of that state without any further judicial process. 'Double Exequatur' means that the relevant sovereign authority in the country where enforcement was sought permitted the merits of an arbitral award made in another country to be reviewed in the courts of the 'enforcement state'. This was the feature that led to the failure of the 1927 Geneva Convention to gain wide acceptance.

signatory states accepted an obligation to enforce *arbitration agreements* between parties to cross-border commercial contracts.

However, this was just the beginning, not the end, of the story, because it is necessary to have national legislation in place, and to create a body of practice rules for the courts, in countries where recognition and enforcement arbitral awards may be needed. The next step was for the United Nations(which had by then created a body called UNCITRAL[4]) to tackle the question of national legislation on international commercial arbitration in NYC[5] contracting states, in order to ensure that the courts in these countries would have the powers needed for the purpose of complying with their NYC treaty obligations. This project was moved forward in the 1980s. After much external consultation and internal discussion, the relevant UNCITRAL Working Group concluded that it would not be practical to achieve this aim through an international treaty, or convention, and it was decided to implement it by means of a *model law* – thereby focusing on *'harmonisation'*, rather than *'unification'*. The result, achieved in 1985, was the UNCITRAL Model Law on International Commercial Arbitration.[6]

The discussion published by the UNCITRAL Secretariat's Explanation of the Model Law indicates that national laws on arbitration revealed considerable disparities.[7] These not only concerned individual provisions and solutions at the level of detail, but also the development of the arbitral process itself. Some national laws may be regarded as outdated, often going back to the nineteenth century and frequently equating the arbitral process with litigation in national courts. Others may be considered as fragmentary in that they do not address some of the most important issues that exist in the context of modern international arbitration.

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[4] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, http://www.uncitral.org/uncitral/ (last visited Oct. 28, 2013).

[5] New York Convention Countries describes the states that have signed and ratified the New York Convention of 1958.

[6] United Nations Commission on International Trade Law, UNCITRAL Model Law, 1985 (as amended in 2006), U.N. SALES NO.E.08.V.4.

[7] *Available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf,

Research indicates that more than sixty jurisdictions have enacted new legislation on arbitration since the UNCITRAL Model law was launched in 1985.[8] Of this total, approximately 35% can be classified as *"two Act"* jurisdictions and the remainder as *"one Act"* jurisdictions. Some of the *"one Act"* jurisdictions have, like France, incorporated separate regimes for domestic as well as international arbitration. However, the statistics demonstrate that both the "*one Act*" solution and the "*two Act*" solution are both viable options.

States contemplating new arbitration legislation have to take a number of important decisions. The present short study explores only one particular element. This is whether states should introduce two Acts or one, and/or whether there is a viable alternative solution. The problem arises in particular for countries that wish to retain some kind of *'appeal'* or *'challenge'* on the merits of an arbitral award. For those that do, there is no real option. They need to have two separate regimes - one for domestic (or national) arbitrations, and another for international arbitrations.

This is because New York Convention countries are bound by their treaty obligations not to permit any challenge to '*foreign'* awards on their merits (including questions of law). In such jurisdictions challenges to arbitral awards are permitted only on the grounds set out in Article 5 of the NYC. These countries, therefore, need two arbitration regimes – one for domestic arbitrations permitting some level of challenge, or appeal, to the national courts on the merits of the award, and another for the recognition and enforcement of *foreign* awards. Fortunately, this was not a problem for England in the discussions that led to 1996 Arbitration Act. This was because in 1979, it had already been resolved to abandon the concept of *case-stated-type* appeals on points of law, except in relation to arbitrations in the so-called 'special categories' (which included maritime, commodities and insurance arbitrations).

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[8] *Available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

However, in England, there were other angles to consider when looking at the topic. The right to appeal on points of law had already been abolished – except in the '*special category'* arbitrations – by the 1979 Arbitration Act. Nevertheless, in the 1990s there was still an intense debate about the level of judicial review that should be applied to '*foreign*' arbitral awards in respect of which enforcement was sought in England.

Further, there were some who felt that international and domestic arbitrations deserved two different regimes, in order that England`s own distinctive court procedures could be retained in the context of domestic arbitration. One of the arguments against this proposition was that there could be difficulties in establishing, at the outset of an arbitration, whether it was *'international'* or *'domestic'*, and another was if a decision on this was taken at the beginning of the process, whether it could be changed during the course of the arbitration, for example, if the nationality of a party changed while the arbitration was in progress.

Nevertheless, at that time, there was a clear majority in favour of implementing a single arbitration Act. The English Arbitration Act, 1996 was therefore prepared on the basis that it would (a) apply to both domestic and international arbitrations, and (b) be fully consistent with the UNCITRAL Model Law.

The result was that many detailed provisions were incorporated in order to ensure that the procedure in domestic arbitrations would be consistent with existing common law procedural rules, at the same time enshrining in it, all of the points of principle contained in the Model Law. The consequence was that, when passed through the parliamentary process, the English Arbitration Act, 1996 contained110 sections (articles), compared to the 36 articles of the Model Law. This may be the main reason why UNCITRAL has not recognised England as a *Model Law* jurisdiction, notwithstanding that (unlike some other countries) there is nothing in its1996 Arbitration Act that is inconsistent with the Model Law.

With the benefit of 20:20 hindsight, it would have been interesting if England had taken the opposite view on the *'one Act or two'* question. On the basis of UNCITRAL's own classification of national arbitration laws around the World, it seems likely that if it had

taken the *'two Act'* path, England would have been categorised as a 'Model Law' jurisdiction for international arbitrations.

However, whatever the merits, there remains a genuine debate on the *'one Act or two?'* question in states that have prospective new arbitration legislation on their agendas. Is there any other credible path? The 'French Solution' of 2011, contained in the amendment to its Civil Code, is certainly worth serious consideration. France has adopted the *hybrid* approach. The new law replaces the previous text of Book IV of the *French Code of Civil Procedure*.[9] Embodied in Articles 1442 to 1527 of the *French Code of Civil Procedure,* the new legislation encompasses both domestic and international arbitrations in a single piece of legislation. It incorporates two separate regimes – one for international arbitrations, and the other for domestic arbitrations, in separate 'chapters'. It is possible that this may be no more than a cosmetic difference. 'Time alone will tell', but it is an ingenious solution and it would certainly be worthwhile for the legislators in India to review it carefully and take it into consideration when formulating their own new arbitration legislation.

In summary, states that wish to retain a distinctive system for the regulation of national/domestic arbitrations, particularly those that intend to offer opportunities for challenges to arbitral awards on the merits in their own courts, have no realistic option. They should adopt a 'two Act' system or, at least, a *hybrid* system incorporating provisions for two separate regimes in a single Act/Code along the lines implemented by France. However, states that are ready to abandon any opportunities for appeals to their own courts on the merits of a dispute (including challenges to arbitral awards on issues of law) that may have existed in their previous arbitration legislation, may find themselves content to adopt a *'one Act'* solution by implementing the UNCITRAL Model Law, or something very close to it, to govern both domestic and international arbitrations.

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[9] *Décret no°2011-48 portantréforme de l'arbitrage'* was published on 14 January 2011 in the Official Journal of France. The new provisions comprise Articles 1442 to 1527 of the French Code of Civil Procedure (CCP).

A NEW DAWN FOR INDIA- REDUCING COURT INTERVENTION IN ENFORCEMENT OF FOREIGN AWARDS

Arpan Kr Gupta[*]

I. Introduction

"Public Policy is an unruly horse, and when you get astride it you never know where it will carry you."[1]

The doctrine of public policy has truly been an unruly horse for international arbitration in India. It had become an established practice to challenge the enforcement of any international arbitration award in India under the guise that the award breached "public policy".[2] This was mainly due to the fact that the Supreme Court of India's judgments in *Bhatia International* v. *Bulk Trading SA* ("Bhatia International")[3] and in *Venture Global* v. *Satyam Computer Services Ltd. & Anr.* ("Venture Global")[4], held that the public policy exception of Section 34 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act") also applies to foreign arbitrations. This was rectified in the seminal decision of *BALCO* v. *Kaiser Aluminum* ("BALCO")[5] where the Supreme Court held that the Part I of the 1996 Act does not apply to foreign seated arbitrations.

However, there still remained ambiguity as to whether under Section 48 of the 1996 Act (Enforcement of a foreign award under the Convention on the Enforcement of Foreign Arbitral Awards, 1958 ("the New York Convention") the expanded the scope of the

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[1] Mr. Justice Burrough noted "Public Policy is an unruly horse, and when you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all but when other points fail" Richardson v Mellish (1824) 2 Bing 228.

[2] *See* Bharat Aluminium Company v. M/s Trafigura, (Interim order, High Court of Chattisgarh, Writ Petition No 4633 of 2008, Aug. 28, 2008) (India).

[3] (2002) 4 SCC 105.

[4] Venture Global v. Satyam Computers Services Ltd. and Anr. A.I.R. 2008 SC 1061 (India).

[5] 2012 (8) SCALE 333 (India).

public policy doctrine would be applicable as it was in *Phulchand Exports Ltd* v. *OOO Patriot.*[6]

In the recent case of *Shri Lal Mahal Ltd* v. *Progetto Grano Spa* ("Shri Lal Mahalal case")[7], the Supreme Court has finally narrowed the scope of the defence of public policy and reinforced the pro-enforcement policy of the Indian Courts as evidenced in *BALCO*.

Before delving into the *Shri Lal Mahal* case, it is important to discuss the history of the application of public policy as an exception to enforcement of an award in Indian courts.

II. History of the Public Policy Doctrine

Section 23 of the Indian Contract Act, 1872 encapsulates the concept of public policy.[8] It states *"The consideration or object of an agreement is lawful, unless it is forbidden by law; or is such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent; or involves or implies injury to the person or property of another; or the court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement, of which the object or consideration is unlawful, is void".*

The 1996 Act is by and large an integrated version of The Arbitration Act, 1940 which governed the domestic arbitration, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Award (Recognition and Enforcement) Act, 1961, which governed international arbitral awards.

The Arbitration Act, 1940 did not contain any reference to the term "public policy". The Foreign Award (Recognition and Enforcement) Act, 1961("the 1961 Act"), which was an Act to give effect to the New York convention, incorporated the term "public policy". Section 7(1)(b)(ii) of the 1961 Act held that *"A foreign award may not be enforced under this Act- ... (b) if the court dealing with the case is satisfied that-... (ii) the enforcement of the award will be contrary to public policy."*

The 1996 Act consists two parts, Part I and Part II. Part I of the 1996 Act applies to all arbitrations where the place of arbitration is India. Part II of the 1996 Act applies to the

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[6] (2011) 10 SCC 300 (India).
[7] (Civil Appeal No. 5085 of 2013 arising from SLP(c) No. 13721 of 2012).
[8] O.P MALHOTRA, THE LAW AND PRACTICE OF ARBITRATION AND CONCILIATION 788 (2002).

enforcement of foreign awards. The term 'public policy' has been used twice in the 1996 Act. An award can be set aside under Section 34 of the 1996 Act (Part I) if the award is in conflict with the public policy of India. Further, a foreign award may be refused enforcement under Section 48 of the 1996 Act (Part II of the 1996 Act) if the award is contrary to the public policy of India.

Section 34 of the 1996 Act (similar to Article 34 of the UNCITRAL Model Law) states:

"(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub- section (2) and subsection (3).

(2) An arbitral award may be set aside by the Court only if-

(b) The Court finds that-

(i) The subject- matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) The arbitral award is in conflict with the public policy of India.

Explanation.- Without prejudice to the generality of sub clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81."

Section 48 of the 1996 Act sets out the conditions for enforcement of foreign awards under the New York Convention:

(2) Enforcement of an arbitral award may also be refused if the Court finds that-

(a)The subject- matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) The enforcement of the award would be contrary to the public policy of India.

Explanation - Without prejudice to the generality of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption."

The first time the question of public policy arose as an exception for enforcement of a foreign arbitral award was in the case of *Renusagar Power Electric co* v. *General Electric Co*

("Renusagar")[9], which involved enforcement of an ICC Award. This was the pre-1996 Act case and the award was being enforced under the 1961 Act.

The Supreme Court held that the expression "public policy" in Section 7(1)(b)(ii) of the 1961 Act meant the public policy as applied by the Indian courts. It recognised that:

"Public policy connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or the public interest or what is injurious or harmful to the public good or public interest has varied from time to time."

The Supreme Court held that the expression "public policy" could be construed widely or narrowly and adopted a narrow view in reference to the enforcement of a foreign award. The Court stated that the term "public policy" "*has been used in a narrower sense and in order to attract to the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India..... Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to:*

(i) Fundamental policy of Indian law; or

(ii) The interests of India; or

(iii) Justice or morality."

The defence of public policy to set aside an award under Section 34 of the 1996 Act then arose in the case of *Oil and Natural Gas Corporation* v. *Saw Pipes Ltd*[10] case ("Saw Pipes case"). The issue was whether an award made in India could be set aside on the ground of public policy; that the arbitral tribunal had incorrectly applied the law of liquidated damages.

Despite the *Renusagar* precedent, the Supreme Court held that any arbitral award which violates Indian statutory provisions is "patently illegal" and contrary to public policy. The court in *Saw Pipes* differentiated the case from that of *Renusagar* on the ground that the question in the latter case was related to an execution of an award which had attained finality under the 1961 Act. By contrast, in *Saw Pipes,* the validity of the award was in

[9] AIR 1994 SC 860 (India).
[10] (2003) 5 SCC 705 (India).

question. The argument accepted by the court was that the foreign award could be set aside under the relevant law by the competent authority where it was being enforced. Thus, in the *Saw Pipes* case the domestic award would be supervised by Indian courts as they were the primary courts. Further, it held that if a narrow meaning was given to the term "public policy," some of the provisions under the 1996 Act would become inapplicable. Therefore, the Supreme Court interpreted Section 34 (2)(b)(ii) of the 1996 Act to include the additional ground of "patent illegality"[11]. The illegality must go to the "*root of the matter*" and must not be of a trivial nature. In another case, the Supreme Court held that an award that is contrary to the specific terms of the contract is patently illegal and can be thus set aside on public policy grounds.[12]

The Supreme Court in *Saw Pipes* quoted the opinion of Late Sr. Advocate Nani Palkhiwala[13] who stated that *"The new arbitration law has been brought in parity with statutes in other countries, though I wish that the Indian law had a provision similar to Section 68 of the English Arbitration Act, 1996 which gives power to the court to correct errors of law in the award. I particularly endorse your comment that courts of law may intervene to permit challenge to an arbitral award which is based on an irregularity of a kind which has caused substantial injustice. If the arbitral tribunal does not dispense justice, it cannot truly be reflective of an alternate dispute resolution mechanism. Hence, if the award has resulted in an injustice, a court would be well within its right in upholding the challenge to the award on the ground that it is in conflict with the public policy of India"*. The court justified the insertion of "patent illegality" on the grounds that it considered that the Indian arbitration Act should contain a provision similar to the "errors of law" under the English Arbitration Act of 1996[14].

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[11] *Id.* ¶30-31. The court referred, *inter alia*, to Section 28 of the Act, which provides for the rules applicable to the substance of the dispute. Section 28(1) refers to the substantive law to be applied in domestic arbitrations and international commercial arbitrations. Section 28(3), which applies to both domestic and international arbitrations, provides that: "*In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction*." On this basis, the court held that an award contrary to the substantive law to be applied to the dispute, the Act or the terms of the contract could be patently illegal.

[12] Hindustan Zinc Ltd v Friends Coal Carbonization, [2006] 4 SCC 445 (India).

[13] *See* JUSTICE DR. B.P. SARAF AND JUSTICE S.M. JHUNJHUNUWALA, LAW OF ARBITRATION AND CONCILIATION (2012)

[14] Section 68 of the English Arbitration Act allows challenges to an award due to serious irregularity and Section 69 allows an appeal to the court on a question of law.

This additional ground for setting aside an award expanded the scope for judicial intervention. By equating "patent illegality" to an "error of law", the Supreme Court effectively paved the way for losing parties to apply in Indian courts on the basis of any alleged contraventions of Indian law.[15]

III. Public policy doctrine in England

One of the reasons as to why the Supreme Court of India expanded the scope of the term "public policy" in the *Saw Pipes* case was to bring parity with the English Arbitration Act, 1996. It would therefore be interesting to analyse as to how the public policy doctrine is applicable in England.

Section 68 of the English Arbitration Act 1996 provides that an award can be set aside in whole or in part on the ground of serious irregularity. Section 68(2)(g) states that "*Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant*: ...(g)*the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy*."

Setting aside an award under Section 68(2)(g) of the English Arbitration Act, 1996 has a higher threshold than under Article 34(b) (ii) of the Model Law[16]. This was highlighted by the House of Lords in *Lesotho Developments* v. *Impregilo Spa*[17]. The Court of Appeal in *Deutsche Schachtbau* v. *National Oil*[18], held that to establish public policy *"It has to be shown that there is some element of illegality or that the enforcement of the award could be clearly injurious to public good or, possibly, that enforcement would be wholly offensive to the ordinary, reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.* "Section 103(3) of the English Arbitration Act, 1996 provides that the recognition and enforcement of a New York Convention award may be refused if it "*would be contrary to public policy to recognise or enforce the award*".

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[15] *See* Aloke Ray and Dipen Sabharwal, *What Next for Indian Arbitration?,* The Economic Times, Aug. 29, 2006.

[16] Section 34 (2)(b(ii) of the 1996 Act is similar.

[17] [2006] 1 AC 221(India). The court referred to the Departmental Advisory Committee on Arbitration (DAC) explanation that Section 68 "*is really designed as a long stop, only available in extreme cases, where the tribunal has gone so wrong in its conduct of the arbitration in one of the respects listed in the section that justice calls out for it to be corrected".*

[18] [1987] 3 WLR 0123.

In England, the pro-enforcement bias under the New York Convention has been faithfully and consistently observed.[19] The national courts in England are reluctant to excuse an award from enforcement on grounds of public policy and interpret it restrictively[20].

In *Soleimany* v. *Soleimany*[21], the case involved smuggling of carpets out of Iran. The English court refused enforcement as it held that it is contrary to public policy to give effect to an agreement to carry out an illegal act.

In *Westacre Investments Inc.* v. *Jugoimport*[22], the Court of Appeal did not refuse enforcement of an award where there was an allegation of bribery to the Kuwaiti officials. The Court held that as the arbitral tribunal rejected the allegations and that the substantive law of the dispute was Swiss law it would respect the decision of the tribunal. Further, it acknowledged that there was a need to maintain a balance between public policy considerations of discouraging illegality and principles of comity in not enforcing awards made in violation of other States' laws and against the policy of giving effect of finality of awards. The Court suggested that unless the contract contained universally condemned activities; or corruption or fraud in international commerce, the public policy exception would not be attracted to contracts which are not performed in England.

The English courts adopt a restrictive approach in the challenges to an award, which mirrors the dual principles of party autonomy and finality of the award on which the English Arbitration Act, 1996 is based[23].

IV. Abuse of the doctrine in India after *Bhatia International* and *Satyam* Judgments

The Supreme Court of India gave a narrow interpretation to 'public policy' in *Renusagar* and a broader interpretation in the *Saw Pipes* case. In effect, this means that there existed

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[19] NIGEL BLACKABY, CONSTANTINE PARTASIDES ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 656 (2009).
[20] CRAIG TEVENDALE AND ANDREW CANNON, CHAPTER 26- ENFORCEMENT OF AWARDS IN ARBITRATION IN ENGLAND WITH CHAPTERS ON SCOTLAND AND IRELAND 580 (Julian Lew QC, et al., eds., 2013).
[21] [1999] QB 785.
[22] [2000] QB 288.
[23] ANDREW TWEEDDALE AND KEREN TWEEDDALE, ARBITRATION OF COMMERCIAL DISPUTES – INTERNATIONAL AND ENGLISH LAW AND PRACTICE 766 (2005).

different interpretations to the term 'public policy' for refusing to set aside an arbitral award due to public policy on one hand and for refusing to enforce a foreign award due to public policy on the other hand. This however changed after the ruling of the Supreme Court in *Bhatia International* and *Venture Global*.

In *Bhatia International*, the court categorically erased the distinction between Part I & Part II of the Act, stating that provisions of Part I would apply to all arbitrations and all related proceedings. For arbitrations held in India, the provisions would be compulsorily applicable and only the derogable provisions of Part I could be deviated from. In international commercial arbitrations, held outside India, the provisions of Part I would apply by default unless the parties expressly or impliedly, excluded all or any of its provisions[24].

The Supreme Court in *Satyam* went further and applied the expanded view of public policy for setting aside a foreign arbitral award. In this case Satyam Computer Services Limited ("*SCS*"), entered into an agreement with Venture Global Engineering ("*VGE*") to create a joint venture company -Satyam Venture Engineering Services Ltd. Another agreement was executed between the same parties, the shareholder agreement ("*SHA*"), wherein an arbitration clause was inserted. The arbitration clause provided that the state law of Michigan would be the governing law of the contract.[25]

SCS alleged that VGE had committed an event of default under the SHA and thus exercised its option of purchasing VGE's joint venture shares at its book value. On arbitration, the arbitrator directed VGE to transfer the shares to SCS and consequently, SCS filed for enforcement of the award before the US District Court, Michigan. VGE objected to the enforcement, arguing that it was in violation of FEMA regulations in India.

After the *Bhatia International* decision, Part I of the Act was applicable to all arbitrations. Even though in the *Satyam* case, the award was not a domestic award, the Supreme Court held that the award can be set aside under the public policy exception in Section 34(2)(b)(ii) of the Act. The court further held that this would not be inconsistent with

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[24] *See* HARSH SETHI AND ARPAN KR GUPTA, INTERNATIONAL COMMERCIAL ARBITRATION AND ITS INDIAN PERSPECTIVE 279 (2011).
[25] *Id.*

Section 48 of the 1996 Act, or any other provision of Part II of the 1996 Act. Moreover, it remarked that as the award, its enforcement, the concerned companies and the entire transaction had a "close nexus" with India, SCS could not evade the laws of India by taking the award to foreign courts.

Both these judgments were widely criticized and they led to a situation where as soon as a foreign award was issued, parties often strategically challenged the arbitration award in Indian courts on the grounds of public policy. This went against the basic principle of mutual recognition and enforcement of arbitral awards expressed in the New York Convention. Recognition of an international arbitration award is of paramount importance. Unless parties can be sure that at the end of the arbitration proceedings, if not complied with voluntarily, they will be able to enforce the award, an award in their favour will only be a pyrrhic victory.[26] The only practical solution was that the parties routinely agreed in their arbitration clauses that Part I of the Act was not applicable[27]. Party autonomy is a key feature in international arbitration and Indian courts were forced to give effect to the parties' agreement. Around this time in 2002, International Law Association ("ILA") Committee on International Commercial Arbitration presented a Final Report and Recommendations on Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitration Awards.[28]

The ILA Report and Recommendations addressed the public policy concerns under the New York Convention, which provides that under Article V(2)(b), recognition and enforcement of an award may be refused if it would be "*contrary to the public policy of that country*". The ILA Committee stated in its Interim Report that: "*The public policy exception to enforcement is an acknowledgement of the right of the State and its courts to exercise ultimate control over the arbitral process. There is a tension, however, which the legislature and courts must resolve between: on the one hand, not wishing to lend the State's authority to enforcement of awards which contravene domestic laws and values; and, on the other hand, the desire to respect the finality of foreign awards. In seeking to resolve this tension, some legislatures and courts have decided that a narrower concept of public*

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[26] JULIAN D LEW, LOUKAS MISTELIS AND STEFAN KROLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 688 (2003).

[27] *Following* Bhatia International v. Bulk Trading (2002) 4 SCC 105 (India).

[28] *Available at* http://www.ila-hq.org/en/Others/document-summary.cfm/docid/BD0F9192-2E98-4B17-8D56FFE03B80B3EA . It was preceded by an Interim Report in 2002. *See* [2003] 19 Arbitration International 213.

policy should apply to foreign awards than is applied to domestic awards. This narrower concept is often referred to as international public policy (or ordre public international)."

Thus, the ILA recommended that international public policy should be construed in a narrow and restricted manner. International public policy should include " *(i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "lois de police" or "public policy rules" and (iii) the duty of the State to respect its obligations towards other States or international organisations*." [29]

It was not all gloom everywhere in India. In January 2011, the Delhi High Court in *Penn Racquet Sports* v. *Mayor International Ltd*[30] applied the restrictive approach of *Renusagar* and ruled that a mere violation of Indian law would not be considered as a violation of the public policy of India. The Delhi High Court held that the term "public policy" in the context of enforcement of a foreign award under Section 48 of the 1996 Act is to be construed more narrowly than in the context of setting aside under Section 34. It distinguished *Venture Global* on the basis that the award before it did not suffer from any patent illegality. The court held:

"*As held by the Supreme Court, the recognition and enforcement of a foreign award cannot be denied merely because the award is in contravention of the law of India. The award should be contrary to the fundamental policy of Indian law for the Courts in India to deny recognition and enforcement of a foreign award. The other grounds recognized by the Supreme Court to refuse recognition and enforcement of a foreign award are that the award is contrary to the interests of India, or justice or morality. Merely because a monetary award has been made against an Indian entity on account of its commercial dealings, would not make the award either contrary to the interests of India or justice or morality*."

However, the Supreme Court decision in *Phulchand Exports Ltd v OOO Patriot*[31] brought back the concerns. In this case, the Indian company challenged an award in favour of the Russian company rendered by the International Court of Commercial Arbitration at the Chamber of Commerce and Industry of the Russian Federation, Moscow. This was after the Russian company applied for enforcement proceedings under Section 47 and 48 of

[29] ILA Recommendation 1 (d), supra at (fn. 28).
[30] 2011 (122) DRJ 117 (India).
[31] (2011) 10 SCC 300 (India).

the 1996 Act. The Indian company claimed that the award should be set aside as it was "patently illegal" and therefore violative of public policy of India. The question before the court was whether under Section 48(2) of the 1996 Act, the term "public policy" would include a wider meaning as it did in the case of *Saw Pipes* case.

The court held that there was no distinction between the interpretation of the term "public policy" in setting aside under Section 34 of the 1996 Act and enforcement of a foreign award under Section 48 of the 1996 Act. The court held that a foreign award can be set aside under Section 48(2)(b) of the Act "if it is patently illegal". The court then conducted an extensive review of the merits of the case and then found that the award did not violate the public policy in India.

This decision caused considerable apprehension amongst commercial parties as the reopening of a case on merits at the time of an enforcement proceeding would lead to much uncertainty.

V. Opportunity missed in BALCO v Kaiser Aluminum

The long anticipated decision of *BALCO* finally made a distinction between Part I and Part II of the 1996 Act. The Supreme Court overruled *Bhatia International* on the basis that the 1996 Act reinforced the territoriality principle and held that the Part I of the 1996 Act would not be applicable to an arbitration not seated in India. Therefore a foreign seated arbitration award can no longer be challenged under Section 34 of the 1996 Act. This decision was one of the most eagerly awaited in recent years and finally helped restoring the confidence of the foreign parties by restricting the intervention of Indian courts in foreign arbitrations.

However even after *BALCO*, the issue as to whether the recognition of a foreign award under Section 48 of the 1996 Act will be refused on the ground of patent illegality (as the Supreme Court held in the case of *Phulchand Exports Ltd* v. *OOO Patriot*) is unresolved. This has now been finally rectified in *Shri Lal Mahal Ltd.*[32]

[32] (Civil Appeal No. 5085 of 2013 arising from SLP(c) No. 13721 of 2012).

VI. Facts of Shri Lal Mahal v Progetto Grana SpA

This case concerned a dispute between an Indian supplier and an Italian buyer in a contract for the supply of Indian origin durum wheat. The seller relied on a certificate of quality provided by a certifying agency C.G.S. India at the port of loading in India. The buyer then sent the certificate to C.G.S. Geneva for issuing another certificate for a further sale to a third party. C.G.S. Geneva certificate showed that the wheat was a soft common wheat and not durum wheat as was required by the contract. The buyer considered that the suppliers were in breach of the contract for shipping non-contractual goods and asked for damages.

The dispute was heard by an arbitral tribunal constituted under the Grain and Feed Trade Association ("GAFTA") contract, seated in London. Another arbitration claim was made by the buyer after the supplier had filed a petition in Delhi High Court for a declaration that no arbitration existed between the parties, for breach of arbitration agreement. Both awards found in favour of the buyer and awarded damages against the supplier. These awards were further appealed (under the GAFTA Arbitration Rules) to the Board of Appeal where they were dismissed. An appeal under Section 68 of the English Arbitration Act, 1996by the supplier before the High Court of Justice in London to set aside the award was also rejected.

The buyer instituted a suit for enforcement of both the awards in the Delhi High Court. The Delhi High Court found in favour of the buyer and rejected the challenges of the seller. The seller subsequently filed a Special Leave Petition to the Supreme Court to challenge the enforcement of the awards on the ground that the awards are contrary to the public policy of India.

VII. Decision of the Supreme Court

The Supreme Court (sitting as a 3 member bench) rejected the argument that the wider meaning given to the expression "public policy" in *Saw Pipes* case would be applicable in the case of enforcement under Section 48 of the 1996 Act. The court applied the

decision of *Renusgar,* and held that for the purposes of Section 48(2)(b) of the 1996 Act, the expression "public policy of India" must be given a narrow meaning[33].

The court also referred to *Phulchand Exports* where the Supreme Court (sitting as a 2 member bench) had previously held that the meaning given to term "public policy" under Section 34 of the 1996 Act must be same as that given under Section 48 of the 1996 Act and must include the ground of "patent illegality" to refuse enforcement. The court overruled *Phulchand Exports* on the ground that it does not lay down the correct law and applied the decision of *Renusagar* to apply a narrow approach to the term "public policy" for enforcement of foreign awards. Section 48(2)(b) of the 1996 Act would not include additional ground of patent illegality. Ironically, Justice Lodha who was in the bench of *Phulchand* case was also a member of the three member bench of *Shri Lal Mahal.*

VIII. Conclusion

After the Supreme Court of India's decision in *BALCO* and *Shri Lal Mahal*, the Indian courts have come a long way from a decade long of interventionist approach in international arbitrations. Although the Supreme Court in *Shri Lal Mahal* endorses a narrow construction of the term "public policy", which includes "*the interests of India*" within its definition, this might however be still considered quite broad.

Still, the aforementioned decisions along with other decisions of the Supreme Court and other High Courts, have demonstrated that the Indian courts are now pro-arbitration and would not intervene in the arbitration process unnecessarily[34]. There has also been tendency of the Indian courts where the decision of *BALCO* is not applicable, to not apply Part I of the Arbitration Agreement by differentiating *Bhatia International*[35].

These decisions indicate the importance placed by Indian courts on enforcing arbitration agreements and not allowing interference from Indian courts. This would also reduce the tactical challenges attempted by the losing party to an arbitration award in the Indian

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[33] An award will be against the public policy of India if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."

[34] *See* Antrix Corp. Ltd. v. Devas Multimedia Pvt. Ltd 2013 STPL (Web) (India); *See also* Indiabulls Financial Services Limited (India) v. Amaprop Limited (Cayman Islands) &Anr (Delhi High Court, O.M.P. 287 of 2011, May 18, 2012).

[35] *See* Videocon Industries Ltd. v. Union of India, (2011) 6 SCC 161 (India).

courts. The international arbitration carriage of India is ready to reach its potential after finally reigning in the unruly horse of public policy!

ASSIMILATING THE NEGATIVE EFFECT OF *KOMPETENZ-KOMPETENZ* IN INDIA: NEED TO REVISIT THE QUESTION OF JUDICIAL INTERVENTION?

Pratyush Panjwani[*] *& Harshad Pathak*[*]

Abstract

The principle of kompetenz-kompetenz has been recognized under Section 16(1) of the Indian Arbitration and Conciliation Act, 1996. As a theoretical principle, it is widely accepted to have a dual effect. While its positive effect confers upon an arbitral tribunal the power to rule on its jurisdiction, the negative effect establishes a presumption of chronological priority for the tribunal with respect to resolving jurisdiction questions.

Stemming from what appears to be an inherent distrust in the arbitration machinery, the Indian Courts have been reluctant in acknowledging this negative effect while assessing the myriad questions put before it. The consequence is the adoption of a not so pro-arbitration approach that is plagued with judicial interventions at every stage.

The present paper attempts to analyse the implications of the principle of kompetenz-kompetenz, when considered in its entirety and determine the permissible extent of judicial intervention in the arbitral process. In particular, two concerns are sought to be addressed – the first of which pertains to the necessity and extent of judicial intervention permitted by law while entertaining an application under Sections 8, 9 or 11 of the Act. Therein, the authors commence with a critique of the decision of the Supreme Court of India in Patel Engineering, which marked a discernible shift in the attitude of Courts. Subsequently, the authors make a reasoned argument as to the limited jurisdictional facts that can be assessed by the concerned Courts or judicial authorities or the Chief Justice, as well as the prima facie standard of review that ought to have been adopted by the apex Court.

The second concern pertains to the consequences of a party's failure to raise a timely challenge to the jurisdiction of a tribunal under Section 16 of the Act. Whether a party, having not raised a jurisdictional objection during the arbitration proceedings, can be permitted to raise the same as a ground for setting aside the award under Section 34 of the Act? Relying upon the doctrine of deemed waiver, the

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jurisprudence relating to the 'wait-and-see' approach in commercial arbitration, and the negative effect of kompetenz-kompetenz, the authors endorse the view that limits the defaulting party's opportunity under Section 34 of the Act. In other words, if a party fails to raise any jurisdictional objection before the tribunal, it shall be prohibited from challenging the arbitral award on the same grounds in a proceeding before the appropriate Courts.

I. Introduction

The Arbitration and Conciliation Act, 1996 ['the Act'][1] recognizes the principle of *kompetenz-kompetenz*. Section 16(1) of the Act empowers an arbitral tribunal to "rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement". This, along with the principle of separability,[2]operates to give primary responsibility to the tribunal to determine its own jurisdiction.

The *kompetenz-kompetenz* principle is closely related to rules regarding the allocation of jurisdictional competence between arbitral tribunals and national Courts and to rules concerning the nature and timing of judicial consideration of challenges to an arbitral tribunal's jurisdiction.[3] The actual scope of the aforementioned principle often raises disagreements amongst scholars and judges alike. While the principle is widely recognized to possess a positive and a negative effect,[4] there is almost equally broad disagreement and uncertainty concerning its precise scope and consequences.[5] In India, the application of this principle divides opinion as to the extent of judicial intervention in the arbitral process. It is this very divide that the authors seek to reconcile.

In order to do so with clarity and brevity, the authors recognize the interaction between an arbitral process and the Courts to be three-staged; the analysis being conducted accordingly. The first stage refers to the pre-arbitration litigation; the second stage

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[1] The Arbitration and Conciliation Act , 1996, No.26, Acts of Parliament, 1996 (India) [hereinafter "TACA"].
[2] *Id*,§ 16(1)(a).
[3] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 852 (2010).
[4] FOUCHARD GAILLARD AND GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 397 (Emmanuel Gaillard & John Savage eds., 1999); STEPHEN SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 2 (1987).
[5] BORN, *supra* note 3, at 853.

encompasses decision making by the arbitrators on merits of the dispute during the arbitral proceedings; and the third stage refers to post-award enforcement or proceedings to set aside the award.[6]

It is sufficient to state that an arbitral process usually poses myriad convoluted challenges across the aforementioned three stages. However, the scope of the present paper is confined to examining the effect of *kompetenz-kompetenz* on the arbitral process in India. In particular, the question sought to be addressed is who decides the issues of arbitral jurisdiction and how? Answering this question involves addressing two concerns; the *first* of which is the necessity and extent of judicial intervention permitted by law while entertaining an application under Sections 8, 9 or 11 of the Act. This concern is limited to the first stage of an arbitral process.

In this regard, the Courts have drifted from an initial reluctance to interfere with the arbitral process to imposing upon itself the duty to consider, and decide questions pertaining to the jurisdiction of the arbitral tribunal. This transition, however, have endangered the very characterization of commercial arbitration as an efficient method of alternate dispute resolution. Consequently, for reasons discussed in Part III of the paper, the authors endorse the view that the negative implications of the aforementioned judicial shift far outweigh the possible positive ones.

The *second* concern meriting academic attention, which arises during the third stage of the arbitral process, is whether a party to a dispute, having not raised a jurisdictional objection during the arbitration proceedings under Section 16 of the Act, can be permitted to raise the same as a ground for setting aside the award under Section 34 of the Act.

On the one hand, one may argue that an action cannot be permitted by reason of a 'deemed waiver' operating against the party pursuant to Section 4 of the Act. On the other hand, few Courts have allowed such applications, asserting that the right to object to violations of mandatory jurisdictional requirements can never be subject to a waiver.

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[6] The categorization is similar to, and influenced by, the distinction drawn by the House of Lords in Coppee-Lavalin SA/NV v. Ken-Ren Chemicals and Feritilizers Ltd., [1994] 2 All..E..R. 449.

This dichotomy of opinion is addressed by the authors in Part IV of the paper, wherein an attempt is made to arrive at an effective solution.

As is often the case, it is considered best to address each concern individually in the chronology of their probable occurrence. The authors, thus, find it fit to first address the concerns arising during the first stage of the arbitral process before proceeding to those pertaining to the third stage. However, prior to the same, it is imperative to understand and appreciate the true meaning and scope of the principle of *kompetenz-kompetenz*.

II. The Principle of Kompetenz-Kompetenz

It is generally accepted that an arbitral tribunal has the power to investigate its own jurisdiction.[7]The principle that arbitrators have jurisdiction to consider and decide the existence and extent of their own jurisdiction is variously referred to as the competence-competence doctrine or the *kompetenz-kompetenz*principle or the 'who decides' question.[8]

While the said principle was first recognized in India through the enactment of the Act in 1996, the position in English law has been well settled since the decision of Mr. Justice Devlin in *Brown* v. *Genossenschaft Osterreichischer Waldbesitzer*[9].Therein, it was laid down in no uncertain words that,

> "[Arbitrators] are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties – because they cannot do so – but for the purpose of satisfying themselves as a preliminary matter about whether they ought to go on with the arbitration or not."[10]

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[7] ALAN REDFERN ET. AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 346 (5th ed., 2009).
[8] BORN, *supra* note 3, at 853.
[9] [1954] 1 Q..B. 8.
[10] *Id.,* at 12 and 13.

In a nutshell, the principle of *kompetenz-kompetenz* recognizes the competence of an arbitral tribunal to rule on its own jurisdiction.[11] It is accepted widely as is evidenced by its express incorporation in Article 16 of the UNCITRAL Model Law ['Model Law'],[12] as well as the arbitration statutes in developed jurisdictions including those that have not adopted the Model Law.[13] Further, international tribunals have developed a tendency to recognize or affirm this principle regardless of the applicable law of the arbitral seat.[14] However, the authors consider the above description of *kompetenz-kompetenz* to be incomplete; a mere recognition of its positive effect.

Many scholars, most notably Emmanuel Gaillard, Professor Philippe Fouchard, Dr. Sebastien Besson and Jean-Francois Poudret, argue in their respective commentaries on commercial arbitration that in order to give full effect to the *kompetenz-kompetenz* principle, the arbitral tribunal ought to be given priority over the Courts as far as issues of its jurisdiction are concerned. "In other words, the arbitral tribunal should be able to decide [the jurisdictional issues] first, subject to a possible judicial review of its decision."[15] This order of priority is known as the negative effect of *kompetenz-kompetenz*.[16] "This negative effect implies not only a priority in favour of the arbitral tribunal in the event of *lis-pendens* with Court proceedings concerning the same subject matter, but also the exclusion of a direct action aimed at confirming or denying the validity of the arbitration agreement and, more broadly, the jurisdiction of the arbitral tribunal. The latter could only be controlled by the Courts in an application to set aside

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[11] JEAN-FRACOIS POUDRET & SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 385 (2007).

[12] H. HOLTZMAN & J. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 478 (1989).

[13] Swiss Law on Private International Law, art.186(1) [hereinafter "Swiss"]; Belgian Judicial Code, art. 1697(1); French New Code of Civil Procedure, art. 1466 [hereinafter "French"]; Netherlands Code of Civil Procedure, art.1052(1); Italian Code of Civil Procedure, art. 817(1), hereinafter "Italian"]; Swedish Arbitration Act, section 2; German Z.P.O., § 1040, [hereinafter "German"]; Spanish Arbitration Act, art. 22(1); Japanese Arbitration Law, art. 23; Korean Arbitration Act, art. 10.

[14] BORN, *supra* note 3, at 871.

[15] POUDRET, *supra* note 11, at 387.

[16] Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc., (2013) 1 S.C.C. 641, at ¶77, 129.

the decision – preliminary or final – of the arbitral tribunal or at the enforcement stage."[17]

Accordingly, while the positive effect of *kompetenz-kompetenz* refers to an arbitral tribunal's power to rule on its jurisdiction[18], the more controversial negative effect takes the said principle a step further by establishing a presumption of chronological priority for the tribunal with respect to resolving jurisdiction questions.[19] It is on an understanding of this premise that the authors discuss the controversial 'who-decides' question in the context of arbitration laws of India.

Despite the abundance of literature available with regard to the scope of *kompetenz-kompetenz*, the authors are mindful that "the precept that arbitrators may rule on their own authority possesses a chameleon-like quality that changes color according to the national and institutional background of application."[20] Therefore, the subsequent discussions as to the principle and its implications across the three stages of an arbitral process are confined to the arbitration laws of India; with references to the principles evolved in other jurisdictions few and infrequent.

III. The first stage of the arbitral process

The first stage of pre-arbitration litigation may arise either as a consequence of an application made to a 'judicial authority' under Section 8 of the Act for referring a dispute to arbitration, or to a 'Court' under Section 9 of the Act for an interim measure, or to the Chief Justice of India or of the appropriate High Court for the appointment of an arbitrator under Section 11 of the Act. During this stage, Courts or judicial authorities or the concerned Chief Justices are often faced with a dilemma - whether to decide the jurisdictional issues raised by a party by themselves or notwithstanding the same, refer the entire matter, along with the jurisdictional objections, to the arbitral tribunal?

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[17] GAILLARD, *supra* note 4, at 660.
[18] Amokura Kawharu, *Arbitral Jurisdiction*, 23 N.Z.UNIV. L. REV., 238, 243 (2008).
[19] GAILLARD, *supra* note 4, at 401.
[20] William Park, *Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law,* 8 NEV. L.J. 135, 136 (2007).

Initially, Courts were reluctant to delve into these contentious issues of jurisdiction and were content with referring the matter to an arbitral tribunal after taking a *prima facie* review of the procedural compliances.[21] However, post the decision of a seven judge bench of the Supreme Court of India in *M/s. S.B.P. & Co.* v. *Patel Engineering Ltd.*,[22] Courts are now empowered to take up a full and final review of intricate jurisdictional issues.[23] The subsequent heads assess this gradual shift and comment upon its incorrectness and inconsistency with the very spirit of commercial arbitration.

A. The Initial Reluctance to Judicial Intervention

In 1998, a two judge bench of the Supreme Court of India, in *Ador Samia Pvt. Ltd.* v. *Peekay Holdings Ltd.*[24] held that the Chief Justice or his designate, acting under Section 11 of the Act, acted in an administrative capacity and such order did not attract the provisions of Article 136 of the Constitution of India. However, the decision was referred to a bench of higher strength for reconsideration. Subsequently, in 2000, a three judge bench of the Apex Court in *Konkan Railway Corp. Ltd.* v. *Mehul Constructions*[25] ['*Konkan I*'] arrived at the same conclusion.

The decision was then upheld, in 2002, by a five judge Bench of the Apex Court in *Konkan Railway Corp. Ltd.* v. *Rani Construction Pvt. Ltd.*[26] ['*Konkan II*']. Additionally, the Constitution bench also held that all jurisdictional questions, including questions pertaining to the validity of the arbitration agreement, were to be taken before the arbitral tribunal.

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[21] Sundaram Finance Ltd. v. N.E.P.C. India Ltd., 1999 (2) S.C.C. 479; Nimet Resources Inc. &Anr.v.Essar Steels Ltd., 2000 (7) S.C.C. 49; Ador Samia (P.)Ltd. v. Peekay Holdings Ltd., (1999) 8 S.C.C. 572; Konkan Railway Corp. Ltd. v. Mehul Construction Co., (2000) 7 S.C.C. 201; Konkan Railway Corp. Ltd. v. Rani Construction (P.)Ltd., (2002) 2 S.C.C. 388.
[22] (2005) 8 S.C.C. 618.
[23] *Id.*, at ¶46(iv).
[24] 1999 (8) S.C.C. 572.
[25] (2000) 7 S.C.C. 201.
[26] (2002) 2 S.C.C. 388.

The said decision was based on the rationale that to make a decision or an act judicial, the following three-fold criterion must be satisfied[27]:

(i) It is a determination upon investigation of a question by the application of objective standards to facts found in the light of pre-existing legal rule;

(ii) It declares rights or imposes upon parties obligations affecting their civil rights; and

(iii) The investigation is subject to certain procedural attributes if a dispute be on questions of fact, and if the dispute be on question of law on the presentation of legal argument, and a decision resulting in the disposal of the matter on findings based upon those questions of law and fact.

Against this threshold, it was distinctly laid down that since the exercise of power under Section 11 of the Act did not involve any 'determination' by way of application of mind; it failed to satisfy the aforementioned criterion.

The Constitution bench further held that the Chief Justice or his designate under Section 11 of the Act neither performed an adjudicatory function nor exercised the power of the State; thereby, not being akin to tribunals. This meant that their orders under Section 11 could not be made the subject of petitions for leave to appeal under Article 136 of the Constitution, as under Article 136, an appeal lies to the apex Court only from adjudications of Courts and Tribunals.[28]

Accordingly, the Court had then concluded that,

> "[T]he only function of the Chief Justice or his designate under Section 11 is to fill the gap left by a party to the arbitration agreement or by the two arbitrators appointed by the parties and nominate an arbitrator. This is to enable the arbitral tribunal to be expeditiously constituted and the arbitration proceedings to commence. The function has been

[27] Jaswant Sugar Mills Ltd. v. Lakshmichand & Ors., (1963) Supp. (1) S.C.R. 242.
[28] The Hind Cycles Ltd. &Anr. v. The Hind Cycle Ltd., (1963) Supp. (1) S.C.R. 625.

> left to the Chief Justice or his designate advisedly, with a view to ensure that the nomination of the arbitrator is made by a person occupying high judicial office or his designate, who would take due care to see that a competent, independent and impartial arbitrator is nominated."[29]

This interpretation is consistent with the understanding associated with the UNCITRAL Model Law, wherein the decision of a Court under Art. 11 of the Model Law is widely acknowledged to be an administrative decision.[30]

B. The Decision in 'Patel Engineering Ltd.'

In 2005, the Apex Court was required to re-assess the legal position laid down in *Konkan II* and determine the nature of function of the Chief Justice or his designate under Section 11 of the Act. It was also to decide whether the Chief Justice should decide any contentious jurisdictional issues before referring the parties to arbitration.

After much deliberation, the Apex Court, through the majority judgment, came to the following three conclusions:

(i) When a statute confers power on the highest judicial authority, the authority has to necessarily act judicially unless the statute states otherwise. Therefore, the Chief Justice, under Section 11 of the Act, performs a judicial function.

(ii) Before exercising jurisdiction, a tribunal has to be satisfied with the existence of conditions, known as jurisdictional facts, which permit it to do so. Moreover, when under Section 8 a Court decides on the existence of the arbitration agreement, it is inappropriate that the highest judicial authority cannot decide under Section 11 on the existence of the arbitration agreement.

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[29] Konkan II, at ¶27.

[30] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE, ANALYTICAL COMMENTARY ON DRAFT TEXT OF A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, U.N. Doc.A/CN.9/264, 29(1985) [hereinafter "UNCITRAL"]

(iii) If the highest judicial authority decides on a jurisdictional question, the tribunal cannot have the power to decide to the contrary on the same question. The decision of the Chief Justice is binding on the parties and the tribunal. In order to make a decision, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary.

The said conclusions had been subsequently followed and reiterated, most notably in 2008, by a two-judge bench of the Supreme Court in *National Insurance Co. Ltd.* v. *Boghara Polyfab Pvt. Ltd.*[31] However, despite being a reasoned judgment of a seven judge bench of the highest judicial authority in the country, the decision in *Patel Engineering* was, and still is, subjected to intense criticism. The authors herein examine the precise reasons relied upon by the Apex Court in *Patel Engineering* to arrive at the above three conclusions. This shall also aid in addressing the concerns involving the principle of *kompetenz-kompetenz* arising during the first stage of the arbitral process.

Accordingly, the authors conduct further discussion under the following two heads – (i) power to decide the contentious issues of jurisdiction; and (ii) the Full and Final Review Approach.

i. Power to decide contentious issues of jurisdiction

The Apex Court in *Patel Engineering* categorically opined on the extent of judicial intervention permissible under Section 8, 9 and 11 of the Act. In unambiguous terms, it held that the Chief Justice or the designated Judge would have the right to decide preliminary issues with respect to the existence of a valid arbitration agreement.[32]

The rationale behind this conclusion is not disputed. The exercise of power by a Chief Justice or a judicial authority shall be futile if upon commencement of arbitration proceedings, the tribunal holds that there was no arbitration agreement in the first place. To this extent, the Chief justice or other authorities cannot be expected to merely

[31] (2009) 1 S.C.C. 267.
[32] Patel Engineering, *supra* note 22, at ¶46(iv).

perform a mechanical function. However, the above concern must also be balanced against the purposive extension of the principle of *kompetenz-kompetenz* to an arbitral tribunal. Pursuant to the negative effect of the principle, any judicial authority should defer all jurisdictional issues pertaining to the arbitration proceedings to the arbitration tribunal itself at the first instance.[33] In fact, the basic requirement that the parties to an arbitration agreement honour their undertaking to submit to arbitration any dispute covered by their agreement entails the consequence that the Courts of a given country are prohibited from hearing such disputes.[34] Therefore, if the Chief Justice is permitted to undertake a full and final review of any jurisdictional concern before it in a manner binding upon the arbitral tribunal, it renders the tribunal's power to assess its own jurisdiction redundant.

As to the reasons relied upon by the Apex Court, it completely disregards the negative effect of the *kompetenz-kompetenz* principle; choosing to neither opine upon the same nor consider its implications on determination of the questions before it. Such an approach is inexplicably surprising especially considering the observations of the Apex Court in *Konkan I*. Therein, the two judge bench of the Court had acknowledged that the negative effect of the *kompetenz-kompetenz* principle, which confers powers on the arbitrator, has been considered in several countries.[35] It is, thus, implausible that the highest judicial authority of the country was unaware of this negative effect.[36]

Therefore, one can only speculate the reasons that may justify the lack of reference to the negative effect of the principle and consideration of its implications on the issue at hand by the Apex Court in *Patel Engineering*; rendering its decision susceptible to criticism. Notwithstanding the same, such reluctance defies logic; allowing the authors an opportunity to reassess the same question afresh.

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[33] E. Gaillard, *The Negative Effect of Competence-Competence,* 17(1) MEALY'S INT'L. ARB. RPT. 27 (2002).

[34] E. Gailard & Y. Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favor of the Arbitrators,* in EMMANUEL GAILLARDET. AL. (EDS.)., ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE, 257 (2008).

[35] Konkan I.

[36] *See also* Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc., (2013) 1 S.C.C. 641, at ¶129; Indeen Bio Power Limited v. Dalkia India Pvt. Ltd., 2013 I.I.A.D. (Delhi) 580.

A similar question had arisen before the United Kingdom Court of Appeals in 2007. In *Fiona Trust & Others v. Yuri Privalov & Others*, [37] the Court of Appeals held that considering the negative aspect of *kompetenz-kompetenz*, the presumption is that an arbitral tribunal should be left to determine its own jurisdiction at the first instance. Consequently, in response to the challenge to the tribunal's jurisdiction on the ground that that the underlying contract was procured by bribery, the Court declined to decide the jurisdiction issue itself and referred the matter instead to the arbitrators.

On the same point, Russel on Arbitration notes that,

> "Even if the underlying contract is alleged to be void or voidable, the parties are presumed to have wanted their disputes resolved by an arbitral tribunal. In the light of the presumption of 'one-stop adjudication', the Court will usually strive to give effect to the arbitration agreement by… allowing the tribunal to investigate whether the contract is valid…"[38]

Borrowing from the same, the authors believe that a mere perusal of principles applicable to commercial arbitration prohibits any conclusion that empowers a Court or judicial authority to entertain every challenge to the tribunal's jurisdiction under Section 8, 9 and 11 of the Act. *Per contra*, the Courts, judicial authorities or the concerned Chief Justices ought to limit the grounds of enquiry under the aforementioned provisions *only* to the questions involving the following:

(i) Procedural requirements of the invoked provision;
(ii) Existence of the arbitration agreement;
(iii) Procedural requirements of the arbitration agreement; and
(iv) Formal validity of the arbitration agreement;

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[37] [2007] E.W.C.A. 20.
[38] DAVID ST. JOHN SUTTON ET. AL., RUSSEL ON ARBITRATION, 361 (23rd ed., 2009).

The above categorization is based partially on the decision of the Supreme Court in *Wellington Associates Ltd.* v. *Kirit Mehta*,[39] and partially on its interpretation in *Patel Engineering*. The Court in *Wellington Associates* had observed,

> "In my view, in the present situation, the jurisdiction of the Chief Justice of India or his designate to decide the question as to the 'existence' of the arbitration clause cannot be doubted and cannot be said to be excluded by Section 16."

Interestingly, as is evident from the above extract, the Apex Court had only affirmed the jurisdiction of the Chief Justice, while acting under Section 11 of the Act, to decide questions pertaining to the 'existence' of an arbitration agreement without extending the same to other jurisdictional challenges that may be raised by a party. This allows us to infer, not without controversy, that a challenge to the jurisdiction of an arbitral tribunal based on the 'existence' of an arbitration agreement was viewed independently, not being comparable with other jurisdictional challenges, in particular, to the validity of the arbitration agreement.

The inference is not unique to India. In *Premium Nafta Products Ltd. & Ors.* v. *Fili Shipping Co. Ltd. & Ors*, Lord Hoffmann remarked "it is very unlikely that rational businessmen would intend that the question of whether the contract was repudiated should be decided arbitrators but the question of whether it was induced by misrepresentation should be decided by a Court."[40] Thus, the distinction between the existence of an arbitration agreement and its validity is not devoid of a sound legal basis.

Further, many scholars, such as Julian Lew, distinguish between 'substantive' and 'formal' validity of arbitration agreements.[41] The categories of substantive invalidity of arbitration agreements are limited to cases where such agreements are invalid on generally-applicable contract law grounds, such as mistake, fraud, impossibility, waiver

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[39] (2000) 4 S.C.C. 272.
[40] Premium Nafta Products Ltd. & Ors. v. Fili Shipping Co. Ltd. &Ors., [2007] U.K.H.L. 40., at ¶17.
[41] Julian M. Lew, *The Law Applicable to the Form and Substance of the Arbitration Clause,* in ALBERT JAN VAN DEN BERG ED., ICCA CONGRESS SERIES NO. 9, 119 (1998).

etc.[42] Formal validity, on the other hand, refers to those form requirements that are relevant to the validity of an arbitration agreement, that is, if these requirements are not met, then the agreement to arbitrate is invalid.[43] The most significant and universally-accepted of these is the 'writing' or 'written form' requirement, together with the signature and/or an exchange of written communications.[44]

Therefore, "while [substantive validity] relates to the question whether there was a valid meeting of the minds of the parties with respect to dispute settlement through arbitration, [formal validity] concerns special formal validity rules established to ensure that the parties are aware that by concluding the arbitration agreement, they oust the jurisdiction of the otherwise competent State Courts."[45] Importantly, the conclusion that a putative arbitration agreement satisfies applicable form requirements does not necessarily mean that it constitutes a validly-formed and enforceable arbitration agreement.[46]

In this regard, the authors believe that while the Courts are acknowledged to have the jurisdiction to assess the formal validity of an arbitration agreement, any questions pertaining to its substantive validity are better left to be decided by the arbitral tribunal, pursuant to the *kompetenz-kompetenz* principle.

The rationale is such that the jurisdictional challenges concerning the substance of an arbitration agreement are often complex in nature and thereby, incapable of being adjudicated without resorting to the trial procedure. The Apex Court in *Patel Engineering* had expressly stated that for the purpose of taking a decision on the issues raised before it, "the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be

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[42] BORN, *supra* note 3, at 705.
[43] *Id.*, at 581.
[44] *Id.,* at 580; *See also* TACA, *supra* note 1,§. 7; UNCITRAL Model Law on International Commercial Arbitration ["Model Law"], art. 7(1); Swiss, *supra* note 13, art. 178(1); French, *supra* note 13, art. 1443; German Z.P.O.,*supra* note 13,§ 1031(1); Austrian Z.P.O., s. 577(3); Italian, *supra* note 13, art. 807; Algerian Code of Civil Procedure, art.458 bis 1, ¶2; Peruvian Arbitration Law, art.5(1); Egyptian Arbitration Law, art. 12(1)..
[45] ALBERT JAN VAN DEN BERG ED., ICCA CONGRESS SERIES NO. 13, 302 (2006).
[46] BORN, *supra* note 3, at 582.

necessary."[47] The natural consequence of the same is the occurrence of tedious litigation proceedings, often spanning across decades, for the purpose of addressing only the preliminary issues of jurisdiction. Therefore, consistent with the spirit of arbitration, Courts or appropriate judicial authorities ought to limit their interference in the arbitral process only to the determination of jurisdictional issues that concern the form of the arbitration agreement, and not its substance.

This approach, based on an artificial differentiation of the different grounds of challenges to the jurisdiction of an arbitral tribunal[48], finds support in Russel on Arbitration,

> "Unless otherwise agreed by the parties, an arbitral tribunal is expressly given the power to rule on its own substantive jurisdiction, as to (i) whether there is a valid arbitration agreement, (ii) whether the tribunal is properly constituted, and (iii) what matters have been submitted to arbitration in accordance with the arbitration agreement."[49]

Therefore, pursuant to such classification, and in a stark deviation from the decision in *Patel Engineering*, the authors endorse the view that jurisdictional concerns pertaining to the substance of the arbitration agreement ought to be considered on first occasion by the arbitral tribunal; with that decision being subject to review by the Courts under Section 34 of the Act.

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[47] Patel Engineering, *supra* note 22, at ¶ 38.
[48] The approach is similar to the position under the International Chamber of Commerce Rules of Arbitration; wherein, a two-stage procedure is followed when any question is raised as to the jurisdiction of the arbitral tribunal. At the first stage, if one of the parties raises one or more pleas concerning the existence, validity or scope of the agreement to arbitrate, the ICC Court must satisfy itself only of the *prima facie* existence of such an agreement. If it is satisfied that such an agreement may exist, it must allow the arbitration to proceed so that, at the second stage, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. *See*REDFERN,*supra* note 7, at 347.
[49] RUSSEL, *supra* note 38, at 145.

ii. The Full and Final Review Approach

The apex Court in *Patel Engineering* noted that a judicial authority under Section 8, as well as a Court under Section 9 of the Act is empowered to take up a full and final review of intricate jurisdictional issues. As a corollary, in the opinion of the Apex Court, a similar approach was to be adopted by the Chief Justice while acting under Section 11 of the Act.

The particular question as to the extent of judicial intervention at a pre-arbitration stage was also addressed by a three-judge bench of the Supreme Court in *Shin-Etsu Chemical Co. Ltd.* v. *Aksh Optifibre Ltd. & Anr.*,[50] albeit with respect to Section 45 of the Act. Though the Apex Court therein did uphold the traditional approach of conducting full and final review with respect to Part II of the Act, it laid down the key points of distinction between Section 8 and 45 of the Act,

> "Unlike Section 45, the judicial authority under Section 8 has not been conferred the power to refuse reference to arbitration on the ground of invalidity of the agreement. It is evident that the object is to avoid delay and accelerate reference to arbitration leaving the parties to raise objection, if any, to the validity of the arbitration agreement before the arbitral forum and/or post award under Section 34 of the Act… The apparent reason is that insofar as domestic arbitration is concerned, the legislature intended to achieve speedy reference of disputes to arbitration tribunal and left most of the matters to be raised before the arbitrators or post award."[51]

Consistent with the above dicta, it shall not be incorrect to say that the majority judgment in *Patel Engineering* arrived at a conclusion that overlooks the purposive distinction between Section 8 and 45 of the Act. The Apex Court proceeded on the assumption that a judicial authority, under Section 8, has the power to dwell even into the contentious issues of jurisdiction; and hence, it would be inconceivable to not extend such authority to the Chief Justice while acting under Section 11. However, the said

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[50] (2005) 7 S.C.C. 234.

[51] Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. &Anr., (2005) 7 S.C.C. 234, ¶63, 82.

assumption has no previous legal basis. In fact, it is contrary to the above-quoted observation of the three-judge bench of the Apex Court in *Shin-Etsu*.[52]

Moreover, any assertion on the issue of the extent of judicial intervention permissible during the first stage of the arbitral process under Part I of the Act is essentially a choice between two recognized approaches - the traditional approach of conducting a full and final review at a pre-arbitration stage or the pro-arbitration approach of allowing only a *prima facie* assessment by the concerned judicial authorities. While the said choice divides opinion across the globe, in the Indian context, it cannot be independent of two factors – the scheme of the Arbitration Act of 1996 and the legislative intent behind its enactment.

Firstly, the conclusion arrived at in *Patel Engineering* to adopt the full and final review approach is inconsistent with, and travels far beyond what was envisaged by the scheme of the 1996 Act.[53] The objective behind the 1996 Act was to prevent the widespread abuse of the arbitral process under the old 1940 Act which gave scope for "interminable, time consuming, complex and expensive Court procedures";[54] and to achieve expedition and effective disposal of the arbitral matters.[55] The underlying principle was "to minimize the supervisory role of Courts in the arbitral process",[56] which is most evident from a bare reading of Section 5 of the Act.

Section 5 curtails the extent of judicial intervention to areas mentioned in the Act itself.[57] Based on Article 5 of the UNCITRAL Model Law, "it is a clear recognition of the policy of party autonomy underlying the Act and the desire to limit and define the Court's role in arbitration so as to give effect to that policy."[58] The use of the word "shall" in Section

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[52] *Id.*
[53] O. P. Malhotra, *Opening the Pandora's Box: An Analysis of the Supreme Court's Decision in S.B.P. v. Patel Engineering,* (2007), http://www.manupatra.co.in/newsline/articles/Upload/30693C83-676B-4CD5-9D46-73C1810E46BC.pdf
[54] Guru Nanak Foundation v. Rattan Singh and Sons, A.I.R. 1981 S.C. 2075.
[55] Union of India v. Singh Builders Syndicate, (2009) 4 S.C.C. 523; N.B.C.C. Ltd. v. J.G. Engineers Pvt. Ltd., (2010) 2 S.C.C. 385.
[56] TACA, *supra* note 1, Statement of Objects and Reasons.
[57] TACA, *supra* note 1, §5.
[58] RUSSEL, *supra* note 38, at 345.

5 of the Act, as opposed to "should" in Section 1(c) of the UK Arbitration Act, 1996, also emphasizes upon the restricted role that Courts play in support of the arbitral process. It is in this light that the other provisions of the Act must be interpreted.

Both, scholars and legal practitioners, consider the propensity of recalcitrant respondents to bring Court proceedings in hopes of delaying the resolution of claims fairly subject to arbitration on the merits as the greatest single threat to modern commercial arbitration.[59] It is indeed unwise to be ignorant of the fact that litigating parties often seek tactical advantages,[60] and consider challenging jurisdiction as an effective way to delay an arbitration proceeding for tactical reasons.[61] Yet, the endorsement of a full and final review approach by the Apex Court provides an incentive to the parties to indulge in dilatory tactics.[62]

Further, the scheme of the Act, centered on minimizing judicial intervention, nowhere mandates a detailed enquiry of the sort as suggested by the majority judgment in *Patel Engineering*. Thus, where a *prima facie* assessment would have sufficed, the Courts or appropriate judicial authorities are now unnecessarily mandated to conduct a detailed assessment of the jurisdictional concerns raised by a party. Accordingly, in the authors' opinion, the decision in *Patel Engineering* is anomalous to the scheme of the Act since the interpretation of the provisions of the Act do not further its purpose and objective. This view finds ample support in the dissenting opinion of C.K. Thakker, J. as well,

> "Before exercising the power to appoint an arbitrator, the Chief Justice must peruse the relevant record relating to an agreement and failure by one party in making an appointment which would enable him to act. There is, however, no doubt in my mind that at that stage, the satisfaction required is merely of prima facie nature and the Chief Justice does not decide any contentious issues between the parties. Section 11

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[59] Jack Graves, *Arbitration as Contract: The Need for a Fully Developed and Comprehensive Set of Statutory Default Legal Rules*, 2 WILLIAM& MARY BUS. L. REV. 227, 242 (2011).
[60] William Park, *Arbitration's Discontents: Of Elephants & Pornography*, 17(2) ARB. INT'L.363 (2001).
[61] JULIAN M. LEW ET.AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, 331 (2003).
[62] Malhotra, *supra* note 53.

> neither contemplates detailed inquiry, nor trial nor findings on controversial or contested matters."[63]

Secondly, the decision in *Patel Engineering* does not conform to the legislative intent behind the 1996 enactment. A statute is an edict of the Legislature[64] and the conventional way of interpreting or construing a statute is seeking the intention of its maker.[65] It is to be construed according to the intent of those who make it.[66] This intention may be derived from the language of the provision, or by a reference to the discussions prior to the enactment of the statute.[67] After all, interpretation must depend on the text and the context; they are the bases of interpretation.[68]

Pursuant to the same, a reference to Article 8(1) of the Model Law shall be of immense assistance because the Indian Parliament enacted the 1996 Act as a measure of fulfilling its obligations under the international treaties and conventions;[69] and drafted the legislation with the Model Law as the basis.[70] Therefore, it is of wide acceptance that if the Act contains such provisions which are capable of two or more different interpretations, then the internal aid of the Preamble to the Act as well as the corresponding provisions of the Model Law ought to be taken to arrive at an appropriate interpretation of the statutory text.[71]

Article 8(1) of the Model Law provides,

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[63] Patel Engineering, *supra* note 22, at ¶ 13.
[64] Vishnu Pratap Sugar Works (Private) Ltd. v. Chief Inspector of Stamp, U.P., A.I.R. 1968 S.C. 102; Institute of Chartered Accountants of India v. Price Waterhouse, A.I.R. 1998 S.C. 74.
[65] G. P. SINGH, J., PRINCIPLES OF STATUTORY INTERPRETATION, 3 (2010).
[66] R. M. D. Chamarbaugwala v. Union of India, A.I.R. 1957 S.C. 628; Chief Justice, Andhra Pradesh v. L.V.A. Dikshitulu, A.I.R. 1979 S.C. 193.
[67] Innamuri Gopalan & Ors. v. State of Andhra Pradesh and Anr., [1964] 2 S.C.R. 888.
[68] Reserve Bank of India v. Pearless General Finance and Investment Co., (1987) 1 S.C.C. 424.
[69] Vikrant Tyres Ltd. v. Techno Export Foreign Trade Co. Ltd., 2005 Supp. Arb. L.R. 465 (Kar.).
[70] P. C. MARKANDA, LAW RELATING TO ARBITRATION AND CONCILIATION 11 (8th ed., 2013).
[71] Union of India v. East Coast Boat Builders & Engineers Ltd., A.I.R. 1999 Del. 44.

> "A Court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

As to its interpretation, few commentators argue, on the basis of the then Article 17 of the early drafts of the Model Law, that the legislative history of the Model Law is either inconclusive or supportive of a mandatory *prima facie* judicial review standard in all cases.[72]*Per contra*, many commentators believe that the Model Law strongly suggests that a full judicial review of the jurisdictional objection is appropriate, at least in some circumstances.[73]

Though the 1996 Act is based upon the Model Law, with its Article 8(1) corresponding to Section 8 of the Act, it is certainly not identical.[74] There have been key departures from the language adopted in the text of the Model Law. Quite notably, the expression "unless it finds that the agreement is null and void, inoperative or incapable of being performed", present in Article 8(1) of the Model Law, has been omitted in Section 8 of the 1996 Act. Even more surprisingly, the expression, despite its omission from Section 8, finds mentions in Section 45 in Part II the Act pertaining to the 'power of judicial authority to refer parties to arbitration'.

An omission of such nature is an accepted indicator of the legislative intent behind the enactment.[75] While adopting most of the Model Law, the Indian Parliament chose to make additions, deletions and modifications therein. These appear to be deliberate acts borne out of a conscious decision to make the Model Law suitable to the Indian industrial climate.[76] Therefore, judicial discipline requires that Courts do not tamper with

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[72] Bachand, *Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction,* 22 ARB. INT'L 463, 473 (2006).
[73] UNCITRAL,*supra* note 44, art. 8(1); BORN, *supra* note 3, at 881.
[74] MARKANDA *supra* note 70, at 11.
[75] M/s Dagi Ram Pindi Lall & Anr. v. Trilok Chand Jain, (1992)2S.C.C.13.
[76] MARKANDA, *supra* note 70, at 12.

the provisions of the statute, especially when the deviation from the Model Law, is clearly a result of a conscious decision.[77]

Accordingly, one may view the omission of the aforementioned phrase from Section 8 of the Act as an intentional departure from the practice under the Model Law. Whereas Article 8 of the Model Law expressly permits a detailed inquiry into the jurisdictional facts pertaining to the validity of the arbitration agreement, no such conclusion can be reached with respect to Section 8 of the Indian Act; an opinion strongly echoed by the Law Commission of India.[78]

If a statutory provision is open to more than one interpretation, the Court has to choose that interpretation which represents the true intention of the Legislature.[79] With respect to the 1996 Act, the appropriate interpretation of Section 8, and hence Section 11, appears to permit only a *prima facie* review of the jurisdictional objections raised during the First stage of the arbitral process.

The authors' stance is akin to the dissenting opinion of Srikrishna, J. in *Shin-etsu*, wherein he observed - "the object of dispute resolution through arbitration… is expedition and that the object of the Act would be defeated if proceedings remain pending in the Court even after commencing of the arbitration…At the pre-reference stage contemplated by Section 45, the Court is required to take only a prima facie view for making the reference, leaving the parties to a full trial either before the arbitral tribunal or before the Court at the post-award stage."

Consequently, the decision of the Apex Court in *Patel Engineering*, favouring a full and final review approach, fails to find agreement with the authors.

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[77] Kotak Mahindra Bank Ltd. v. Sundaram Brake Lining Ltd., 2008 Supp. (1) Arb. L.R. 702.
[78] Law Commission of India, *176th Report on the Arbitration and Conciliation (Amendment) Bill*, 37 (2001).
[79] Venkataswami Naidu R. v. Narasram Naraindas, A.I.R. 1966 S.C. 361; District Mining Officer v. Tata Iron and Steel Co., A.I.R. 2001 S.C. 3134.

IV. The third stage of the arbitral process

The *second* concern sought to be addressed by the authors is confined to the third stage of the arbitral process and pertains to the consequences of a party's failure to raise a timely objection to the jurisdiction of a tribunal under Section 16 of the Act. In other words, whether a party to a dispute, having not raised a jurisdictional objection during the arbitration proceedings, can be permitted to raise the same as a ground for setting aside the award under Section 34 of the Act? While the principle of *kompetenz-kompetenz* is central to any discussion as to the posed question, it also encompasses a perusal of the doctrine of deemed waiver as envisaged under the Act.

As stated before, the negative effect of *kompetenz-kompetenz* contemplates a rule of priority in favour of the arbitral tribunal[80] with respect to questions of arbitral jurisdiction. As a natural corollary to this prioritisation, every party has the right to object to jurisdictional irregularities during proceedings before the arbitral tribunal, that is, during the second stage. The question that arises at this juncture, and the one addressed in this part, is whether a party to arbitration proceeding has a corresponding obligation to raise a jurisdictional objection before the tribunal. In other words, what is the consequence if a party does not exercise its right to object during the arbitral proceedings and instead seeks to raise the jurisdictional objection as a ground for setting aside or challenging the enforcement of the award?

In this regard, Indian Courts have shared, at best, a perturbed relationship with the concept of the negative effect of *kompetenz-kompetenz*, as evidenced by the stark difference of opinion amongst Indian Courts regarding the aforementioned question. On the one hand, numerous judicial decisions are of the view that a failure to exercise the right to object during the second stage leads to a deemed waiver that operates to preclude the party from raising a jurisdictional challenge for the first time during the third stage.[81] On the other hand, many Courts have also held that the right to raise a jurisdictional objection can, in no circumstance, be waived because such a fundamental defect in the

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[80] Banifatemi, *supra* note 34, at 260.

[81] Krishna BhagyaJala Nigam Ltd. v. G. Harishchandra Reddy & Anr.,(2007) 2 S.C.C. 720; S.N. Malhotra & Sons v. Airport Authority of India & Ors., 2008 (2) Arb. L.R. 76 (Delhi); Karnataka State Road Transport Corporation v. M.Keshava Raju, 2004 (1) Arb. L.R. 507 (Kar.); Shyam Telecom Ltd. v. A.R.M. Ltd., 113 (2004) D.L.T. 778.

proceedings should never be subject to a rule of deemed waiver.[82]It is best to scrutinise both lines of argument.

A. The Argument of Waiver

i. Principle of Deemed Waiver under the 1996 Act

Provisions in a statute can be broadly categorised as being either mandatory, that is provisions from which the parties cannot derogate, or derogable, which are provisions from which the parties may by agreement derogate. Undeniably, mandatory provisions are known to occupy a consecrated position in the entire arbitral process as they provide protection against fundamental procedural irregularities,[83] which are violations of due process.[84] In this regard, it cannot be disputed that the provisions providing for jurisdictional requirements, for instance section 7 of the Act, are mandatory provisions.

The argument that parties cannot derogate from mandatory provisions either by agreement or by waiver[85] is anchored in the premise that mandatory provisions are indispensable in nature. This argument appears to be further strengthened by Section 4 of the Act, corresponding to Article 4 of the Model Law,[86] which codifies the rule of deemed waiver.

According to this provision, if a party who is aware of a non-compliance of a derogable provision, proceeds with the arbitration without stating his objection to such non-compliance within the prescribed or a reasonable time as the case may be, the party shall be deemed to have waived its right to object. Evidently, the rule of waiver as stipulated under Section 4 of the Act extends only to derogable non-mandatory provisions. This view also seems to find favor in the UNCITRAL Working Group's Report on Article 4

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[82] Waverly Jute Mills Co. Ltd. v. Raymon and Co. (India) Pvt. Ltd, A.I.R. 1963 S.C. 90; Atul R. Shah v. Vrajlal Lallobhai, A.I.R. 1999 Bom. 67; Vinay Bubna v. Yogesh Mehta, 1998 (4) Bom.C.R.849 (India).

[83] Paul Stretford v. Football Association Ltd, [2007] E.W.C.A. Civ. 238.

[84] Fabrisio Fortese, *Is an Irregularly Composed Tribunal a Tribunal at All,* 78 INT'L J. ARB. MED. & DISP. MANAG'T 86, 90 (2012).

[85] Vinay Bubna v. Yogesh Mehta, 1998 (4) Bom.C.R. 849.

[86] B. P. SARAF& S. M. JHUNJHUNWALA, LAW OF ARBITRATION AND CONCILIATION 78 (3rd ed., 2001).

of the Model Law,[87] according to which the rule of waiver, if it were to cover fundamental procedural defects, would be extremely rigid.[88]

However, it must be kept in mind that the principle of deemed waiver does not emanate solely from Section 4 of the Act and that it may also operate independent of it. Consequently, it is possible to contemplate a waiver of mandatory provisions in certain circumstances, and the questions regarding the scope of section 4 are extraneous to this proposition.

ii. Waiver of a Mandatory Provision

The applicability of the doctrine of waiver to mandatory statutory provisions has been subjected to considerable judicial scrutiny in the past. However, the Supreme Court of India, on a number of occasions, has held in unequivocal words that a mandatory provision can be waived by an individual, provided that the provision was enacted for the benefit of the individual and not the public.[89] High Courts have also complied with the Apex Court's view.[90] Therefore, it is only if the mandatory provision serves to protect public interest that the provision is rendered incapable of being waived.

Whether or not these rulings hold good in the context of delayed jurisdictional challenges in arbitral proceedings is a question that came up for consideration before a two-judge bench of the Supreme Court in *M/s Dodsal Pvt. Ltd.* v. *Delhi Electric Supply Undertaking of the Municipal Corporation of Delhi.*[91] Therein, the bench, after relying on the Apex Court's finding in *Krishan Lal* v. *State of Jammu and Kashmir,*[92] decided that the matter be placed before a five-judge bench. The Constitutional bench, however, opined that it

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[87] A. BROACHE, COMMENTARY ON THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, 27 (1990).
[88] UNCITRAL, *supra* note 30, at57.
[89] Dhirendra Nath Gorai & Subal Chandra Shaw and Ors v. Sudhir Chandra Ghosh & Ors., A.I.R. 1964 S.C. 1300; State Bank of Patiala & Ors. v. S.K. Sharma, (1996) 3 S.C.C. 364; Graphite India Ltd. & Anr. v. Durgapur Project Ltd. & Ors., (1999) 7 S.C.C. 645.
[90] Modern Builders v. Hukmatrai N Vadirani, A.I.R. 1967 Bom.373; Madan Pal Singh v. Smt. Pushpa Lata Pandey & Ors., A.I.R. 1998 All. 372; Texmaco Ltd. v. Appellate Authority &Ors., (2003) I.I..L.L.J. 567 Cal.
[91] (1996) 2 S.C.C. 576.
[92] (1994) 4 S.C.C. 422.

was not necessary to delve into the referred question and decided the matter on other grounds.

Although the Constitutional bench kept the issue open, the Apex Court once again encountered the question of maintainability of a first-time jurisdictional challenge in a setting aside proceeding, in the matter of *Krishna Bhagya Jala Nigam Ltd.* v. *G. Harishchandra Reddy and Anr.;*[93] and this time the Court did not shy away from answering it. The Court noted,

> "The plea of 'no arbitration clause' was not raised in the written statement filed by Jala Nigam before the Arbitrator … It submitted itself to the authority of the Arbitrator … It filed its written statements to the additional claims made by the contractor. The executive engineer who appeared on behalf of Jala Nigam did not invoke Section 16 of the Arbitration Act. He did not challenge the competence of the arbitral tribunal. He did not call upon the arbitral tribunal to rule on its jurisdiction. On the contrary, it submitted to the jurisdiction of the arbitral tribunal. It also filed written arguments … Suffice it to say that both the parties accepted that there was an arbitration agreement, they proceeded on that basis and, therefore, Jala Nigam cannot be now allowed to contend that Clause 29 of the Contract did not constitute an arbitration agreement."[94]

Therefore, the Supreme Court has taken a firm stand that the right to object to a jurisdictional irregularity, if not exercised before the tribunal, shall be deemed to be waived and the party cannot be permitted to raise such a plea at a later stage. This decision has been squarely followed by the Delhi High Court in *S.N. Malhotra and Sons* v. *Airport Authority of India and Ors.*,[95] where-in it was held,

> "On an analysis of the provisions of section 16(1) to (6), in our view, it is clear that the legislative intent was that a plea as to jurisdiction of the

[93] (2007) 2 S.C.C. 720.
[94] *Id.,* at ¶8.
[95] 2008 (2) Arb.L.R. 76 (Delhi) [hereinafter "Malhotra v. AAI"].

> arbitral tribunal or as to exceeding of its authority must be raised at the threshold and cannot be entertained at a subsequent stage. In other words, a plea in terms of sub-section (2) or sub-section (3) of Section 16 of the Act not having been taken at the initial stage must be deemed to be waived."[96]

While examining Section 16, the Delhi High Court went on to point out the following indicators, which make it certain that the intention of the legislature was to have all questions of jurisdiction raised and decided at the earliest,[97]

- The use of the words '*shall* be raised not later than the submission of the statement of defense' in sub-section (2).
- The use of the words 'as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings' in sub-section (3).
- The discretion given to the tribunal under sub-section (4) to 'admit a later plea if it considers the delay justified'. In other words, the tribunal must, after examining the matter, rule that the delay in raising objection in terms of sub-section (2) or sub-section (3) is justified. If the delay is not justified in the view of the arbitral tribunal, the tribunal will be at liberty not to admit the objection with regard to its jurisdiction and/or the scope of its authority, by passing an order refusing to admit the plea on the ground that there was unjustified delay.
- A ruling of the arbitral tribunal on the acceptance or rejection of the objection to its jurisdiction/competency is mandatory as is evident from a reading of sub-section (5), and particularly by the use of the words '*shall* decide on a plea referred to in sub-section (2) or Sub-section (3)'.
- Where the arbitral tribunal rejects the plea and proceeds to make an award, the aggrieved party pursuant to sub-section (6) 'may make an application for setting aside such an arbitral award' in accordance with Section 34. The use of words 'such an arbitral award' is of significance. The legislative intent quite clearly is that the arbitrator will rule on the objection raised before the Tribunal in terms

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[96] *Id.,* at ¶12.
[97] Malhotra v. AAI, *supra* note 95.

> of sub-section (2) or sub-section (3) and it is only 'such an arbitral award' which can be set aside in accordance with section 34. The words 'such an arbitral award' thus have direct reference to an award rejecting the plea of want of jurisdiction of the arbitral tribunal to deal with the matter. 'Such an award' can only exist if the plea is raised before the arbitrator himself and not at any subsequent stage.

Additionally, it must be noted that before these two judgments, the Karnataka High Court in the matter of *Karnataka State Road Transport Corporation* v. *M.Keshava Raju*,[98] had undertaken a similar analysis of the intention of the legislature. While dismissing an appeal under Section 37 of the Act, directed against an order of the City Civil Judge under Section 34, the Court laid down the law regarding the applicability of the doctrine of waiver to mandatory provisions,

> "Though, in order to apply the doctrine of waiver by invoking section 4, the first condition is that the non-compliance must be of a non-mandatory provision of Part I or of any requirement under the arbitration agreement, certain mandatory provisions of the Act also provide for a grant of waiver in the event of failure to object. For example, sub-sections (2) and (3) of section 16 are two of such mandatory provisions."[99]

This passage finds agreement in the Delhi High Court decision in *Shyam Telecom Ltd* v. *ARM Ltd.*[100] The Karnataka High Court, in to this conclusion, placed strong reliance on the UNCITRAL Working Group Report on the draft Article 16, wherein it was observed that "a party who failed to raise the plea as required under Article 16(2) should be precluded from raising such objections not only during the later stages of the arbitration

[98] 2004 (1) Arb.L.R.507 (Kar.) [hereinafter "KSRTC v. Raju"]
[99] *Id.,* ¶17.
[100] 113 (2004) D.L.T. 778.

proceedings, but also in other contexts, in particular in setting aside proceedings, or enforcement proceedings."[101]

Therefore, the view taken by the aforementioned decisions are in consonance with the opinion of the drafters of the Model Law. In fact, it shall be shown that this line of argument is endorsed even internationally, by Courts and scholars alike.

iii. The 'Wait and See Approach': An International Perspective

It is almost unanimously accepted that "if a party waits until the award is handed down before it objects to the tribunal's jurisdiction; it may well have lost its opportunity to challenge."[102] In this regard, Professors Alan Redfern and Martin Hunter in their treatise on Arbitration note,

> "Two possibilities are open to a party wishing to challenge the jurisdiction of the arbitral tribunal. The first is to challenge jurisdiction at the outset of an arbitration (or at the latest, as soon as the reasons for objection are known) and ask the tribunal to deal with this challenge, either by means of an interim award or as part of its award on merits. The second is to wait until the award is made and then challenge it, or attempt to resist enforcement, on the basis that the tribunal had no jurisdiction and so its award has no validity. The second course is usually adopted by a party that has decided to 'boycott' the arbitration – that is, to take no part in the proceedings … parties that take part in an arbitration but fail to raise a jurisdiction issue when they may have been entitled to do so, risk losing their right to object."[103]

A party, who is aware of a jurisdictional defect in the proceedings but chooses to not raise an objection to the same, may do so either by participating in the proceedings without bringing the jurisdictional defect to the tribunal's knowledge or by boycotting

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[101] *supra*note 30, at39.
[102] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 205 (2nd ed., 2012).
[103] REDFERN, *supra* note 7, at 409.

the proceedings. The former course of action guarantees the loss of right to object, while in the latter scenario the right to object may survive in certain jurisdictions.

Participating in the arbitration without voicing one's objections is often termed as an 'ambush strategy' whereby the party deliberately decides to let the arbitration proceed, and chooses to 'wait and see' if the award is made in its favor before challenging the jurisdiction.[104] Such a wait and see approach is condemned almost universally because it amounts to an absolute disregard of good faith participation. Good faith participation demands that a party who is aware of a reason to doubt that its rights are respected in the arbitral proceedings should submit the objection immediately, before he has taken any step in the proceedings.[105] Parties cannot wait until the arbitration turns against them and then rely on a ground for challenge.[106]

In this regard, it is essential to reproduce Section 73 of the English Arbitration Act, 1996 titled 'loss of right to object', which can be considered to be a codification of the above line of argument,

> "(1) If a party to the arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection –
>
> (a) that the tribunal lacks substantive jurisdiction,
>
> (b) that the proceedings have been improperly conducted,

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[104] CLARE AMBROSE ET. AL., LONDON MARITIME ARBITRATION 121 (1996).

[105] A.W. Rovine, *Contemporary Issues in International Arbitration and Mediation,* Presented at the Fordham Law School Conference in New York, 115 (2008); GABRIELLEKAUFMANN-KOHLER ET. AL., INTERNATIONAL ARBITRATION IN SWITZERLAND: A HANDBOOK FOR PRACTITIONERS 46 (2004).

[106] JULIAN LEW ET. AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 241 (2003).

> (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
>
> (d) that there has been any other irregularity affecting the tribunal or the proceedings,
>
> he may not raise that objection later, before the tribunal or the Court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

The unmistakable clarity of the provision leaves absolutely no scope for any differing opinion. Voluntary participation in proceedings manifests a waiver of the right to object, and in order to rebut the presumption that the right to object has been waived, the challenging party must show that it did not know, and could not with reasonable diligence have discovered, the grounds for objection.[107]

Further, it is pertinent to note that many scholars are also of the opinion that it is not open for a party to challenge the existence or validity of the arbitration agreement after having participated in the arbitration (by submitting written submissions etc.) without raising a timely jurisdictional objection, because such participation amounts to establishing a fresh arbitration agreement in itself.[108]

Therefore, it is agreed across jurisdictions that voluntary and unreserved participation leads to a deemed waiver of the right to object. However, the consequence that entails from non-participation in the arbitral proceedings is different in different jurisdictions. Whereas in England the right to object survives if the party does not participate in the arbitration, in Switzerland, as is evident from the decision in *Westland Helicopters* v.

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[107] William W. Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction,* in ALBERT JAN VAN DEN BERG ED., ICCA CONGRESS SERIES NO. 13, 47 (2006).
[108] SIMON GREENBURG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA PACIFIC PERSPECTIVE 237 (2011).

Emirates Arabs Unis, Arabie Saoudite, Etat du Qatar, the challenging party is deemed to have lost his right to object, not only when it participates in the proceedings without stating its objections, but even when the party chooses to boycott the arbitral proceedings.

B. The Argument of non-waivability of the Right to Object

Having gone through the argument of waiver in detail in the previous section, the authors now turn to highlight the tenets of the counter-argument. There exist a compelling number of cases that back this counter-argument, the crux of which is that jurisdictional defects are in the nature of fundamental procedural irregularities, and the argument of waiver cannot operate to effectively regularize a fundamental irregularity.[109] Consequently, a challenge to the award on the ground of want of arbitral jurisdiction is maintainable even if a jurisdictional challenge was not raised under Section 16.

This opinion was first endorsed by the Apex Court in the case of *Waverly Jute Mills Co. Ltd.* v. *Raymon and Co. (India) Pvt. Ltd,*[110] in the following passage,

> "[A]n agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the time when they enter on their duties, the proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties in those proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction."[111]

It is important to note that this matter arose under the old Act,[112] which was significantly different from the new statute, primarily on the point that it did not specifically recognise *kompetenz-kompetenz.* The Supreme Court in *M/s Sundaram Finance Ltd.* v. *M/s N.E.P.C. India Ltd.*[113] has held that owing to the dissimilarities between the 1996 Act and the Arbitration Act, 1940, the provisions of the new Act must be interpreted and construed

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[109] Waverly Jute Mills Co. Ltd. v. Raymon and Co. (India) Pvt. Ltd., A.I.R. 1963 S.C. 90; Atul R. Shah v. Vrajlal Lallobhai, A.I.R. 1999 S.C. 565; M/s Gas Authority of India Ltd. and Anr. v. Keti Constructions (I) Pvt. Ltd. and Ors., (2007)5 S.C.C. 38.
[110] A.I.R. 1963 S.C. 90.
[111] *Id.,* at ¶18.
[112] Arbitration Act, 1940, Act No. 10 of 1940.
[113] A.I.R. 1999 S.C. 565.

independently, "uninfluenced by the principles underlying the 1940 Act."[114] However, the Bombay High Court in *Atul R. Shah* v. *Vrajlal Lallobhai,*[115] when faced with a first-time jurisdictional challenge under a Section 34 application, went on to apply the exact rationale that was advanced by the Court in *Waverly Jute Mills*. It is sufficient to state, this decision had no discussion whatsoever on the concept of *kompetenz-kompetenz*. The Court held,

> "[T]he fact that an Arbitral Tribunal is not properly constituted and objection has not been raised by the petitioner before the Tribunal, cannot result in the Arbitral Tribunal exercising jurisdiction if its constitution was in contravention of … the Arbitration & Conciliation Act, 1996. Courts cannot confer jurisdiction on themselves, by consent of the parties and clothe themselves with jurisdiction. A Court without jurisdiction merely on account of non-objection by the parties cannot assume jurisdiction in itself. The same is to also true of Arbitral Tribunals."[116]

Another judgment wherein the Supreme Court came to an almost identical conclusion was in the matter of *M/s Gas Authority of India Ltd. and Anr.* v. *Keti Constructions (I) Pvt. Ltd. and Ors.*[117] However, the Court on this occasion was not oblivious to the concept of *kompetenz-kompetenz*, and therefore qualified its finding accordingly. The Court opined that when a plea of jurisdiction had not been taken up before the arbitral tribunal as provided in Section 16 of the Act, the party "must make out a strong case why he did not do so if he chooses to move a petition for setting aside the award under Section 34(2)(v) of the Act."[118] The Court however, did not elucidate upon what amounted to a strong enough case in order for a Section 34 application on grounds of want of jurisdiction to be maintainable. In substance, what the Apex Court said in this matter was that a party cannot be deemed to have waived its right to object to a jurisdictional violation, even though the same was not exercised before the tribunal.

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[114] *Id.,* at ¶9.
[115] A.I.R. 1999 Bom. 67.
[116] *Id.,* at ¶5.
[117] (2007)5 S.C.C. 38.
[118] *Id*, at ¶19.

The argument of non-waivability of the right to object has been advanced, based on the premise that: (a) the doctrine of waiver, as stipulated under section 4 of the Act, does not apply to mandatory provisions;[119] and (b) that voluntary participation cannot confer jurisdiction.[120] However, the authors are not in agreement with any of these judgments, primarily because all of these cases were decided without even considering, let alone discussing, the principle of *kompetenz-kompetenz* and the jurisprudence surrounding it. The authors' stance is accurately explained in the afore-quoted passage of the Karnataka High Court judgment,[121] in *Karnataka State Road Transport Corporation* v. *M. Keshava Raju.*[122]

V. Conclusion

The objective of the present paper was to analyse the implications of the negative effect of *kompetenz-kompetenz* on the arbitral process in India. In particular, the authors sought to comment upon two questions. The *first* pertains to the permissible extent of judicial intervention across the three stages of an arbitral process, and the *second* concerns the consequence of a failure to raise a jurisdictional challenge before the arbitral tribunal, despite an opportunity to do so.

The authors' analysis is equally reliant on the judicial decisions across India and the United Kingdom, as well as the dark realities of the litigation process in India. It was also felt pertinent to not restrict the discussions to a literal interpretation of the text of the Arbitration & Conciliation Act of 1996, but give equal emphasis to its object and purpose, as well the legislative intent behind its enactment. However, despite their individual opinions, the authors endeavored not to compromise their objectivity while arriving at their conclusions.

Firstly, in determining the extent of judicial intervention in the arbitral process permissible under the arbitration laws of India, the authors share an unsurprising disagreement with the decision of the apex Court in *Patel Engineering*.

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[119] VinayBubna v. Yogesh Mehta and Ors., 1998 (4) Bom. C.R. 849.
[120] Atul R. Shah, *supra* note 113.
[121] KSRTC v. Raju, *supra* note 98.
[122] 2004 (1) Arb.L.R.507 (Kar.).

It is inconceivable to empower the concerned judicial authority or the Chief Justice, acting during the first stage of the arbitral process, to examine every challenge to the jurisdiction of an arbitral tribunal. While there is indeed a need for the concerned judicial authorities to satisfy themselves of the necessary jurisdictional facts, those must be limited to the ones which do not require a complete trial. Therefore, an artificial distinction ought to be made segregating the various grounds of challenges to an arbitral tribunals' jurisdiction.

During the first stage, the judicial authority must be satisfied on issues such as the existence of an arbitration agreement, its formal validity and adherence to the procedural requirements of the underlying statutory provision or the arbitration agreement itself. However, in recognition of the negative effect of *kompetenz-kompetenz*, challenges to the substantive validity of the tribunal, arbitrability of the subject matter, impartiality and independence of the constituted tribunal and other convoluted objections must be decided by the arbitral tribunal itself in the first instance.

Moreover, in continuation of the above, there is a need to reassess the standard of review adopted by the concerned judicial authorities during the first stage of the arbitral process. Consistent with the dissenting opinion of C. K. Thakker, J in *Patel Engineering*, preference must be given to the practice of assessing the necessary jurisdictional facts through *prima facie* assessment, as opposed to conducting a full and final review. The assertion is not only intrinsically related to the previous conclusion as to the nature of jurisdictional challenges that may be raised before a judicial authority, but also derives its strength from the absence of any express statutory requirement as to the applicable standard of review, the scheme of the 1996 Act and the legislative intent behind its enactment.

Secondly, with respect to the party's failure to raise a timely jurisdictional objection before the tribunal, the authors endorse the view in support of the doctrine of deemed waiver. The rule of waiver under the 1996 Act is based not only on Section 4 of the Act, but also operates independent of it through Section 16(2). Therefore, a proposition to the effect of limiting this rule to only derogable or non-mandatory provisions lacks adequate legal basis. While acquiescence to an arbitral proceeding may not be capable of granting a tribunal the jurisdiction it apparently lacks, one cannot overlook the inter-relation

between the conduct of a party and its right to raise a jurisdictional objection. Such an approach is consistent with the international practice of condemning the 'wait and see approach' adopted by parties as a dilatory tactic.

Therefore, if a party fails to raise any jurisdictional objection before the arbitral proceedings, then such grounds of objection are deemed to be waived. Consequently, the defaulting party shall be prohibited from challenging the arbitral award on the same grounds in a proceeding before the appropriate Courts.

The above assertion also appreciates the principle of *kompetenz-kompetenz* in its entirety. In other words, adopting a stance to the contrary nullifies the negative effect of *kompetenz-kompetenz.* After all, empowering an arbitral tribunal to address the questions as to its own jurisdiction would serve no purpose if a party is permitted to raise a challenge to the arbitral award, if unfavourable, despite having had an opportunity to do so before the tribunal itself.

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

Nidhi Gupta[*]

I. Introduction

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

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

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

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

[3] In *White Industries* case the arbitral tribunal ruled that the Republic of India had breached its obligation to provide "effective means of asserting claims and enforcing rights" with respect to White Industries Limited's investment pursuant to the Bilateral Investment Treaty. It asked India to pay white industries a compensation amounting to A$4.08 million, the fees and expenses of arbitrators in ICC arbitration (A$84,000), the White's cost in the ICC arbitration (A$ 500,000),the witness fees and expenses (A$

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

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

A. Background of the Case

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

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86,246.82)together with interest thereon on each item mentioned above at the rate of 8% per annum from 24thMarch, 1998 till the date of payment,

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

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

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

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

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

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

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

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

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

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

arbitrator in accordance with the ICC rules. Having assumed jurisdiction, the ICC sent a letter to Antrix inviting it to nominate its nominee to complete the process of constituting a tribunal.

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

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

Contending that Devas had failed to abide by the procedure for constitution of the arbitral tribunal as per the terms of the agreement, Antrix filed an application under Section 11(4) read with Section 11(10) of the Act requesting the Supreme Court to direct Devas to nominate its arbitrator. As Devas refused to comply with such a directive, Antrix requested the Court to appoint an arbitrator in exercise of its powers under Section 11(6). Considering that the application involved important questions of law, the matter, which was initially being heard by the delegate of the Chief Justice, was referred to a larger bench for determination. The parties were requested to propose the questions of law to be considered by the larger bench.[6] They framed the following questions:

[6] The division bench which came to consider this case consisted of Justice Altamas Kabir, then Chief Justice of India and Justice Surinder Singh Nijjar.

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

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

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

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

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

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

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

Considering that most of the questions were resolved while the matter was pending, the question that came to be considered by the court was: "Whether Section 11 of the Act could be invoked when the ICC rules had already been invoked by one of the parties."

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[7] (2008) 14 SCC 271 (India).

After taking into consideration contentions from both the sides, it answered the above question in the negative.

II. The Court's decision: a pragmatic solution

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

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

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

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

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

agreement, his/its remedy would be by way of a petition under Section 13 and thereafter under Section 34 of the Act"[9]

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

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

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

By rejecting the application by Antrix, the Apex Court declined to assume jurisdiction in accepting authority of the ICA to decide on its own jurisdiction. It directed Antrix to challenge the appointment of the arbitrator in front of the ICC itself. It did so, on the ground that it will not be proper for an Indian court to 'interfere' once one of the parties to the contract had already approached the ICC, whether "rightly or wrongly"[12]or "notwithstanding the fact that one of the parties had proceeded unilaterally in the matter"[13]. Rejecting the application of the petitioner the Court stated, that once the provisions of the ICC rules of arbitration had been invoked by Devas the proceedings

[9] *Id.* at ¶32, *emphasis added.*
[10] *Id.* at ¶33.
[11] *Id.* at ¶34.
[12] *Id.* at ¶30.
[13] *Id.* at ¶16.

initiated thereunder could not be interfered in a proceeding under Section 11 of the Act."[14]

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

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

The above doubt in this case arises because on the one hand the judgment enlisted seven questions which apparently were suggested by the parties for the Court's consideration and on the other hand, soon after enlisting these questions, the Court stated that most of the above questions had been resolved on their own while matter was pending. Can questions of law which needed to be referred to a larger bench get resolved automatically during course of time, and if that is the case could they have been considered as questions of law at all? However, leaving the reader with the above questions, the Court went to frame another question which in its view was the main question that remained to be decided. It noted that the main question that remained to be decided was "Whether Section 11 of the Act could be invoked when the ICC rules had already been invoked by one of the parties".[16]

Strangely enough, soon after raising the above question the Court went on to notice that not only was the issue simple but it also remarked that the law relating to it was well

[14] *Id.* at ¶34.
[15] The petition was filed by Antrix in August 2011.
[16] *Supra* note 8, at ¶12.

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

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

III. Pragmatism at the cost of unanswered questions of law

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

Considering that the Act is based on the Model law, the principle of *Kompetenz- Kompetenz* finds expression in Section 16 of the same. Courts in India have also held on many occasions that whenever there is a dispute between the contracting parties relating to the existence of an arbitration agreement and one of the parties makes a reference to arbitration, the tribunal should be given an opportunity to decide on the question of its

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[17] *Id.* at ¶22.

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

own jurisdiction.[19] The law certainly can be considered settled and the issue under consideration can be considered simple if the issue is whether Section 11 of the Act can be invoked when the ICC rules have already been invoked by one of the parties under the arbitration agreement.

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

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

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

And, the above question, as is evident, can neither be considered simple nor can the law with respect to it be considered well settled. There are no available precedents which address the above-mentioned question. Nor do any of the leading works on international commercial arbitration offer an answer to these questions. This was undoubtedly one of the unprecedented situations in front of the Court and that is why, as it is apparent, the reference was made to the larger bench.[20]

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

[20] One can presume that had it been possible to decide the petition soon after ICC accepted the reference, the Court could have answered this question of law in the affirmative by assuming jurisdiction under Section 11(6). This was a situation where the arbitration agreement envisaged a procedure for appointment of arbitrators and constituted a tribunal, and one of the parties had failed to abide by that procedure. This

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

IV. Thinly veiled attempts to cover pragmatism

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

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

(ii) It unilaterally[21] and without prior notice[22] to Antrix made a reference to ICC for constitution of an arbitral tribunal and an appointment of an arbitrator whereas, as per the agreement, neither the choice of ICC was definitive nor did the agreement confer, in clear terms, any authority on one of the parties to the contract to invoke jurisdiction of the ICC for constitution of a tribunal.

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could have been a legal ground strong enough for exercising power under Section 11(6). – Do we need authority for this suggestion?(this suggestion is not based on any authority, as it author's suggestion. It is in fact pre-empting an argument/issue and also to some extent giving an opinion about the legal position in this case.

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

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

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

The main contention of Antrix was that the agreement contemplated an ad-hoc tribunal in accordance to the provisions of the Act. It argued that the reference for constitution of a tribunal was to be governed by Indian law, that is, the Act. Thus, the proper law of the arbitration agreement was Indian law given the fact that by virtue of Article 19 of the contract, parties had Indian law as the proper law of the contract[23]. It further contended that reference to the ICC for the constitution of an arbitration tribunal was in violation of the agreement. The agreement envisaged, first, the constitution of an arbitral tribunal and then it was for the tribunal to choose the ICC or the UNCITRAL rules for conducting the proceedings. In contrast to the above, the contention of Devas was that its steps to invoke the jurisdiction of the ICC were in accordance with the agreement since the choice of ICC rules in the arbitration agreement for conduct of arbitration proceedings included reference to ICC for the constitution of the tribunal. Devas contended that since the arbitral tribunal had been constituted under the ICC rules, any objection as to whether or not the tribunal had been properly constituted would have to be raised before the arbitral tribunal itself. It is only in case of such an objection that the arbitral tribunal would have to decide as to whether a tribunal was required to be

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

constituted before application of the ICC or UNCITRAL rules, inasmuch as, according to the agreement, the claimant in the arbitration has the right to choose any of the two rules when commencing the arbitration. (Para 19)

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

The above-mentioned doubts and ambiguities in the agreement indicate the need for further consensus and clarity between the parties before initiating arbitration proceedings. However, these ambiguities were not sufficient to gloss over the fact that the agreement neither reflected a clear preference for institutional arbitration over ad-hoc arbitration, nor did it give authority to any one of the parties for unilateral action. Moreover, one of the parties to the agreement had failed to fulfill the condition precedent for initiation of arbitration, which is, referring the case to the senior

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

management. In such a situation, it cannot be denied that the invocation of ICC rules by Devas amounted to violation of the agreement. [25]

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

"In view of the language of Article 20 of the arbitration agreement which provided that the arbitration proceedings would be held in accordance with the rules and procedures of the ICC or UNCITRAL, Devas was entitled to invoke the rules of arbitration of the ICC for the conduct of the arbitration proceedings."[26]

It remains unclear as to what the basis was for the Court to draw the inference that Devas was entitled to invoke rules of arbitration of the ICC for the conduct of the arbitration proceedings. How the courts come to the conclusion that "where the parties had agreed that the procedure for the arbitration would be governed by the ICC rules, the same would necessarily include appointment of an arbitral tribunal in terms of the arbitration agreement and the said rules"[27] Is rather unclear. It is difficult to understand the compulsions of the Court to support Devas leading it to ignore important issues relating to the proper law of the contract and the proper law of the arbitration

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

[26] *Supra* note 8, at ¶34, emphasis added.

[27] ¶34.

agreement. What reasoning made it reach such misleading and contradictory conclusions about the proper law of the contract and the proper law of the arbitration agreement is quite unknown. Making passing references to the above issue the Court mentioned at one place in the judgment, "Article 19 in clear terms provides that the rights and responsibilities of the parties under the agreement would be subject to and construed in accordance with the laws in India, which, in effect, means the Arbitration and Conciliation Act, 1996."[28] On the other hand, appearing to contradict the above statement at another point the court stated, "Article 19 of the agreement provided that the rights and responsibilities of the parties thereunder would be subject to and construed in accordance with the laws of India. *There is, therefore, a clear distinction between the law which was to operate as the governing law of the agreement and the law which was to govern the arbitration proceedings."*

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

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

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[28] *Id,* at ¶24 emphasis added.

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

Having done so, the Court seems to have overlooked the fact that the remedy of Section 13 may not be appropriate in the given situation since Section 13 of the Act has nothing to do with the validity of an arbitral tribunal.[30] Section 13 of the Act provides possibilities for challenging the appointment of an arbitrator whereas the concern of Antrix was not merely challenging the appointment of the arbitrator or replacing one arbitrator appointed by ICC with another. Instead, its concern was with the constitution of the arbitral tribunal itself and the validity of the tribunal constituted by the ICC.[31]

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

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

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

Act, to an ICC arbitration in which the parties had presumably agreed to be governed by ICC rules.

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

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

V. Conclusion

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

But did considerations of 'image' warrant such a defensive positioning and weak reasoning by the Apex Court? Moreover, isn't the above situation a making of a tardy legal system in India? Was the root of the problem not in the fact that it took two years for the Apex Court to decide the arbitration petition especially in a matter which was in furtherance of national interest and national security?[33] Were these considerations

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[32] In the aftermath of Bharat Aluminium Company and Ors v. Kaiser Aluminium Technical Service, Inc. and Ors (2012) 9 SCC 552 (India), the award will be considered a foreign award if the seat of arbitration is outside India irrespective of the fact that subject matter of the dispute is governed by Indian law or it is closely connected with India.

[33] The gap of two years and then forcing of Antrix to submit to the ICA's jurisdiction is also a cause of concern considering the basic subject matter of dispute. The dispute was concerning allocation of spectrum and the deal was cancelled because of reasons of national security and strategic interests. It was a dispute which could have been and

compelling enough to let a defaulting party benefit from its own wrong? Has the Apex Court not established a wrong precedent which dilutes the sanctity of an arbitration agreement and does this not go against the basic principle of party autonomy? Has the court not sacrificed the values of predictability and certainty- the values integral to the 'rule of law' regime?

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

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should have been best decided in our country under supervision of the Indian courts considering that Indian courts would be best placed to protect national interest. Making Antrix submit to the ICC, location of arbitration and the supervisory powers of court over that arbitration were compromised. Moreover, once the ICC decides for a place outside India as a seat of arbitration, the award will be a foreign award which can be challenged on much limited grounds.

ASSESSING THE GEOPOLITICS OF INVESTOR-STATE ARBITRATION: A *TWAILIAN* CRITIQUE FROM INDIAN PERSPECTIVE

Parth Shah[*] *& Udit Vyas*[*]

Abstract

Investment treaty arbitration of White Industries has opened a lot of eyes and has struck fear into the heart of the Indian Government. The wide scope of Investment treaty Arbitrations borders on a frightening range for every government involved especially Third World Countries as it derives its powers from a Bilateral Investment Treaty and other forms of treaties meant for trade. Such powers have been present from the colonial times, but their usage is being truly recognized by different institutions now. A mechanism which out rightly is set to promote trade and development in the Third World countries is strangely enough taking the opportunities away from such countries largely due to the structural development of such institutions. Signs of such bias have been in the open for quite some time but the Indian Economy is just facing the music. Several countries have been worn out due to it and strangely enough, most of the time developing countries feel the brunt of the violations caused under the Investment treaty arbitrations. In some cases, there is clear abuse of the freedom allowed by the BIT from the tribunal by not following such said principles, which result in compensation and damages amounting to millions flushed out of their economic set-up, leaving them weak. This paper will deal with the alleged bias in the two investment arbitrations that the Indian government has been a party to. The focus will also be on Regime bias, which is more focused on the forging of legal rules and the meaning acquired by a particular term and how it is interpreted by different bodies and on Doctrinal Bias, which speaks about usage of doctrines and principles under the current state of International law.

I. Introduction

The developing world is slowly losing its confidence in the Investor-State arbitration regime. It is now being construed as a genuine threat to the sovereignty of these so-called 'Third World' economies. Unlike traditional tribunals who are empowered to adjudicate upon the rights and liabilities of the parties arising out of a contract, these tribunals utilise indistinctive standards of international law to interfere with the policy space of the

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host nations.[1] While India's hustle with this particular form of dispute resolution is just in its nascent stage, recent incidences such as the *2G- Spectrum Scam*[2]and the *Vodafone Tax Controversy*[3] have opened the flood gates of numerous claims for Investor-State arbitrations under various Bilateral Investment Treaties (BITs). Currently India neither has the experience nor the expertise to deal with such claims. The (modern) Indian 'history' of investment arbitration spans across a time period of less than two decades which is categorically demarcated by the *Dabhol Arbitration* (2005)[4] and *White Industries Arbitration* (2010)[5]. Although there has been a considerable paradigm shift from 2005 to 2010 vis-à-vis the recognition of 'Third World interests' there is no gainsaying that in fact, this system is still dominated by the First World.

This Article seeks to analyse this limited experience through the aid of Third World Approaches to International Law (TWAIL). Apart from being a critical assessment tool for international law[6], TWAIL also seeks to transform international law into a language

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[1] Stephan W. Schill, Symposium, *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review Through Comparative Public Law*, 2012 3 (2012) *available at:* http://www.ssrn.com/link/SIEL-2012- Singapore-Conference.html, Last visited [30/07/2013][hereinafter 'Schill']; Muthucumaraswamy Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, *in* KARL P. SAUVANT, APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES, 39-45 (Karl P. Sauvant ed., 2008).

[2] Sumit Rai, *Does 2G License Cancellation Amount to Expropriation by India?,* (February 5, 2012), *available at:*http://blogarbitration.com/2012/02/05/does-the-2g-license-cancellation-amount-to-expropriation-by-india/, Last visited [12/09/2013]; Allen & Overy, *India: Investment treaty arbitration* (2012),*available at:* http://www.allenovery.com/SiteCollectionDocuments/India%20%20Investment%20Treaty%20Arbitration.pdf, Last visited[26/12/2012].

[3] RaagYadava et al, *Vodafone and India- A Review of Claims in Investment Arbitration*, NLSIU (Bangalore), 2012, *available at:* http://www.nls.ac.in/index.php?option=com_content&view=article&id=442:vodafone-and-india-a-review&catid=3:resources, Last visited[31/07/2013].

[4] *Capital India Power Mauritius I and Energy Enterprises (Mauritius Company v. Maharashtra Power Development Corporation Limited, Maharashtra State Electricity Board and State of Maharashtra*, Int'l Comm. Arb. Case No. 12913/MS (27 April 2005), *available at* http://ita.law.uvic.ca/documents/Dabhol_award_050305.pdf,Last visited[25/07/2013] [hereinafter 'Dabhol Arbitration'].

[5] White Industries Australia Limited v. The Republic of India*,* Final Award, 30 November 2011.

[6] MakauMatua, *What is TWAIL?*, 94 AM SO'Y INTL L. 31 (2000) at 31; Gus Van Harten, *TWAIL and Dabhol Arbitration*, 3(1) TRADE L. & DEV. 131 (2011), at 134 [hereinafter 'Van Harten'].

of emancipation for the developing countries[7] such that it is not used for advancing the interest of the North but responds to the problems of the global South.[8] Staying true to the said objectives of the movement, this article prescribes certain modifications in the existing norms of investment treaty arbitration to cater to the interests of the developing world and consequentially restore its confidence in this particular dispute resolution mechanism.

The entire debate of an 'inherent bias' in international law and international law institutions is attributed to its colonial origins by the TWAIL scholarship[9] in the 1990s (See Part II). It was only through colonial expansion that international law achieved one of its most defining characteristics- universality.[10] The development of various international law doctrines with special reference to the Third World countries is essentially seen as an instrument of suppression under the auspices of the West's civilizing mission.[11] Towards the later part of the said discussion, a functional relationship between TWAIL and Investment Arbitration is sought to be established. Firstly, it will include the prime points of distinction between traditional international commercial arbitration and investment-treaty arbitration. Secondly, since this exercise predominately involves the analysis of arbitral awards (See Part III and Part IV), Gathii's elaboration on Regime bias becomes one of quintessential importance. Regime bias examines the internal processes by which international law is interpreted and applied in decisions affecting the Third World.[12] Apart from this, the authors also introduce the concept of 'deference' from a Third World perspective. Most arbitral tribunals adjudicating Investor-State disputes apply varying standards of deference. Our line of

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[7] Antony Anghie B.S. Chimni, *Third World Approaches to international Law and Individual Responsibility in Internal Conflicts,* CHINESE J.INT'L LAW, 77 (2003), at 79 [hereinafter 'Anghi and Chimni'].

[8] Van Harten, *supra* note 6 at 135.

[9] Richard Falk, Jacqueline Stevens & Balakrishnan Rajgopal, *Introduction, in* INTERNATIONAL LAW AND THIRD WORLD: RESHAPING JUSTICE (Richard Falk, Jacquiline Stevens &Balakrishnan Rajgopal eds., 2008) at 5-6 [hereinafter 'Falk, Stevens and Rajgopal']; BS Chimni, *Third World Approaches to International Law : A Manifesto*, 8 INTERNATIONAL COMMUNITY LAW REVIEW 3 (2006) at 5 [hereinafter 'Chimni'].

[10] Van Harten, *supra* note 6 at 84.

[11] *Id.*

[12] James Thuo Gathii, *Thirld World Approches to International Economic Governance*, *in* INTERNATIONAL LAW AND THIRD WORLD: RESHAPING JUSTICE 264 (Richard Falk, Jacquiline Stevens &BalakrishnanRajgopal eds., Routledge 2008) [hereinafter 'Gathii'] .

argument is, when such a tribunal is bestowed with the responsibility of adjudicating disputes involving developing nations, it owes a higher degree of deference in comparison to such disputes which involve the developed world economies. Whenever the Third World countries adopt an alternative development policy authorizing active state intervention in the private sphere an investor is bound to be affected.[13] Policy decisions are essentially sovereign in nature and once it is established that the conduct in question was in the larger interests of the citizens and the overall stability of the economy, the tribunal must refrain from intervening with such decisions.

Part III and IV of this article are devoted to the analysis of two awards passed by respective tribunals against India. *Dabhol Arbitration* was based on a long-term investment arrangement between Dabhol Power Corporation (DPC) established by Enron (a US based Private Corporation) and Maharashtra State Electricity Board (MSEB), Government of Maharashtra and Maharashtra Power Development Corporation (MDPCL) all of which are public entities. The dispute had given rise to four international arbitrations out of which only one award is available publicly which is the subject of our analysis. Similar to the arbitrations stemming from BITs this award is also an example of collisions over the legal boundaries between the public and private sphere.[14] According to Van Harten, aspects of the Arbitration, *relating to the structure and process of the arbitration as well as the content of the tribunal's award, offer reasons to support perceptions of Regime bias in international arbitration*.[15] The project was cancelled as it was highly admonitory from the stand-point of policy, consumer interests and cost of the project.[16] Even the World Bank characterised the project as non-feasible and prejudicial to the interests of the Indian parties.[17] Despite such *prima facie* infirmities, the tribunal assumed the jurisdiction of adjudicating a policy decision in a situation where it should have characterised the steps taken by the Indian government as legitimate and abstained from meddling with the same.

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[13] Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neo-liberalism*, 41(2) HARV. INT'L L.J. 419 (2000), at 424 [hereinafter 'Shalakany'].
[14] *Id.* at 429.
[15] Van Harten, *supra* note 6 at 148.
[16] Preeti Kundra, *Looking Beyond the Dabhol Debacle: Examining its Causes and Undertaking its Lessons,* 41 VAND J. TRANSNAT'L L. 907 (2008) 912; *ibid* at 137 [hereinafter 'Kundra'].
[17] Kundra, *supra* note 16 at 907.

On the other hand, *White Industries Arbitration* (Part IV) is a classic example of TWAIL theory in practice. Although the majority of the issues were decided in favour of India, the Tribunal by the application of the *Most Favoured Nation Treatment* (MFN) doctrine in fact, rules in favour of the investor. The blanket application of MFN clauses in various disputes involving developing countries has rendered them defenceless against exorbitant claims from the foreign investor. A doctrine which is essentially colonial in nature lay dormant up to the year 2000[18]. But once in vogue, this doctrine has given rise to many evils such as "treaty shopping" which allow an investor to cherry pick provisions form the BITs other than the one under which he is entitled protection. It is a general observation that an investor from a developed country generally chooses provisions from the BIT with another developed country. After discussing the merits of the award passed in the *White Industries Arbitration,* the authors will trace the historical development of this doctrine (Part V). The history reveals that the nature of the doctrine is imperialistic and that its interpretation and application suffers from a colonial hangover. The problem especially in the Indian context is that we are following the same model BIT with minor alterations since our first BIT with United Kingdom in 1994.[19]As on July 2012, India has signed 82 BITs out of which 10 have not yet entered into force[20], all of which have a MFN clause.

It is true that investment arbitration and the institutions involved in it have tended to resolve the dispute in favour of the economic interests of the North. As a result of this, several developing countries have refused to comply with the arbitral awards which levy heavy monetary obligations on these countries. Many developing countries like Venezuela have started withdrawing membership from the ICSID which is a strong evidence of the pessimism prevailing among these countries with regards to Investor-State arbitration. The system is considered as a blatant violation of sovereignty. In such

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[18] Emilio AgustínMaffezini v.The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, January 25 2000 [hereinafter 'Maffezini Case'].

[19] Department of Economic Affairs, Government of India, *Indian Model Text of Bilateral Investment Promotion and Protection Agreement (BIPA)*, *available at*:http://finmin.nic.in/the_ministry/dept_eco_affairs/investment_div/invest_index.htm#Indian%20Model%20Text%20BIPA,Last visited[20/07/2013].

[20] Ministry of Finance, Government of India, *Bilateral Investment Promotion and Protection Agreements (BIPA)*, *available at:* http://finmin.nic.in/bipa/bipa_index.asp?pageid=1, Last visited [22/07/2013].

circumstances, if this mechanism wants to succeed, it must respond to the Third World interests (See Part VI).

II. Third World Approaches to International Law: A Brief Understanding

The history of TWAIL can be broadly characterised into two phases with its fulcrum point around the 'New International Economic Order' (NIEO) movement. The TWAIL scholarship that existed before the NIEO indicated that the colonial international law characterised the non-European nations as barbaric, backward and violent who needed to be civilised, redeemed and pacified.[21] International law was a system that legitimized the conquest and exploitation by the Europeans over the rest of the world.[22] Further, they did not out-rightly adopt a rejectionist tendency towards international law. They believed that the contents of international law could be transformed according to the aspirations of the Third World.[23] This notion is still carried forward by the Later TWAIL scholarship. The Early TWAIL scholars also advocated in favour of 'sovereign equality' and 'non-intervention' especially the concept of Permanent Sovereignty over Natural Resources.[24]

NIEO movement in the 1960s and 1970s fundamentally argued for the reformation of the global economic order and to strike a balance between the labour and raw material producing Third World countries and the predominately Industrial West.[25] The early TWAIL scholars had place immense faith in The United Nations system for the restructuring of the world economic order. Using their majority, a group of seventy-seven countries[26] organised itself to float the Charter of Economic Rights and Duties of State which sought to re-introduce the *Calvo Doctrine* along with the right of a state to nationalise foreign-owned property and the right of such State to use municipal law

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[21] Henry J. Richardson III, *Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT'L L. (1993) at 42; Ruth Gordon*, Saving Failed States: Sometimes a Neocoknialist Notion*, 12 AM. UJ.INT'L L. &POL'Y903 (1997).

[22] CARL SCHMITT, NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF JUS PUBLICUM EUROPAEUM(G.V. Ulman Trans., 2003); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW, 310 (Cambridge University Press, 2005).

[23] Anghie & Chimni, *supra* note 7 at 81.

[24] Gathii, *supra* note 12 at 260.

[25] *Id.*

[26] Falk, Stevens & Rajagopal*, supra* note 9, at 2.

instead of international law to measure compensation after such nationalisation.[27] In the early 1970s these countries were also successful in getting preferential access to developed markets.[28] All the efforts made by the developing nations went in vain as their voices met deaf years of the developed world. For example, the *Texaco* arbitration[29] de-legitimized the nationalisation of oil concessions by Libya by stating that a newly independent country would be bound by the existing norms of international law. By protecting the status-quo of international law, the new States were denied any effective power to change the unfair norms of international law that existed. Despite several General Assembly Resolutions articulating the notions of the Third World politically, NIEO proved to be a failure with little effect on the redistribution of global wealth.[30]

Later TWAIL scholarship was a result of the failure of the NIEO and other Third World initiatives. Instead of considering colonisation as external or incidental to international law, they started to examine the effects of colonisation on international law. A different yet simple structuring of the history of international law led to one of the most glaring yet fundamental propositions of TWAIL that colonialism was central to the formation of international law.[31]

It was principally through colonial expansion that international law achieved one of its defining characteristics- universality. The doctrines used for the assimilation of the non-European world into this universal system of international law including the fundamental concept of sovereignty itself-were shaped by the relationships of power and subrogation inherent in the colonial relationship.[32] The historical reference of 'uncivilised' is now replaced by the qualms of (under) development and traditional notions of violence are replaced by economic superimposition and the barbarism is now construed in terms of deficiency in democratisation, good governance, war against terror etc. for which there is

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[27] ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 221 (Cambridge University Press, 2004).
[28] Micheal Finger, J. & Schuler*, Implementation of Uruguay Round Commitments, World Bank working paper* (1999) No. 2215, 1.
[29] BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic, 53 I.L.R. 297 (1997).
[30] Shalakany, *supra* note 13 at 420.
[31] Anghie&Chimni, *supra* note 7 at 84.
[32] Antony Anghie, *Finding the peripheries; Sovereignty and Colonialism in 19th International Law,* 40(1) HARV. INT'L L.J. 1 (1999).

a need for international intervention similar to the imperial intervention of the colonial times.[33]

Globalisation is having more delirious consequences on the sovereignty of Third World countries. National sovereignty suffers from a critical rupture at this moment of post-colonial liberalisation. This global capitalist hierarchy is no different from the imperialistic circuits of international domination. Armed with the international finance and trade institutions to enforce their *neo-liberal agenda,* international law threatens to reduce democracy to a set of elected representatives who irrespective of political affiliations are compelled to pursue the same economic and social goals.[34] The economic and social independence of Third World Countries is undermined by the policies and laws dictated by First World and the institutions that it controls.[35]

A. Approaches adopted by the Later TWAIL Scholars

Unlike the Early TWAIL scholars which provided for alternatives to international rule in the form of National Economic Control or the New International Economic Order various scholars from the Later TWAIL scholarship examines the internal processes by which international law is interpreted and applied to decisions affecting the Third World.[36] With reference to the *Dabhol Arbitration* these approaches have been utilised to review the structure, process and reasons of the award.

According to the idea of Regime bias, International law is not a neutral set of rules but an instrument employed in context of power relations among western and Third World States, International Law reflects an underlying bias against the countries that were colonized and remain 'other' in International society.[37]

Further, the notion of deference is used to designate a margin of appreciation, a space for manoeuvre within which host state conduct should be exempted from review by a

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[33] Chimni, *supra* note 9 at 3.
[34] Chimni, *supra* note 9 at 3.
[35] *Id.*
[36] Van Harten, *supra* note 6, at 136.
[37] Ikechi Mgbeoji, *The Civilised Self and the Barbaric Other: Imperial Delusions of Order and the Challenges of Human Security*, *in* INTERNATIONAL LAW AND THIRD WORLD: RESHAPING JUSTICE(Richard Falk, Jacquiline Stevens & Balakrishnan Rajgopal eds., 2008) at 152-153, *supra* note 9.

tribunal.[38] The authors argue that in case of developing economy or a country in crisis the degree of deference should be higher and that such countries should not be made accountable for policy decisions advance towards achieving its own vital/ national interest.

i. Regime Bias:

Regime bias is a methodological extension of the TWAIL ideology. Since it is difficult to pin-point inherent Third World bias in the international rules and norms, Regime bias focuses on:

> "…*the way in which rules of international trade, commerce and investment are crafted applied and applied and adjudicated between Third World and Developed countries and the interest of international capital. Regime bias therefore refer to examining the choices made between alternative ways of crafting legal rules, meaning ascribed to the particular rule whether in its application by a n administrative agency, or at the adjudication by a domestic judicial body, or an international tribunal*"[39]

Regime bias is a tool which examines the way in which any international tribunal or adjudicatory authority applies existing rules and norms of international law. TWAIL is fundamentally oppositional not only to the existing international law but also equally precludes any conclusions based on international law which are inconsistent with the interests of the vulnerable group of the global economic order.[40] It is not the plain reading or formation of rules *per se* which determines that the outcome are adverse to the interest of the Third World countries but its application and interpretation which would expose the double standards of the world economic order.[41]

Put in this way, Regime bias appears to replicate only a subtler form of the pre-colonial and colonial attitudes of Western exploitation of Third World States whereby Western States would make the rules that subjected colonial territories to their domination, and

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[38] Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law,* 16 EURJ INT'L LAW 907 (2005).
[39] Gathii, *supra* note 12, at 262.
[40] *Id.*
[41] *Id.* at 264.

later applied these rules when disputes arose, interpreting and applying these rules themselves, all to enhance their aggrandizement and to promote the prosperity of the international economic system.

Hence, this thesis is premised on the notion that Regime bias in international dispute resolution seeks to marginalize the interest of Third World States and their peoples, where such disputes involve the economic interest of Western Industrialized States or where such economic interests includes the furtherance of the capitalist oriented global economic system.

It is true that the developing nations must attract long-term foreign investments to sustain their growth rates in the modern times which will not migrate to the capital importing nations unless it includes the additional luggage of an arbitration clause. It is also true that arbitration is a far more peaceful, convenient and direct mechanism than either "gunboat diplomacy" or "diplomatic protection model" but this doesn't imply that this system is free from bias against the Third World. John Paulsson, a prominent scholar from the North contends that bias in arbitration is a thing of the past. According to him, "Developing countries that have come of age are hardly the perplexed and powerless victims of esoteric arbitrations they might have one been." According to him, arbitration is a superior mechanisms among the available dispute settlement mechanisms and hence something which is "to be mastered rather than complained about."[42] However one pertinent observation is in order to arrive at the said conclusion most examples of the awards on which Paulsson relies are straightforward private disputes with no public policy element.[43]

At this juncture, it is important to distinguish between traditional international commercial arbitration and Investor-State arbitration. Investor-State arbitration, unlike any other form of dispute settlement mechanism under international law, provides for international adjudication of domestic public law along with international investment law.[44] Further Investor-State arbitration differs from international commercial arbitration

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[42] Jan Paulsson, *Third World Participation in International Investment Arbitration*,2 FOREIGN INVESTMENT L.J. 19 (1987) at 21.
[43] Shalakany, *supra* note 13 at 429.
[44] Schill, *supra* note 1 at 4.

in the nature of disputes. While commercial arbitrations determine contractual obligations of the parties, Investor-State arbitration disputes are in essence public law disputes which decide upon the lawfulness of the exercise of public authority by States. Lastly, since there is no requirement of exhaustion of local remedies in such proceedings the tribunals are in effect replacing the domestic courts of the Host State.[45]

ii. Deference*:*

As an extension of TWAIL, the authors contend that international tribunals should exhibit higher degree or standard of deference in disputes involving Third World countries and their interests. Deference refers to the notion that international tribunals which assessing the obligations of a state party under a BIT must respect the sovereignty of the State which includes policy decisions. Deference is also characterised as an interpretive tool which provides for a 'breathing space' within which State conduct can be exempted from judicial review. Hence, deference refers to a limitation in a tribunal's scrutiny concerning the decisions taken by the host state. Various aspects relating deference vis-à-vis investment arbitration were captured in *S.D. Myers v. Canada*.[46] The Tribunal stated:

> "(Investment treaty tribunals) *d[o] not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections. …must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.*"

Deference, in that understanding, is a parameter of the relationship between international and domestic law and protects a state's domestic policy space against control by international law and international tribunals. Likewise, the Tribunal in *Tecmed v.*

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[45] *Id.* at 11.

[46] S.D. Myers, Inc v. Canada, UNCITRAL (NAFTA), Partial Award, 13 November 2000.

Mexico[47]observed that, in determining whether a regulatory act constituted an indirect expropriation,

> *"the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining […] whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation."*

International investment law and Investor-State arbitration perform the important function of protecting foreign investments against illegitimate government interference. At the same time, it is important that States do not feel unduly prejudiced by the system of international investment protection and continue to be able to both accept arbitration as a legitimate way for settling investment disputes and remain able to implement legitimate domestic public policies.[48]

Failing to apply appropriate standards of deference should also constitute Regime bias. International Financial Institutions such as ICC Arbitration, UNCITRAL, WTO Dispute Settlement Body, ICSID are all subservient to interests of the developed world. There have been several occasions where the Tribunals have failed to apply necessary standards of deference and have assume extraordinary jurisdiction thereby impinging the sovereign sphere of Third World countries.

The subsequent section seeks to analyze the *Dabhol Arbitration* which in the opinion of the authors is a glaring example of Regime bias.

III. The Dabhol Arbitration

Dabhol Power Project was a $ 2.8 billion project involving the construction of a natural gas powered electricity plants. It was one of the several projects approved by the

[47] Tecnias Medioambientales Tecmed S.A. v The United Mexican States, ICSID Case No.ARB(AF)/00/2, Final Award,29 May 2003, para 112.
[48] Schill, *supra* note 1, at 27.

Government of India in the 1990s for encouraging foreign investment and privatization of energy sector.[49]

The project remained controversial since its inception due to the lack of transparency[50], environmental concerns and non-compliance with the standard bidding process of India[51] etc. and all amongst the taint of corrupt practices.[52] A detailed examination of the terms of the Power Purchase Agreement (PPA) and other documents such as the Shareholders Agreement (SHA), Guarantee of the State of Maharashtra reveal that the project was highly admonitory from the stand-point of policy, consumer interests and cost of the project.[53] Even the World Bank characterised the project as non-feasible and prejudicial to the interests of the Indian parties.

Table 1: The comparative analysis of the economic rights and obligations

DPC	**State of Maharashtra, MSEB and MPDCL**
Rights: • Claim of guarantee from State of Maharashtra which was further backed by a counter-guarantee of Government of India. • Proposed profit and return at 28% per annum	Rights • 17% return subject to an arithmetic increase in the tariffs at the rate of 14.5% every year over a period of twenty years. Liabilities: Compulsory purchase of 90% of the

[49] Jeswald w. Salacuse, *Renegotiating international project agreements*, 24 FORDHAM INT'L L.J.1319, (2000) at 1344 [hereinafter 'Salacuse'].
[50] Kundra, *supra* note 16 at 912.
[51] Kirit S. Parikh, *Thinking Through the Enron Issue*, 36(17) Econ. & Pol. Wkly. 1463 (28 April 2008); Van Harten, *supra* note 6, at 137.
[52] Van Harten, *supra* note 6, at 138.
[53] Deeptha Mathavan, *From Dabhol to Ratnagiri: The Electricity Act of 2003 and Reform of India's Power Sector,* 47 COLUM. J. TRANSNATIONAL 387 (2008) at 403; Van Harten, *supra* note 6, at 139.

Liabilities and Obligations Modest penalties for failures and breaches of the PPA	produce irrespective of the market demand by MSEB over the project life-time

Despite this, the project was approved but even when it was underway the oppositions were persistent. The steps taken by the government authorities to curb those protests tantamount to gross violations of Human Rights like excessive use of force, arbitrary detentions and infringement of the right to livelihood.

The public opinion on the policies of the then government was substantially reflected in the State elections of 1995. The new coalition government of Bhartiya Janta Party (BJP) and Shivsena established a high level committee to review the viability of the Dabhol Project and based on the report of the said committee the government decided to cancel the project[54]. In response to the steps taken by the government, Enron initiated arbitration proceedings under the PPA in London and the State government pursued action before the domestic courts alleging violations of the said agreement. The disputes ended when both the parties mutually agreed to re-negotiation of the terms of the agreement.[55]

Later, in the year 2000, the Maharashtra government declared that it is financially incapable of meeting its obligations under the agreement[56] and thereafter, within a span of months, yet again alleged the breaching the terms of the PPA and ceased payments. The Government of India also declined to make any payments under the counter-guarantee agreement as it also held DPC to be in breach of its obligations.[57]

As a result of all such developments, four international arbitrations were initiated against Indian governmental entities:

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[54] Kundra, *supra* note 16 at 917.
[55] Van Harten, *supra* note 6, at 141.
[56] Salacuse, *supra* note 49, at 919; *Id.* at 137.
[57] Kundra, *supra* note 16, at 919.

1) DPC referred to arbitration under the PPA in London.[58]
2) Bechtel a co-owner of DPC, referred a claim under the DPC Shareholders Agreement (SHA) to ICC Arbitration in New York.
3) Bechtel and General Electric, as a co-owner of DPC, launched claims for approximately $ 1.3 billion under Indian BITs with Mauritius and the Netherlands.[59]
4) The US government brought a State-to-State claim against India after the US Overseas Private Investment Corporation was made to pay a sum of $ 110 million to Enron, General Electric, Bechtel and Bank of America in lieu of risk insurance for the Dabhol Project.

Out of these four claims, the only publicly available award was made in the ICC Arbitration instituted by Bechtel under the SHA and all the other proceedings were terminated after a settlement was negotiated between the governments and the other parties to the dispute.[60]

The ICC Arbitration was initiated by Bechtel, which held 10% shares in the Dabhol Power Corporation under the SHA against the MPDCL who became a party to the SHA after the re-negotiations in 1996 after an interim award was passed by the ICC Tribunal in London.[61] There are several anomalies in the arbitral award which the authors wish to highlight. They are:

A. Structure of the Tribunal:

The arbitration clause provided for the procedure of the appointment of arbitrators and the constitution of the tribunal. Once the Indian parties did not participate in the standard procedure of appointment the alternative procedure prescribed in the clause ensured that the make-up of the tribunal was such that the tribunal had a greater affinity towards the US corporate interests. Accordingly, in a situation where either of the parties fails to appoint their arbitrator, the other party could make an application to the Chief

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[58] *Id.* at 922.
[59] John J Kerr & Janet Whittaker, *Dabhol Dispute- Legal questions remain unresolved,* 1 CONSTRUCTION L. INT'L 17 (2006); Van Harten, *supra* note 6, at 143.
[60] Ronald J. Bettauer, *Indian and International Arbitration: The Dabhol Experience*, 41 GEO. WASH INT'L L. REV. 381, 384-385 (2009); Van Harten, *supra* note 6 at 133.
[61] Dabhol Arbitration, *supra* note 4,at 3,4.

Justice of the District Court of the Southern District of New York.[62] On the basis of this, the following were appointed as the arbitrators:

1. James H. Carter, Commercial Lawyer in US, appointed by Bechtel
2. Johnathan Rosner, Commercial Lawyer in US, appointed by the Chief Justice.
3. Louis A. Craco, Presiding arbitrator, Commercial Lawyer in US, appointed by the mutual consent of the other arbitrators

The structure of the tribunal is a basic indication of the fact that it lacked impartial and neutral elements.

B. Seat of Arbitration and the governing rules:

New York was designated as the seat of arbitration and hence, as per Article V of the New York Convention, the courts of New York would decide upon the matter if the award is liable to be set aside. Also, it is worth noting that it was an institutional arbitration conducted as per the ICC Arbitration Rules and most of the US firms who were a party to the dispute were either a member of the ICC or the US Council of International Business, the National Committee of the ICC. Hence, it is a reasonable presumption that the proceedings were more inclined to the tune of the interests of the firms than the Indian parties.[63]

C. Interpretation and construction of the facts:

The characterisation and interpretation of the facts leading to the dispute was clearly to the prejudice of the Indian parties. The entire failure and breakdown of the Dabhol Project was attributed to the political turmoil in the State of Maharashtra and the changes in the energy policies.[64] On the other hand, the portrayal of the project and the foreign investors was no less than that of a 'messiah' who could remedy the 'acute shortfall of power' in India. The tribunal mentions that the foreign investment was made upon the confidence of the 'assurances' provided by the government entities in India (137).[65] The tribunal made no mention of the economic shortcomings of the project or any of the other substantial ancillary concerns as a result of which the project was always

[62] *Id.* at 6.
[63] Van Harten, *supra* note 6, at 151.
[64] Dabhol Arbitration, *supra* note 4, at 2,26.
[65] *Id.* at 20.

surrounded by a cobweb of controversies. The manner in which the facts were construed enabled the Tribunal to exercise jurisdiction over the regulatory sphere of Maharashtrian Government. The Tribunal was ineffective in applying due standards of deference. Given the nature and consequences of the project, the decision of the new government was legitimate. The closure of the project was in fact, one of the prime reasons for their elections. The decision of the tribunal shakes the foundation of representation of people and democracy. It forces the developing countries to subjugate themselves to the social and economic goals determined by the dominating countries despite its effect upon their own development.

D. Abhorrent exercise of Jurisdiction:

A tribunal mustn't go beyond the scope of the agreement under which it is constituted. This is an established practice of arbitration. However, here the tribunal allowed Bechtel to advance claims against MSEB and the State of Maharashtra which were not the parties to the dispute. By expanding the various sources of law the tribunal assumed the authority to adjudge the policy decisions associated to the project.

According to clause 8.1 of the SHA:

> "*8.1 Arbitration. If any dispute or claim (other than over a price per share as described in Section 6.3(c)) between two or more Shareholders or between one or more Shareholders and the Company (in this Section 8.1, each a "disputing party") arising out of this Agreement or any of the Organizational Agreement (in this section 8.1, a "claim") has not been resolved by mutual agreement on or before the 30th day following the first notice of the subject matter of the claim to or from the disputing parties, then the disputing party can refer to arbitration under the following provisions:"*

The clause provides ample clarity to the fact that arbitration can only be brought against or by a Shareholder. MSEB and the State of Maharashtra were not a party to the SHA and hence, not a Shareholder within the meaning of the Agreement. However, the tribunal sought to induct them as parties in the capacity of 'affiliates' of the MPDCL. The term 'affiliate' was defined under Section 1.1 of the Agreement as to include "with respect to any Person, any other Person that (i) owns or controls the first person" in

matters of "voting or granting consents with respect to matters in which it or its Affiliates are involved as the Parties to a Project Contract (Section 5.4).

The decisions of the Maharashtra State government to terminate the project because of its non-feasibility or any change in the energy policies of the state of the country are purely 'sovereign' acts and not in the capacity of the parties to the project contract. Therefore, MSEB and the State of Maharashtra were wrongly inducted.

The tribunal interpreted the conduct of the India parties under "the applicable body of international law including the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards as well as certain international agreements to which India is a party creating a legal framework within which private investment in that country could be made"[66] without justifying how these sources of international law were applicable to a contractual dispute.[67] The tribunal also made a reference to various BITs without mentioning a single provision in the SHA which permitted it to make such exuberant incorporations.

To summarise, the tribunal had made a decision in favour of the claimants in the issues of fact, jurisdiction, and merits and also to a certain extent in the issue of damages. The award failed to account for or even state the unfair nature of the PPA. In the opinion of the authors, the tribunal should have also considered the negative review of the World Bank and Human Rights Watch and the detailed host of problems with the project.

The tribunal does reveal having considered the position of the Indian parties[68], its evidences and legal submissions *in absentia* but it fails to refer to any of the above information in any of its reasoning or the main-body of the award.

The award rendered in the Dabhol Arbitration is the only publicly available award against India before White Industries Limited. The material fallacies of the award raise suspicions over the confidential awards. Dabhol Arbitration metes out as a clear-cut case

[66] *Id.* at 18.
[67] *Id.*
[68] *Id.* at 19.

where contractual arbitrations are used to discipline governments which respond to the interests of developing countries.

IV. White Industries Arbitration

In 1989, a Public Sector Undertaking of Government of India i.e. Coal India entered into a contractual agreement with White Industries, an Australia based Company for the supply of technology related to coal mining development. Dispute arose soon, which lead to ICC arbitration as prescribed according to rules of the contract and the award was given in the favour of White Industries Australia Limited (WAIL) in 2002.

Now, both sides proceeded to the Indian Judiciary for the respective actions: Coal India moved Calcutta High Court for the setting aside of the award and White Industries moved Delhi High Court for the enforcement of the same. Generally, if a suit is filed which is directly and substantially in issue between the parties in a previously instituted suit, then the Court should not proceed with the same. Keeping this very principal in mind i.e. *res sub judice*, White Industries moved Supreme Court to stay the Calcutta proceedings which will be highlighted further as the wrong step in terms of litigation strategy. Supreme Court heard and stayed the proceedings in Calcutta High Court and the transfer petition was dismissed later on. Calcutta High Court, which had its hearing stayed due to the Supreme Court order, would have to recommence the hearing of the dispute. At this point, White Industries should have sought the transfer of its application of enforcement from Delhi High Court to Calcutta High Court but instead, it filed an application. This application sought to quash the setting aside proceedings in the Calcutta High Court, challenging the scope of jurisdiction, but on the basis of *Bhatia*[69] the petition was dismissed, as was the appeal, which was challenged in the Supreme Court.

At this point the proceedings in Delhi High Court were stayed under the pretext of waiting for a decision from the Supreme Court under *res sub judice*. The proceedings stayed could have been challenged, but clearly White Industries wanted to wait for the decision of the Supreme Court. This could be seen as them holding out for the opportune moment and trying to build their case on it. In 2008, the appeal from Calcutta

[69] Bhatia International v. Bulk Trading S.A., AIR 2002 SC 1432.

HC was being heard in Supreme Court, days after the decision of *Ventura Global Engineering*[70].This should have meant that the appeal be dismissed altogether, but the bench instructed this matter to a larger bench, citing differences in the opinions of the judges presiding on the bench (Katju, J dissenting). And in 2011, the matter came for the hearing against a three judge bench. Subsequently, the matter was kept to be heard from a constitutional bench.

The enforcement procedure has taken almost a whole decade and still the decision is not clear. But one thing can be commented that Indian Judiciary has never overlooked the proceedings of the case, in all forums. White Industries should have known better while approaching the Supreme Court or even different forums under the High Courts that the proceedings might stretch over an elongated period, not due to any bias or ineffectiveness of the judiciary but due to the volume of cases which does not allow any swift procedure to take place. Further, the matter induced a constitution bench, highlighting its importance.

But in the end, without waiting for the constitution bench to decide the matter, White Industries approached the issue via a violation of the Bilateral Investment Treaty and made the Government of India a party, implicating the Public Sector Undertaking of Coal India. White Industries brought out a whole new dimension not only to Investment Arbitration but also to Arbitration as a whole in India. It is the only International Arbitration with an Award passed in current parlance with plenty of such disputes in the pipeline; this award is surely going to be viewed as an important development for investors all over the world. As discussed earlier, although most of the issues were decided in the favour of India, the decision is in fact, in favour of the Investor. The authors shall summarily discuss all the issues before commenting on the interpretation and application of the MFN clause by the tribunal.

A. Admissibility and Jurisdiction:

The principal question before the tribunal was whether WIAL was an investor or whether the manufacturing agreement constituted an investment within the meaning of

[70] Ventura Global Engineering v. Satyam Computers, (2008) 4 SCC 190.

BIT[71]. Heavy debate was done upon the applicability of *Salini Test*[72] and the contribution of the alleged investment on the in the economic development of the host nation India[73]. On this point, the tribunal held that the *Salini Test* doesn't apply as it is not the party to the ICSID convention.

The original dispute arose upon the forfeiture of bank Guarantee rendered by WIAL. Therefore, it was essential to determine the nature of this Bank Guarantee. The tribunal accepted the contention of WIAL to the extent that is a 'risk' within the purview of the *Salini Test.* However, it ruled the issue in favour of India considering the fact that a Bank Guarantee is not an asset and does give rise to any substantive right. WIAL also contended that the award passed by the ICC tribunal also forms a part of the investment as it adjudicated the right and liabilities of the part under the investment contract[74] and that if it is not thus considered, it would be easily set aside by the courts in India. India placed heavy reliance on the GEA Group[75] arguing that an award is not a part of the investment. On this, the tribunal contends that an award is to be to treated as an investment and that the position of India[76] is an incorrect departure from the jurisprudence in the treatment of awards.

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[71] *Art.1(c): "investment" means every kind of asset, including intellectual property rights, invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and investment policies of that Contracting Party, and in particular, though not exclusively, includes:*
(i) moveable and immovable property as well as other rights such as mortgages, liens, or pledges;
(ii) shares, stocks, bonds and debentures and any other form of participation in a company;
(iii) right to money or to any performance having a financial value, contractual or otherwise;
(iv) business concessions and any other rights required to conduct economic activity and having economic value conferred by law or under a contract, including rights to search for, extract and utilise oil and other minerals;
(v) activities associated with investments, such as th-e organisation and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights.

[72] SaipemS.p.A. v.The People's Republic of Bangladesh, ICSID Case No.ARB/05/7, Decision on Jurisdiction, 21 March 2007;SaliniCostruttoriSpA v Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001.

[73] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on Jurisdiction, 16 April 2009.

[74] *Id*, at 41.

[75] GEA Group Aktiengesellschaft v. Ukraine case, ICSID Case No.ARB/08/16, Final Award, 31 March 2011.

[76] Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

B. Amenability of Coal India to the tribunal's jurisdiction.

The entire argument of WIAL was dependent upon the fact that Cola India was a Public Sector unit and since the appointment of Board of directors was regulated the president and the majority share was held by the Government of India, it's amenable to the jurisdiction of the tribunal.

On the other hand, India based its objectives on the 'effective control' test propounded on *Nicaragua*[77]. India further contended that since there is no sovereign interference, there cannot be any treaty violations. The tribunal ruled that since there is nothing on record to show any direct or indirect influence of Government of India on Coal India Limited[78], Coal India Limited is not amenable to the jurisdiction of the tribunal. Before moving on to the core issues of delay caused in the Indian courts the authors would briefly mention that since Coal India Limited is not amenable to its jurisdiction, WIAL's claims under Art.9 which related to violation of free and non-discriminatory investment due to improper retention of Bank Guarantee must fail as these acts cannot be attributed to India.

C. Denial of Justice and the breach of Fair and Equitable standards:

WIAL contented that the exercise of jurisdiction for setting aside the arbitral award was improper which amounted to denial of Justice and breach of Fair and Equitable standards[79]. Also, the award passed by the ICC tribunal remained due for enforcement for a period of 9 years in the India courts and India, being a party to the New York Convention, is obliged to enforce the award without timely delay,[80] failing which it has not fulfilled the Legitimate Expectations of the investors. The Fair and Equitable standards have evolved in 2 tracks. 1) Personal safety, denial of justice and due process 2) any actor miss that infringing a sense of fairness equity and unreasonableness.

The tribunal held that as far as setting aside of awards and enforcement is concerned, WAIL had full knowledge of the existing legal position and its expectations with respect

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[77] 1986 I.C.J. 14.

[78] Gustav F Hamester GmbH ad Co KG v Ghana,ICSID Case No.ARB/07/24, Final Award, 18 June 2010,para 179.

[79] Lowen Group Inc v. United States of America, 7 ICSID Rep 421, Decision on Respondent's Objection to Competence and Jurisdiction, 5 January 2001.

[80] Medioambientales Tecmed v. United Mexican States (2004) 32 ILM 133.

to India being an unsafe place for enforcement doesn't hold water as there is no conduct on the part of India or Coal India Limited to the detriment of WIAL. WIAL also makes contentions regarding Coal India Limited's delaying tactics and the inefficiency of the Courts to provide remedy on a timely basis but all these contentions do not form a concrete basis for the violation of Fair and Equitable standards.

D. India's Liability under MFN clause:

The MFN clause allows the claimants to borrow provisions from other treaties and by the Host State, if those provisions are more favourable than that to those contracts in the treaty between host State and investor. Accordingly, WAIL sought to incorporate and extend the application of Art 4(5) of India-Kuwait BIT in the India-Australia BIT by the virtue of the MFN clause incorporated thereunder. The relevant clause of the India-Kuwait BIT read as under:

> "*Each Contracting State shall maintain a favourable environment for investments in its territory by investors of the other Contracting State. Each Contracting State shall in accordance with its applicable laws and regulations provide effective means of asserting claims and enforcing rights with respect to investments and ensure to investors of the other Contracting State the right of access to its courts of justice administrative tribunals and agencies and all other bodies exercising adjudicatory authority, and the right to employ persons of their choice, for the purpose of the assertion of claims and the enforcement of rights with respect to their investments.*"

India contented that during its negotiations with Kuwait, "strong and unusual emphasis on application of national laws" to suit the requirements of the countries and hence the application of Art. 4(5) *in toto* must be rejected. Further, there is no effective denial or differential of "treatment" in comparison to any investor of other country as most of the delay was caused by the faulty litigation tactics of White Industries itself.

The Tribunal held that, under Art.4 (2) known as 'MFN', the contentions relating to proceedings being delayed by the court has to be system in a twofold manner. Firstly, the 3.5 year delay in the Local courts, held by tribunal as the delay in Delhi High Court seems extraordinary- allowing several applications, filing of rejoinders et al, but there was no indefinite delay on part of courts here and the delay in Supreme Court, wherein the

tribunal concluded there was no unnecessary delay on the part of the Court. Moreover, WIAL has failed to show any tangible proof that the Judiciary deliberately delayed the enforcement of the award. As a part of India's contention under asserting claims and enforcing rights under 'effective means standard'[81], there wasn't any denial of justice by this delay rather it was held that there is a failure on the part of the Judicial system showing lax to address the issue and that the delay served as an injustice to the parties involved and the tribunal resorted that procedure of the lower courts was in standard and proper but the delay in the Apex Court was a failure which served to violation of the obligations, concluding that India is in Breach of Article 4(2).

Essentially, the White Tribunal used the MFN route to incorporate a treaty which India did not have with Australia. Then the incorporated treaty provision (Article (5) of the Kuwait-India BIT) was interpreted with reference to *Chevron* ignoring the difference in language in the treaty provisions and the prior precedents on the point. The exceptional facts in *Chevron* were also not reflected upon. The resultant award was thus, with respect, erroneous. The subsequent section seeks to go beyond the plain analysis of the award *per se*, into the origins of the MFN doctrine and illustrate how the doctrine and its resultant application or interpretation is intrinsically biased.

V. The Colonial Origins of MFN and Doctrinal Bias

A. Understanding the Doctrine:

The most favoured nation or MFN clause arguably allows claimants to "borrow" from the provisions of other treaties entered by the host state, if those provisions are more favourable that those contained in the treaty between the host State and the investor's State. For an instance, Article 4 of the US Model BIT provides:

> "*Each Party shall accord investors [and investments] of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-party with respect to establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*"

[81] Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

In *Maffezini* v. *Spain*[82], the MFN clause extended to "all matters to this agreement".[83]The broad language of the clause provided both substantive and procedural rights pertinent to investment including the dispute resolution clause due to which the claimant was justified in waiving the requirement of exhausting all local remedies before commencing the arbitration.

B. History:

Most Favoured Nation clause (MFN) is one of the staple clauses of investment treaties all over. It was never majorly controversial or influential; it was included in the agreement to assure the party agreeing to the investment treaty that it will be treated equally with all the regulations being availed by the other country. Hence, it has also been adopted by WTO as one of its core principles. A typical MFN clause provides that, States party to a treaty will provide treatment no less favorable than that offered to third parties[84]. This allows for the investors to carry a sense of security as the investment amounts are huge, and if any losses occur then there should be a way out for them to get reasonable compensation and damages. This concept has been used from the time inter-trade began, and in the manner of documentation this was first used in the *Open Door Policy*. It has always been mishandled and misinterpreted like every other clause empowering any relations related to economic and financial powers[85].

The usage of such treaties by Indian Contingent dates back to the British colonisation. The prime objective of colonisation was to promote and protect the economic interests of the colonising State. In order to facilitate the process, the colonising State made huge infrastructural investments in the colonies. This entanglement of politics with foreign

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[82] Maffezini Case, *supra* note 18.

[83] La Republica Argentina*, Acuerdo Para La Promocion Y La Proteccion ReciprocaDe Inversiones Entre La Republica Argentina Y El Reino De España* (1991), *available at*: http://www.sice.oas.org/investment/bitsbycountry/bits/arg_spain_s.pdf,Last visited [12/09/2013].

[84] U.S Department of State, *Model Bilateral Investment Treaty* (20 April, 2012), *available at:* http://www.state.gov/documents/organization/188371.pdf Last visited [12/09/2013].

[85] Stanley K. Hornbeck, *The Most Favoured National Clause,* AM. J. INTERNATIONAL 395, 1909.

investment is considered as a causative factor which necessitated colonisation.[86] As Friden remarks, "*Colonies held up as much colonial capital as much as this capital was holding colonisation.*"[87]During this time, the United Kingdom entered into various *Friendships, Commerce and Navigation Treaties (FCN Treaties)* and all the subjects and territories of colony would be bound by custom to follow such trade agreements, which allowed them to reap the benefits whilst being obligated to enforce at the same time. The most preliminary forms of MFN can be made out in the "Automatic Inclusion Clauses" whereby once a country enters into a FCN treaty with the UK, it gains market access and equal protection across *all British Dominions in Asia and Europe*.[88] The MFN Clauses got more defined when the Automatic Inclusion Clauses were replaced by a "Nevertheless Clause" while such clauses restricted the market access the also provided reciprocal most-favoured treatment.[89]

After this the treaties started including Companies and vessels in its jurisdiction. All of this happened when India did not have an independent identity in global economic and political relations. It was therefore unable to influence such decisions. Nevertheless, India helped the treaty usage and interpretation to grow. After independence, the country made its own economic and diplomatic identity which leads to a different regime implementation involving no regulation of FDI[90] but soon this policy was found out to be ineffective, stomping the overall development with no significant development to show.[91]Then in 1993, the policy and financial regulations were finally put through knife for the world to invest.

Around 1993, India signed with the European Union a third-generation Cooperation Agreement on Partnership and Development, wherein Art. 11 speaks about reciprocally providing a favourable climate and non-discrimination between the member States,

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[86] Devashish Krishan, *India and International Investment Laws, in.* BIMAL N. PATEL, INDIA AND INTERNATIONAL LAW VOL. 2 277, 286 (Bimal Patel ed., 2008) [hereinafter 'Krishan'].
[87] *Id.*
[88] *Id.* at 287.
[89] *Id.* at 289.
[90] MICHAEL HUDSON, GLOBAL FRACTURE: THE NEW INTERNATIONAL ECONOMIC ORDER (2005).
[91] CHAN WAHN KIM, ECONOMICS LIBERALISATION AND INDIA'S FOREIGN POLICY100 (2006).

allowing for the start of foreign investments in the country with legal protection being availed to them according to their needs, providing them a growing environment for development. Codification of different standards, with the necessary discretion to be availed to each state was started and Bilateral Investment Treaties (BIT) were formed out of it, with the application of municipal laws being submissive to international application of law. The best feature of such treaties was that the disputes were directly referred to international arbitration.

In general, the first BIT was signed between Germany and Pakistan in 1959 and the first claim relating to the jurisprudence did not come until 2000 in the case *of Maffezini v Kingdom of Spain*[92]. But the International Court of Justice had propounded jurisprudence for the same in *Anglo-Iranian Oil Co.*[93]*,* succeeded by *Rights of U.S. Nationals*[94] in which the court propounded that until both the parties and related treaties are in force and active, the claimant could use the powers of third parties in an extensive manner under consular jurisdiction. In finality, the interpretation was put to rest by the *Ambatielos Case*[95]*,* which related the MFN clause to every matter relating to commerce and navigation, interpreting the bare text and also concerning the principles of Justice, Equity and Conscience.

It is evident from the history of Investment treaties during the time of colonisation that the development of MFN treatment is closely linked with colonisation *per se*.[96] The doctrine of MFN treatment was born out of colonial needs and imposition of imperialistic order. MFN clause had developed for the sake of colonial administrative convenience.[97] The doctrine as it stands today is nothing more than a manifestation of colonial objectives i.e. promotion and protection of the economic interests of the First World.[98] This doctrine provides for unfettered market access and protection of the First World countries to the detriment of the Third World nations owing to their capital-importing status. The entire WTO system, to which this doctrine is of core importance,

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[92] Maffezini Case, *supra* note 18.
[93] U.K v. Iran, 1952 I.C.J. 93 (July 22).
[94] Rights of Nationals of the United States of America in Morocco, 1952I.C.J. 93, 176.
[95] Greece v. United Kingdom, 12 R.I.A.A. 91, 106.
[96] Krishan, *supra* note 86.
[97] *Id.*
[98] *Id.* at 285.

stands as an evidence of this extended period of colonisation in the guise of neo-liberal agendas.[99]

The colonial origins of various doctrines of international law give rise to an interesting phenomenon known as *doctrinal bias*. This form of bias focuses on the doctrines relied upon by the arbitrators to reach to their decisions, the legal validity and the current state of acceptance of the doctrine under international law.[100] For example, The Libyan Oil concessions arbitrations are often regarded as instances of flagrant bias in which a developing country's pursuit of its independent development strategy was hampered by subjecting it to the jurisdiction of biased international doctrines.[101] Post colonisation, the Third World countries view political and economic sovereignty as a leeway for escaping the evils of colonisation and an unjust legal order which was a creation of a small consortium of States which has projected its law of domination as the international law governing the entire world.[102] All doctrines of international law like the MFN produce inescapable outcomes favouring Western economic interests.[103] As M. Sornarajah rightly puts forth:

> "…*If international commercial arbitration is to escape from the charge of bias, it should dismantle the existing structure which is based on doctrines associated with neo-colonistic efforts at the preservation of economic dominance and move towards more acceptable standards which seek a balance between capital exporting States and those of capital importing States.*"[104]

C. Precedents and current scenario:

There are several cases against the usage, application for MFN Clause, such as *Tecmed v Mexico*[105], in which the tribunal highlighted the importance of specific clauses being inserted in the BIT between two parties. Hence, any clause from a BIT relating to a third

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[99] Gathii, *supra* note 12 at 261.
[100] Shalakany, *supra* note 13, at 445.
[101] *Id.*
[102] *Id.*
[103] Gathii, *supra* note 12, at 261.
[104] Shalakany, *supra* note 13, at 446.
[105] TecnicasMedioambienctalesTecmed, S.A. v United Mexican States, ICSID Case No.ARB (AF)/00/2, Final Award, 29 May 2003; 19ICSID REV. 158 (2004).

party defeats the purpose and should not be allowed. The same was followed in *Salini v Jordan*[106] with *Palma v Bulgaria*[107] trying to overrule *Maffezini* in toto, saying that MFN clauses should not be applicable to dispute settlements. Other cases typifying the disallowance of MFN clauses on a general basis were *M.C.I. Power Grp. v. Republic of Ecuador*[108], *Telenor Mobile A.S. v. Republic of Hungary*[109], *Berschader v. Russian Federation*[110] and *Tza Yap Shum v. Republic of Peru*[111].

From the above discussion it is clear the White Industries is an example of both doctrinal bias and Regime bias.

In *Ros Invest Co. v. Russia*[112], an interesting contention was made against the claimant who wanted to "cherry-pick" favourable clauses with total disregard to the context of the BIT. The claimant had resort to Denmark-Russia BIT to make its expropriation claims against taxations. The respondent State argued that the Denmark-Russia BIT and the dispute resolution clause thereunder had a specific crave out for taxation and therefore, while invoking the MFN in relation to the applicable Treaty the limitations under the importing treaty must also be considered. The tribunal however rejected this contention and allowed the UK investor to enjoy the most favourable dispute resolution provision that was divested from the agreement's taxation or other exceptions.

The MFN clause must refer to 'treatment' as against 'treaty shopping'. According to Zackary Douglas:[113]

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[106] ICSID Case No.ARB/02/13, Decision on Jurisdiction, 29 November 2004; 20 ICSID REV. 148 (2005).
[107] ICSID Case No. ARB/03/24, Decision on Jurisdiction,8 February 2005; 20 ICSID REV. 262 (2005).
[108] ICSID Case No. ARB/03/6, Decision on Application for Annulment, 19 October2009 (disallowing the usage of MFN Clause to import the entry into the force date of another treaty).
[109] ICSID Case No ARB/04/15, Final Award, 13 September 2006; 21 ICSID REV.603 (2006); (Raising the issue of fair and equitable treatment using MFN).
[110] SCC Case No. 080/2004, Final Award, 21 April 2006.
[111] ICSID Case No.ARB/07/6 (Pending).
[112] RosInvestCo UK Ltd. v.The Russian Federation, SCC Case No.Arb. V079/2005, Final Award, 12 September 2010.
[113] Zachkary Douglas, *The MFN clause in Investment Arbitration: Treaty Interpretation off the Rails*, 2 J. INTL. DISPUTE SETTLE.97,114 (2011).

> "*The MFN Clause does not, in truth, operate automatically to 'incorporate' provisions of a third treaty so that all that remains for a tribunal to do is to interpret the amended text of the basic treaty. It is not an exercise in the construction of a static legal text that has been modified by an invisible hand prior to or upon the commencement of arbitration proceedings. The MFN clause operates to secure more favourable treatment for the claiming party; it does not operate to rewrite the terms of a treaty in respect of which the claimant is not even a signatory. Let us not forget that the more favourable treatment can be granted to an investor of a third state by means of a domestic legislative enactment or by any other act of state (judicial decision, administrative circular and so on). It would be wrong to suppose that the documents recording this treatment are 'incorporated' into the basic treaty by the operation of the MFN clause. It is the 'treatment' represented by these documents that can be invoked by the investor claiming through the MFN clause in the basic treaty (emphasis in original)*."

There were also set precedents wherein the Tribunals have divulged from the traditional interpretation of MFN clauses owing to special circumstances. Article 4(5) of the India-Kuwait BIT was inserted because it would have the effect of fundamentally subverting the carefully negotiated balance of the BIT in question. The tribunal also failed to have applied appropriate standards of deference by disrespecting the treaty-making powers of India, including the authoritative by the respective parties. The tribunal must not re-write treaty obligations they disagree with for policy reasons.[114]

VI. Conclusion

The TWAIL perspective provides us with an analytical tool for the review of India's investment arbitration experience. The TWAIL approach asserts that international law reflects the power relation between Western and Third World interests which hasn't changed substantially since the colonial times, as said Investment treaties are more like International law translated over the years with respect to power struggle.

In the review of the two major arbitral awards against India, three points were discussed. Firstly, international rules were a product of colonisation and they still suffer from a colonial hangover. Most doctrines of international law were developed as instrumentalities of continuing imperial dominance and hence they are inherently biased

[114] Schill, *supra* note 1, at 5.

towards Third World interests. In the 21st century it is impossible for the developing countries to sustain growth levels without Foreign Direct Investment because of which they are left with no other choice but to accept doctrines like the MFN.

Secondly, by elaborating on the concept of Regime bias it has been illustrated that irrespective of the origins of the rules of international law the outcomes of such international adjudication processes are bound to be adversarial to the Third World countries because the current system which is responsible for the application and interpretation of these rules is in itself subservient to the interests of the Global North.

Lastly and more importantly, investment arbitration has been used as a mechanism to discipline governments which respond to Third World interests. Investment arbitration is increasingly becoming the means of impinging upon the sovereignty of developing States. The arbitrators have reconfigured the role of international adjudication as a forum for the review of sovereign decision makers.[115]Combined with the broad discretion under the treaties and the potent remedies at their disposal, the arbitrators have positioned themselves as the overseers of sovereigns.[116] While most authors argue that the tribunals have shown deference with varying degrees[117] Prof. Van Harten shows that on the record, the arbitrators, with few exceptions, did not appear to show restraint in any of various forms.[118] This evidence contradicted widespread claims, including by arbitrators and other participants in Investor-State arbitration, that the system is 'balanced'. It was also despite the fact that the arbitrators were evidently aware (or can reasonably be assumed to be aware) of one or more options for restraint. On many occasions, they were presented with a viable case for restraint that was endorsed by a

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[115] GUS VAN HARTEN, SOVEREIGN CHOICES AND SOVEREIGN CONSTRAINTS, Oxford Univ. Press .(Forthcoming). The authors would like to extend sincere thanks to Prof. Gus Van Harten for his constructive inputs on the article and also for permitting to cite from his forthcoming book.

[116] *Id.*

[117] Schill,*supra* note 1.

[118] Van Harten, *supra* note 115. Van Harten's study's findings contradict other commentators' suggestions that investment treaty tribunals 'often refer to the notion of deference' (SW Schill, *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review,* 3 J. INTL. DISPUTE SETTLE.5 (2012).)or that they 'are in the process of embracing balancing and proportionality' (A Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier,* 4 LAW AND ETHICS OF HUMAN RIGHTS 47, 62 (2010).

party in the arbitration, by a previous tribunal, or in courts. In some cases, restraint appeared to be warranted clearly by the terms of the treaty or a relevant contract. In others, it was open to the tribunal due to ambiguous language in the treaty or the track record of judges or other adjudicators. Yet the arbitrators declined *en masse* to adopt restraint.[119]

The final question which needs to be addressed is how the system should respond to Third World interests. Where critics of the TWAIL scholarship contend that TWAIL offers no positive agenda for action or reform in international law and reforms[120] most TWAIL scholars continue to believe in its ability to reform the international order. The reason that the NIEO movement got some recognition on the international front was that it was propelled by the G-77. The current situation also demands the developing countries to stay united in presenting the desirable norms.

In the case of Investment Treaties the countries have various alternatives. First, countries could completely withdraw from the treaty system. But the non-feasibility of this option has already been discussed with reference to developing nations. Second, the countries could exclude arbitration clauses from their treaties. Countries like Venezuela and Argentina have signaled their return to the *Calvo Doctrine*.[121]However this option is also not viable in Indian context. Foreign investors have no confidence in the Indian judicial system in such a situation an arbitration agreement is a necessary baggage. The most appropriate option for India is to adopt the 'balanced treaty' approach. This approach enables the host state to identify the circumstances in which it would regulate foreign investment and thereby avoid treaty liability by inserting express provisions to that effect. The State can include a list of exceptions or preclusion of liability which could include measures taken to protect public health, morals and public welfare.

Ultimately it is always up to the developing country to consistently contest the outcomes adverse to them, with the alternatives that serve their best interests, rather than merely focusing on bias as the inevitable outcome on the colonial origins of international rules

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[119] Van Harten, *supra* note 6.
[120] Jose Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 881 (2003).
[121] M. Sornarajah, *Mutations of Neo-Liberalism in International Investment Law,* 3(1) TRADE L. & DEV. 203, 228 (2011).

or the asymmetrical nature of the bargaining power. In light of recent events such as The Vodafone tax controversy where the notice of arbitration has been served under India-Netherlands BIT, as well as under 2G Spectrum Scam by *Sistema* among others, India still has the time to revitalize and recalibrate its investment treaty regime in order to protect its vital interests.

THE POSSIBLE CONFLICT OF LAW RULES EMPLOYED IN INTERNATIONAL COMMERCIAL ARBITRATION TO DISCERN THE GOVERNING LAW: AN ANALYSIS

Tapobrata Mukhopadhyay[*]

Abstract

It is rarely the case that highly diversified commercial contracts, containing arbitration as a dispute resolution method, mention specifically all the applicable governing laws. Indeed, modern transnational arbitration agreements often do not mention the applicable law governing the contract, primarily because of the increased flexibility that this ambiguity offers. However, it should be noted that there exists no clear and established consensus within the international community regarding the mechanism that may be followed by an arbitral tribunal to determine the law governing the contract, in case it is not expressly chosen by the parties. Although concepts of private international law, or conflict of laws are often used by the arbitral tribunal to arrive at the law governing the contract- the practise itself has been widely debated, and even disregarded by recent tribunals. Moreover, there exists an inherent lack of consistency among the various conflict rules followed by tribunals in such a situation. As a result of this, parties to an arbitration agreement are often compelled to have their contract governed by a law not envisaged by either side. Through this article, the author attempts to discern a logical thread of hierarchy between the multifarious conflict rules that are generally adopted by an arbitral tribunal. This, he does by analyzing the advantages and disadvantages of the various conflict rules under the broad delocalization regime. The author, in this article also explores the possibility of bypassing the application of conflict rules altogether by direct application of substantive law by the tribunal. The article ultimately vouches for the development of an international consensus on the mechanism for determining the applicable governing law.

I. Introduction

Arbitration is all about choices. Primarily, the parties make the *choice* to submit their dispute to arbitration. Once that primary choice is made, it is again the *choice* of the parties to decide the arbitrators, the place or *situs* of arbitration, the procedure governing

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arbitration, and most importantly, the law governing the merits of their dispute, which is meant to be settled through arbitration.[1]

This marked shift, from an imposed municipal law to a mutually agreeable applicable law, forms the bedrock of the principles governing international commercial arbitration. Party autonomy, therefore, forms the fundamental operative force in commercial arbitrations. The choice of applicable law, governing the contract, *almost* always rests on party autonomy. However, there has been considerable divergence with regard to the steps to be followed by the arbitral tribunal, in case such a choice is not made.[2]

In such a case, where the law governing their contract is not chosen, it falls upon the arbitral tribunal to make the necessary choice. This is often done with reference to various *conflict of law* rules that are available to the tribunal, and the complication arises in determining the applicable conflict rule. Recently, a trend has developed among tribunals, calling for a total abandonment of the application of conflict of law rules, favouring a direct application of substantial law.[3]

In this article, I will first address the conflict between the theories of 'localization' and 'delocalization', in the context of modern arbitration. Thereafter, I would attempt to provide an overview of the various conflict methods used *generally* by arbitral tribunals. In that section, I will also address the debate surrounding the direct application of substantive law. In the same section, I would review the various legal systems both at the national and international level, with regard to their points of divergence in the application of conflict rules.

Finally, I would conclude this paper with the affirmation of the need for a hierarchical system of conflict rules, in determining the applicable law.

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[1] MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 1.1 (Larry E. Edmonsoned, 2003).

[2] See A.F.M. Maniruzzaman, *Conflict of Law Issues in International Arbitration : Practice and Trends,* 9 ARB. INT'L 371 (1993)[HEREINAFTER 'MANIRUZZAMAN'].

[3] P. Bellet, *Forward,* LAW & POLICY INT'L BUS. 673 (1984).

II. The 'localization- delocalization' conflict

While resolving conflict of law issues in international commercial arbitration is certainly more flexible than in international litigation, there is arguably an additional complication arising out of the very fact that arbitral tribunals are not bound by the *lex fori,* in the same manner in which a judge is.[4]

This gives rise to the question as to whether, in a case where the parties have not chosen an applicable law governing the merits, the conflict rules of the seat of arbitration or *lex fori,* would bind the tribunal.

A. The Traditional Approach: Localization

Historically, one of the most commonly used method for resolving the question of the applicable conflict of law rules was to apply the conflict of law rules of the *situs*[5]. A more recent extension of this rule has been to bypass the conflict of law rules altogether and apply the substantive law of the seat of arbitration.[6]

The first approach was recommended as the primary method of addressing the issue of applicable conflict rules by the Institute of International Law in 1957[7], and approved in 1959.[8]

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[4] GREENBECK, KEE & WEERAMANTRY, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA PACIFIC PERSPECTIVE, 97, (2011) [hereinafter 'GREENBECK, KEE&WEERAMANTRY'].

[5] *Id*; *See also,* FOUCHARD, GILLIARD, GOLDMAN, INTERNATIONAL COMMERCIAL ARBITRATION, 867 (Emmanuel Gilliard& John Savage ed., 1999) [hereinafter 'FOUCHARD, GILLARD, GOLDMAN']; GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2119 (2009) [hereinafter 'BORN'].

[6] A. EHRENZWEIG, CONFLICT OF LAWS 540 (1962); Wilner, *Determining the Law Governing Performance in International Commercial Arbitration: A Comparative Study*, 19 RUTGERS L. REV. 646, 676-77 (1965); *See* PPG Indus. Inc. v. Pilkington plc, 825 F.Supp. 1465 (D. Ariz. 1993); Splosna Plovba of Piran v. Agrelak SS Corp., 381 F.Supp. 1368, 1370 (S.D.N.Y. 1974); In re Doughboy Indus. Inc., 233 N.Y.S.2d 488 (N.Y. App. Div. 1962); Tzortzis and Sykias v. Monark Line A/B [1968] 1 Lloyd's Rep. 33;Norske Atlas Co. v. London Gen. Ins. Co. (1927) 43 TLR 541 (K.B.); Czarnikow v. Roth, Schmidt & Co. [1922] 2 K.B. 478, 488 , *See also,* The Sri Lankan Arbitration Act, 1995, §24(3).

[7] Institute of International Law, Resolution on Arbitration in Private International Law, 1957 (Amsterdam), Tableau des Résolutions Adoptées (1957-1991) 237, at Art. 11(1) (1992).

[8] *Id*, at 254.

But, as will be explained subsequently, an unavoidable implication of this theory was to make the otherwise independent arbitral tribunal shackled with the same limitations as that of a national court, in so far as application of 'conflict rules' are concerned. This is because the method made it *mandatory* for an independently formed arbitral tribunal to apply the conflict rules of the seat- in the same way a national court of the seat would be bound to do- thereby compromising the flexibility of an international commercial arbitration.

The premise of this theory is that there exists no *truly* international commercial arbitration, as every system of private international law ultimately relies on a national law to settle the dispute, and the tribunal, being seated in, and acting under the domestic jurisdiction of a particular country, the *lex-fori* of that country automatically becomes the obvious choice.[9] In the opinion of the author, this might be too simplistic an argument - as the gradual emergence and application of 'general principles of international law' to the *merits* of a case (as explained subsequently in Chapter III) evinces that it is not necessary for the tribunal to always rely on one *national* legal system or the other.

Initially, this approach was avidly followed by a number of civil law countries, as well as England[10], and even arbitral tribunals[11]. This method is still followed in the Chinese[12]and Malaysian[13] laws, which makes it mandatory for the tribunal to apply their national conflict rules.

However, the drawbacks of this theory, which has led to substantial erosion of this approach, can be found in the resulting benefits of the delocalization approach, discussed below.

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[9] *See* Mann, *Lex Facit Arbitrum*, 2 ARB. INT'L 241, 244-245, 248 (1986)

[10] This approach was followed in England before the passing of the English Arbitration Act, 1996.

[11] Award in ICC Case No. 1512 of 1976, 1 Y.B. Comm. Arb. 128 (ICC Int'l Comm. Arb.); Award in Case No. 2730 of 1984, 111 J.D.I. (Clunet) 914 (ICC Int'l Comm. Arb.); Award in Case No. 2735 of 1977, 104 J.D.I. (Clunet) 947 (ICC Int'l Comm. Arb.); Final Award in Case No. 5460 of 1988, 13 Y.B. Comm. Arb. 104, 106 (ICC Int'l Comm. Arb.).

[12] JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA 105 (2008).

[13] Malaysian Arbitration Act, 2005, §30(4).

B. The Erosion of the Traditional Approach and Delocalization

1. The Drawbacks with the Traditional Approach

The method of applying the conflict rules of the seat of arbitration initially received support at an international level, especially from the European countries. However, the problem with the application of this theory was soon to be exposed.

Critics of this method argued that the choice of the seat of arbitration may be a result of various practical considerations, like geographic convenience, the advanced quality of the arbitral tribunal in that seat etc., and gave no indication whatsoever on the issue of applicable law.[14] Therefore, to mandatorily bind the arbitral tribunal to the conflict rules of the seat of arbitration is to import the same limitations that would bind national courts, and thereby undermine the principle of party autonomy[15]. Furthermore, by binding the tribunal to only *domestic* conflict of law rules, it has been argued, mars the transnational characteristic of arbitration.[16]

This criticism eroded the application of the localized approach to arbitral disputes, and today it is very rare that arbitral tribunals follow this approach[17].The untenable nature of this approach has been brought forth by various scholars, who have argued against it[18].

However, it would be wrong to presume that this approach has been totally abandoned as there is still some notable support for this theory among scholars[19]and arbitral

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[14] See Award in Case No. 7375 of 1996, 11(12) Mealey's Int'l Arb. Rep. A-1, A-37 (ICC Int'l Comm. Arb.); Award in Case No. 117 of 1999, 1 Stockholm Arb. Rep. 59, 64 (ICC Int'l Comm. Arb.; Award in Case no. 6257 of 1993,18 Y.B. Comm.Arb. 44 (ICC Int'l Comm. Arb**.);** D. CARON, L. CAPLAN& M. PELLONPÄÄ, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 126 (2006).

[15] Goldman, *La LexMercatoria Dans Les Constacts Et L'Arbitrage Internationaux: R'ealit'e Perspective* 475 J DU DROIT INT**L** (1979); SapphireInt'l Petroleum Ltd v. Nat'l Iranian Oil Co., Ad Hoc Award (15 March 1963) 35 I.L.R. 136, 170 (1967) [hereinafter 'Sapphire'] .

[16] Gabrielle J. Kaufmann-Kohler, *Aspects de la mise en œuvre du droit en arbitrage*, REV. DR. SUISSE 403, 414 (1988); PHILIPPE FOUCHARD, L' ARBITRAGE COMMERCIAL INTERNATIONAL ¶¶ 546 *et seq.* (1965).

[17] CRAIG PARK AND PAULSON , INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 290 (2001)

[18] REDFERN AND HUNTER, INTERNATIONAL COMMERCIAL ARBITRATION 234 (2009) ;FOUCHARD, GILLIARD, GOLDMAN, *supra* note 5, at 1541**;** GREENBECK, KEE & WEERAMANTRY,***supra*** note.4, at 108.

tribunals[20], on the ground that *presumptively,* the parties choice of the seat of arbitration constitutes an *implied* acceptance of the choice of law rules of that state, and more importantly, it provides the parties with the most predictable, neutral and fairest choice of law.[21]

It is the opinion of the author, that it is rarely the case the parties would choose a seat of arbitration, merely based on factors like geographic convenience- as essentially *seat* and *place* of arbitration exists as distinct concepts under arbitration law. In fact, in a situation where the parties themselves select the seat, but do not choose any law applicable to govern the contract- it is only fair to presume that the parties intended the former to govern the contract as well. The author therefore, would support the direct application of substantive law, despite its supposed erosion. This is because, as explained later, the other option available to the parties, viz., letting the arbitral tribunal deciding the 'appropriate conflict rule'- gives rise to a *probability* of the application of a legal system un-envisaged by the parties. In such a situation, given the lack of any hierarchy between the multifarious conflict rules available to the tribunal, the legal system ultimately chosen to govern the contract would largely depend on the arbitrators' individual &personal preference of one rule above another. The underlying idea behind this approach is that parties desire predictability and neutrality in the governing law, rather than uncertainty and unfamiliarity.

Therefore, in a case where the parties have not made a specific choice, it would be wise to undertake an analysis of the contract as a whole, and thereafter arrive at a conclusion as to whether the choice of seat was dictated by any external factor, with a strong presumption in favour of extending the law of the seat to the law governing merits. In

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[19] BORN, *Supra* note 5, at 2124-2127**;** O. Lando, *The Law Applicable to the Merits of the Dispute* in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 101 (1986).

[20] Case no. 5460 of 1987, 13 Y.B. Comm.Arb. 104(ICC Int'l Comm. Arb.);Award in ICC Case No. 8619, in Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 Recueil des Cours 9, 230 n. 230 (2001) ; ICC Ca–se no. 4504;.; ICC Case No. 1598; ICC Case No. 3540, in S. JARVIN & Y. DERAINS, COLLECTION OF ICC ARBITRAL AWARDS 1974-1985*,* 19, 105 (1990); Interim Award in Case no. 6149 of 1995, 20 Y.B. Comm. Arb. 41 (ICC Int'l Comm. Arb.).

[21] *See* BORN, *supra* note 5, at 2141.

case such an external factor is not discernable, law of the seat may be applied, due to the prevalence of factors such as predictability, neutrality and fairness.[22]

2. Delocalization/ Denationalization Trends

As an aftermath of the criticism to the traditional approach, there has been a considerable shift towards 'delocalization' or 'denationalization' of the arbitral tribunal. This approach detaches the arbitral tribunal from the *lex fori*.[23]Under the 'localization' approach, the arbitral tribunal was sought to be bound by the *lex fori;* whereas, this approach, as an antithesis to 'localization', leaves it to the tribunal to decide the conflict rule it considers *appropriate.*[24]

This approach of allowing the arbitral tribunal increased the flexibility of choosing the applicable conflict rule and has gained momentum in international statutes[25], national courts[26] and even among arbitral tribunals[27].

This has led to the formation of a new trend which disassociates the arbitral tribunal from the control of laws of the place where such arbitration is being held. The tribunal is

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[22] However, other modern approaches, like the 'Cumulative Approach', as has been discussed below, may also provide a viable alternative in case the intention of the parties cannot be determined.

[23] *See* generally A. SAMUEL, JURISDICTIONAL PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION, CHAPTER 1 (1989) [Arguing that arbitral tribunals have no *lexfori*]; H.P. de Vries, *International Commercial Arbitration: A Traditional View,* 1 J. INT'L ARB. (1984).

[24] Article 28(2) , UNCITRAL Model Law on International Commercial Arbitration, 1985; Article VII, European Convention on International Commercial Arbitration , 1961 ; *See also* W. CRAIG, W. PARK & J. PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, P. 17.01 (2000).[Hereinafter **'**CRAIG, PARK AND PAULSSON']

[25] CRAIG, PARK AND PAULSSON, *Id*; *See also* Article 13(3) ICC Rules (1975); Article 33 UNCITRAL Rules (1976); Art. 42(1) Washington Convention (1965).

[26] Konkar Indomitable Corp. v. FritzenSchiffsagentur und Bereederung, 1981 U.S. Dist. LEXIS 9637 at 6-7 (S.D.N.Y. 1981); Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (U.S. S.Ct. 1974); Compagnied'Armement Maritime SA v. CompagnieTunisienne de Nav. SA, [1971] A.C. 572, 600 (House of Lords).

[27] Case No. 2930 of 1984, 9 Y.B. Comm. Arb. 105 (ICC Int'l Comm. Arb.); Final Award in Case No. 6527 of 1993, 18 Y.B. Comm. Arb.44 (ICC Int'l Comm. Arb.); Partial Award in Case No. 8113 of 2000, 25 Y.B. Comm. Arb. 324, 325 (ICC Int'l Comm. Arb.); Sapphire, .*supra*note15.

given the authority to decide on the applicable conflict rule on a case to case basis, giving primacy to the party autonomy.

Whereas *prima-facie* this approach indeed appears to increase party-autonomy in international commercial arbitration; on a close examination it should be observed that in reality, it simply increases the autonomy of the tribunal, which, as explained next need not *necessarily* translate into increased party autonomy, and predictability.

The discussion regarding the various conflict rules used by arbitral tribunals, in the next Chapter, attempts to offer an insight into the ambiguity that prevails over the application of these divergent rules.

III. The Possible 'Conflict Rules'

In the attempt to arrive at an appropriate 'conflict rule' which would point towards the applicable substantive law, various alternative approaches to the traditional theory have been developed. The striking feature of these approaches is that whereas individually they have widely used by various international tribunals, as whole the international community is yet to reach at a consensus on any particular conflict rule, or the establish a hierarchical order among the available rules.

This creates complications in a situation where different conflict rules point towards totally different substantive laws, and consequentially the rights and obligations of the parties differ very widely based on the specific conflict rule used by the tribunal. To add to this, although these 'conflict rules' in legal theory are based on very different approaches; they may be used simultaneously or alternatively by the same arbitrator in one particular matter.[28]

A. Cumulative Application of Various Conflict Rules

Undoubtedly the least controversial conflict rule, the cumulative approach allows the arbitrators to examine all the conflict rules of the different legal system connected to the

[28] Yves Derains, *Possible Conflict of Laws Rules and the Rules Applicable to the Substance of the Dispute,* in PIETER SANDERS, UNCITRAL'S PROJECT FOR A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION**,** ICCA Congress Series, Lausanne 2 169 – 195 (1984).

matter, and determine whether they converge and point to the same substantive law.[29] The conflict rule of all the connected legal systems may be similar, or they may be different and yet point to the same substantive law. In either case, the substantive law thereby indicated is chosen by the arbitrators as the law governing the merits of the dispute.[30]

The benefit of this approach is that since it considers the national conflict rules of all the legal systems connected with the dispute, it is not open to criticism on grounds of non-neutrality and non-predictability. Furthermore, this approach also reduces the cost of arbitration as it does not require the arbitrators to analyze the various conflict rules in order to give preference to one over the other.[31] The application of this rule also ensures that the interest of the various states in the dispute is respected, and therefore increases enforceability of the award. The effect of this approach is to 'internationalize' the award, which is aptly suited for such disputes.

However, Born has criticised this approach on the ground that this method can only be used in case of a 'false conflict', i.e., when there is no real conflict , as all the conflict rules

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[29] Yves Derains, *L'application cumulative par l'arbitre des systèmes de conflit de loisintéressés au litige (A la lumière de l'expérience de la Courd'Arbitrage de la Chambre de Commerce Internationale)*, REV. ARB. 99 (1972) ;*See also*Award in Case No. 953 of 1978, 3 Y.B. Comm. Arb. 214 (ICC Int'l Comm. Arb.); Award in Case No. 1512 of 1976, 1 Y.B. Comm. Arb. 128 (ICC Int'l Comm. Arb.); Award in ICC Case No. 2272, in S. JARVIN & Y. DERAINS (EDS.),COLLECTION OF ICC ARBITRAL AWARDS 1974-1985 11 (1990); Award in Case No. 2879 of 1979, 106 J.D.I. (Clunet) 989, 990 (ICC Int'l Comm. Arb.); Award in Case No. 2930 of 1984, 9 Y.B. Comm. Arb. 105 (ICC Int'l Comm. Arb.); Award in Case No. 3043 of 1979, 106 J.D.I. (Clunet) 1000 (ICC Int'l Comm. Arb.); Award in Case No. 4434 of 1983, 110 J.D.I. (Clunet) 893 (ICC Int'l Comm. Arb.).

[30]Award in Case No. 4996 of 1985, French agent of an Italian company v. Italian company, 113 J.D.I. 1131 (ICC Int'l Comm. Arb.); Award No. 3043 of 1978, South African company v. German company, 106 J.D.I. 1000 (ICC Int'l Comm. Arb.); Award in Case No. 5717 of 1988, ICC BULLETIN, Vol. 1, No. 2, at 22 (1990); Award in Case No. 6281 of 1989, Egyptian buyer v. Yugoslavian seller, 116 J.D.I. 1114 (ICC Int'l Comm. Arb.),Award in Case No. 6283 of 1990, Agent (Belgium) v. Principal (U.S.A.), 17 Y.B. Comm. Arb. 178 (ICC Int"l Comm. Arb.); Award in Case No. 6149 of 1990, Seller (Korea) v. Buyer (Jordan), 20 Y.B. Comm..Arb. 41 (ICC Int'l Comm. Arb.); Award in Case No. 7250 of 1992, American distributor v. Dutch producer, ICC BULLETIN, Vol. 7, No. 1, at 92 (1996).

[31] Grigera Na'on, *Choice-of-Law Problems in International Commercial Arbitration*, 289 RECUEIL DES COURS 9, 36-37, (2001) [hereinafter 'Na'on].

ultimately lead to the same result.[32]This rule becomes ineffective when the different conflict rules point towards different substantive laws, as in often the case in multiparty contract (as opposed to bi-party contracts).[33] This criticism seems correctly based, as it very rare that in a multiparty contract, involving several jurisdictions- all legal systems would point to the same conflict rule, or applicable substantive laws. In most cases, this rule would have very limited or no contribution, thereby compelling the arbitrator to choose an alternate rule. Thus, the comfort of similarity between the laws is marred by its extremely rare application.

Although the applicability of this approach is limited when major differences exist between the conflict rules of the various legal systems involved, the author is of the opinion that it would be a suitable step for any arbitral tribunal to approach the conflict issue first through this method. This is primarily because of the aforementioned advantages which would take into the interest of all the concerned parties to the dispute.

Extending this approach further, arbitral awards have sometimes gone beyond the conflict rules and directly considered the various substantive laws and examined the possibility of a same legal outcome, notwithstanding the different legal systems involved.[34]

B. Application of the General Principles of Private International Law

Since arbitrators are not bound by the *lex fori,* and have the scope of applying any conflict of law rule that they deem *appropriate,* tribunals often refer to 'general principles of private international law' to guide them to the applicable substantive law.[35]

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[32] BORN**,** *supra* note 5, at 2129.

[33] *Id; See,* Award in ICC Case No. 6281, in J.-J. Arnaldez, Y. Derains & D. Hascher (eds.), Collection of ICC Arbitral Awards 1991-1995 409 (1997); Partial Award in Case No. 7319 of 1999, 24a Y.B. C**omm**. A**rb.**.141 (ICC Int'l Comm. Arb.)

[34] Na'on, *supra* note 31, at 29.

[35] M. Akehurst, *Jurisdiction in International Law*, 46 BYBIL 222 (1972–73); Berthold Goldman, *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives*, 106 J.D.I. 475, 492 (1979); Pierre Lalive, *Les règles de conflit de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse*, 1976 REV. ARB. 181; Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 ICSID REV. – FOREIGN INV. L.J. 208, 216 (1995); JULIAN D.M. LEW, APPLICABLE LAW IN

Indeed, an application of these 'general principles' seems quite apt in the realm of commercial arbitration, where the parties seek neutrality, predictability and effective international enforcement. This approach is free from the conflict rules peculiar to various national legal systems and provides the commercial world with an internationally recognized and accepted, uniform conflict rules, which, in turn, increases predictability.[36]

However, unfortunately, there exists no uniformly accepted set of 'general principles' and the views of different scholars and arbitral tribunals have differed quite extensively as to what these might constitute. In reality, the conflict rules the various legal systems have differed so extensively that to discern a thread of 'general principles' running across all the legal system becomes quite difficult.

There is a possibility that the usage of the concept of 'general principles' might increase with wider acceptance of the various international conventions on private international law, which have long been regarded as sources of 'general principles.[37] Arbitral tribunals have, on various instances, considered these regional and international conventions to contain the general principles that govern the conflict rules.[38]

While some commentators have noted the growing usage of these general principles among international tribunals[39], others scholars have criticised the application of these

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INTERNATIONAL COMMERCIAL ARBITRATION – A STUDY IN COMMERCIAL ARBITRATION AWARDS 436. (1978); Maniruzzaman, *Supra* note 2, at 377.

[36] Na'on, *supra* note 31, at 36, 236.

[37] *See,* The Rome Convention on the Law Applicable to Contractual Obligations, 1980; The Hague Convention on the Law Applicable to International Sales of Goods,1955; The Law Applicable to Contracts for the International Sale of Goods 1986; The Law Applicable to Intermediary Agreements and Agency, 1978.

[38]Award in Case No. 6360 of 1990, ICC BULLETIN, Vol. 1, No. 2, at 24 (1990); Award in Case No. 7205 of 1993, French company v. Owner of Saudi company, 122 J.D.I. 1031 (1995), and observations by J.-J. Arnaldez; Award in Case No. 7319 of 1992, French supplier v. Irish distributor, ICC BULLETIN, Vol. 5, No. 2, at 56 (1994); Award in Case No. 7177 of 1993, Greek agent of an Antiguan corporation v. Greek company, ICC BULLETIN, Vol. 7, No. 1, at 89 (1996); Award in Case No. 5885 of 1989, Seller v. Buyer, 16 Y.B. Comm.. Arb. 91, 92 (1991); ICC BULLETIN, Vol. 7, No. 1, at 83 (1996); Award in Case No. 5713 of 1989, Seller v. Buyer, 15 Y.B. Comm..Arb.70 (1990).

[39] J. LEW, RELEVENACE OF CONFLICT OF LAW RULES IN PRACTISE OF ARBITRATIONS, 451, 7 ICCA Congress Series (1994).

principles of the basis of their unpredictably, and the uncertainty surrounding what exactly these principles are.[40]

It remains, however, that these criticisms are not enough the totally discredit the application of this method to resolve the conflict. The contemporary inquiry into these 'general principals' by the arbitral tribunals has almost always been carried with reference to the above mentioned conventions or other arbitral awards, which by definition, reflect substantial consensus with regard to status of these principles.[41]

It is the opinion of the author that if, while deciphering 'general principles' arbitrators keep these conventions as their reference point, rather than their own diverse experiences, and if there is indeed a greater acceptance of these conventions, or any new internationally agreed upon set of principles, this method might result in producing the best guidelines to solve conflict issues. However, a viable alternative, at least for the present purposes may be to decipher a set of general principles on conflict of laws among *only* those legal systems *connected to the dispute.*

C. The Closest Connection Method

Another method of resolving the conflict is to select the conflict rules of the legal system which has the closest connection to the dispute. It should be noted that the inquiry is not into the *state,* but the *legal system* which has the closest connection to the dispute at hand.[42] This practise has been followed by a number of arbitral tribunals to discern the

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[40] BORN, *Supra* note 4, at 2132**;** SJ TOOPE, MIXED INTERNATIONAL ARBITRATION 51 (1990).

[41] Andrea Giardina, *International Conventions on Conflict of Laws and Substantive Law, in* A.J. VAN DEN BERG, ICCA CONGRESS SERIES NO.7, PLANNING EFFICIENT ARBITRATION PROCEEDINGS/ THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION, 459 (1996).

[42] M.A. CLARKE**,** THE LAW OF INSURANCE CONTRACTS 23 (1989); *See also*The Resolution 'The Proper Law of the Contract in Agreements between a State and a ForeignPrivate Person' of the *Institut de Droit International (adopted by the Institut at its Athens Session*, *September 4–13*, *1979*, 58 *AnnIDI* (1979) at pp. 193, 195 (Articles 1 and 5).

applicable law. [43] The Rome Convention and various domestic legal systems also adopt this technique as one of the methods for selecting the applicable law.[44]

The selection of the *conflict rule* of the system most closely connected to the dispute, rather than the substantive law has some patent disadvantages.

This is firstly because , in a multi-party contract, where there are several legal systems connected to the dispute, and there is no indication as to which one of these has the 'closest connection', the tribunal would have to revert back to the general principles of private international law to guide them to choose the system with the closest connection. Even to decide the factors to be taken into account in order to determine which connection is the closest requires the tribunal to apply general principles of international law. However, as discussed above, the there exists no uniform set of general principles, and therefore it imports a substantial degree of subjectivity into the selection of the 'closest' legal system.[45]

Secondly, after selecting the legal system with the closest connection, which is a complicated matter in itself, it requires the arbitral tribunal to analyze the various conflict rule of that system, which is also often quite complex. Thereafter, it again requires the tribunal to select a national legal system and apply the laws of such system to the dispute.

The author therefore observes that this approach present multiple levels of complicated and subjective and uncertain selection- first, on the means of technique of selecting closet connection, second on the applicable conflict rule from the system with the closest connection, thirdly the selection of another system through the conflict rule of the former system and lastly the application of the laws of that system. The parties may

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[43] Award in Case No. 1422 of 1974, 101 J.D.I. (Clunet) 884 (ICC Int'l Comm. Arb.); Award in Case No. 3742 of 1984, 111 J.D.I. (Clunet) 910 (ICC Int'l Comm. Arb.); Award in Case No. 4434 of 1983, 110 J.D.I. (Clunet) 893 (ICC Int'l Comm. Arb.); Final Award in Case No. 5885 of 1990, 1(2) ICC Ct. Bull.23 (ICC Int'l Comm. Arb.); Interim Award in Case No. 6149 of 1995, 20 Y.B. Comm. Arb.41 (ICC Int'l Comm. Arb.).

[44] Art 4(1) of the Rome Convention,*supra*note37; *See* §188 , Restatement (Second) of the Conflict of Laws of the United States of America,1971; §1-105 Uniform Commercial Code of the United States of America, 1978; Article 5 of the Foreign Economic Contract Law of the People's Republic of China,1985.

[45] *See* GREENBECK, KEE &WEERAMANTRY, *Supra* note 4, at 111.

ultimately arrive at an applicable law which none of them ever intended to apply to their dispute.[46]

In any case, it is the opinion of the author, that if the tribunal does reach a decision on the legal system closest to the dispute, it is only logical to apply the substantive law of that system to the merits of the case, than to merely apply conflict rules of that system. For eg, if a tribunal arrives at a decision that the legal system with closest connection with the dispute is England, it is only logical to apply the English law to the govern the *contract;* rather than use the conflict-rules of the English law, which might point to say, Germany- which has little to do with the dispute.

D. Direct Application of the Substantial Law

A general modern tendency has been to allow the arbitral tribunal considerable latitude in selecting their choice of law, while insisting that they do so by way of appropriate conflict rules.[47] In stark contrast to that approach, the post-modern 'direct application' method allows the arbitral tribunal to bypass the conflict rules altogether and select the substantive law that the arbitrators deem applicable to the dispute.[48]

This approach is being increasingly supported by arbitral tribunals.[49] In fact, this approach of dispensing with the conflict rules altogether , and simplifying the process by

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[46] *See* BORN, *supra* note 5, at 2133.

[47] A. REDFERN AND M. HUNTER, INTERNATIONAL COMMERCIAL ARBITRATION, 128 (1991).

[48] O. Lando, *Conflict of Law Rules for Arbitrators, in* 157-178 FESTSCHRIFTFÜR ZWEIGERT (1981) ;Yves Derains, *Attente légitime des parties et droit applicable au fond en matière d'arbitrage commercial international,* in TRAVAUX DU COMITÉ FRANÇAIS DE DROIT INTERNATIONAL PRIVÉ 81 (1984-1985) ; Lalive, *Supra* note 35, at 10; MATTHIEU DE BOISSÉSON, LE DROIT FRANÇAIS DE L'ARBITRAGE INTERNE ET INTERNATIONAL 652 (1990) ; GILLIARD**,** *supra* note 5, at 876**.**

[49] Award in Case No. 1675, *in* S. JARVIN & Y. DERAINS (EDS.), COLLECTION OF ICC ARBITRAL AWARDS 1974-1985 197 (1990); Award in Case No. 4132 of 1983, Italian company v. Korean company, 110 J.D.I. 891 (ICC Int'l Comm. Arb.); French company v. Swiss, French and Luxembourg companies, 105 J.D.I. 985 (1978); Belgian purchaser v. Belgian company, seller, 110 J.D.I. 897 (1983), 10 Y.B. Comm. Arb. *See also* Award in Case No. 6840 of 1991, Egyptian seller v. Senegalese buyer, 119 J.D.I. 1030 (1992).

directly applying the substantive law of the countries that the arbitrators deem applicable has recently been developed into various national legal systems as well.[50]

However, a complication might arise with the application of this approach when the national law expressly points towards an application of a conflict rule,[51] but the parties choose to be governed by the rules of the various institutions, which have endorsed this rule.[52] In such a situation, party autonomy should be given prominence to the national rules, and the arbitrators should be allowed to choose the applicable law without reference to any particular conflict rules.

It has been argued that this method takes away the *channelling* effect of the conflict rules, and thereby leaves the determination of the law governing the merits to the individual subjective choice of the arbitrators.[53] Therefore, it has been urged that even in legal systems where such direct choice approach is endorsed, the arbitral tribunal should, *suomoto* undertake a defined and objective conflict of law analysis to determine the applicable law.[54]

It is submitted that the first criticism, with regard to subjectivity is not well placed. This is primarily because, as it has been observed above, even in the application of conflict rules, there remains substantial divergence among arbitral tribunals with regard to the application of one rule above another. Therefore, subjectivity cannot be viable argument to discredit a rule. However, the second mandate on the arbitrators is an agreeable proposition, as long as it is left to the choice of the tribunals.

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[50]Article 1496 of The French Code of Civil Procedure,(1981); Article 187 of The Swiss Private International Law Act (1987); Article 1054 of Netherland Arbitration Act (1986); Article 28(1)(b) of the Indian Arbitration and Conciliation Act,1996.

[51] *Eg*: English Arbitration Act, 1996.

[52] *See,* Art. 28(1) of the 1997 AAA International Arbitration Rules; Art.17(1) of the 1998 ICC Rules; Art. 22.3 of the 1998 LCIA Rules; Art. 34.1 of the ACICA Rules; Art. 25.1 of the KCAB International Rules; Artcle 15 of the BANI Rues; Rule 6 of the Indian Arbitration Centre Rules. For a commentary, *see*YVES DERAINS AND ERIC A. SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION 221 (1998).

[53] *See,* BORN, Supra note 5, at 2137; Partial Award in Case No. 8113 of 2000, 25 Y.B. Comm. Arb.324, 325 (ICC Int'l Comm. Arb.).

[54] BORN**,** *id.*

IV. Conclusion

The uncertainty prevailing around the application of possible conflict rules is indeed perplexing, and yet most interesting. As the author has tried to establish in this article, although there are various methods which are open to the arbitrators to determine the applicable governing law, the multiplicity of these methods, coupled with a lack of hierarchy and unclear boundary between the traditional and modern approaches makes it impossible to discern any uniform practise and trend. In reality, it is ultimately the subjective choice and reasoning of the arbitrator, based of course, on their own experience and background, that determines the applicable law. Hence, it would be recommended for the parties to expressly mention a choice of governing law while concluding the contract.

In case such a choice is not made, it would be a wise step for the tribunal to first approach the dispute through 'cumulative method'. However, in case of a 'true conflict', when that does not apply, the tribunal should choose the substantive law of the seat the seat, for the security and predictability that it provides. In the alternative, when such direct application is impliedly excluded by the parties, the tribunal might consider the application of the conflict rules of the seat of arbitration. Failing that the tribunal should consider the 'general principles' of the connected legal system. 'Closest connection' being itself one of the very few agreed upon general principles should be the next obvious choice, in case any other 'general principle' is discernable.

It is admitted that there are several types of other types of rules also used by the tribunals, but a thorough examination of every rule is beyond the scope of this paper. This article has attempted to provide a logical hierarchy among the most *generally* used conflict-rules, based upon an analysis of the advantages and disadvantages of each individual rule. However, the author concludes by recommending wider acceptance of the various international conventions on conflict rules, thereby giving rise to a uniform international set of conflict rules. Once this is achieved, the applicable law should be decided keeping these conventions and principles therein as the touchstone. That would make choice of law predictable, neutral and truly international in character.

UNCITRAL ARBITRATION RULES, 2010: COMMENT ON CERTAIN REVISIONS

Badrinath Srinivasan[*]

I. Introduction

Almost thirty five years after the publication of the UNCITRAL Arbitration Rules, 1976, the UNCITRAL has revised its arbitration rules. The Working Group of the UNCITRAL on Arbitration and Conciliation[1] discussed the possible revisions to the said Rules for about eight sessions and completed the same after nearly four years of discussion. The UNCITRAL Arbitration Rules, 2010[2] were adopted by the UNCITRAL on 25 June 2010 and by the General Assembly of the United Nations on 6 December 2010.[3]

This paper comments on certain critical aspects of the 2010 Rules viz., (1) the power of the arbitral tribunal to rule on its own jurisdiction, (2) interim measures, (3) immunity of arbitrators, and (4) costs and fee in arbitration.[4] In addition, the paper briefly analyses the

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[1] Hereinafter "Working Group".

[2] United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules (as revised in 2010) (Apr. 2011), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html [hereinafter "2010 Rules"].

[3] *Id.*

[4] For a review of the changes introduced in the 2010 Rules, *see*, DAVID D. CARON, LEE M. CAPLAN, *ET.AL.*, The UNCITRAL Arbitration Rules (2013) [hereinafter "CARON & CAPLAN"]; Badrinath Srinivasan, *UNCITRAL Arbitration Rules 2010: A Review*, 2 CHRIST UNIV. L. J. 117-152 (2013); Lee Anna Tucker, *Interim Measures under Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects both Greater Flexibility and Remaining Uncertainty*, 1 Arbitration Brief 15 (2011), *available at* http://digitalcommons.wcl.american.edu/ab/vol1/iss2/6/ (last visited September 16, 2013); Matthew Skinner, Sam Luttrell, et.al., *The UNCITRAL Arbitration Rules 2010*, 7 ASIAN INT'L ARB. J. 76 (2011); James Castello, *Plusça change, plus c'est la même chose: Eight Revisions not Adopted in the 2010 UNCITRAL Rules*, 28 ASA BULL. 855 (2010); Stephen L. Drymer, *The Revised 2010 UNCITRAL Arbitration Rules: New Rules / New Roles for*

recently published UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration[5] and related amendment to the UNCITRAL Arbitration Rules, 2010. The paper also makes note of certain small revisions relating to examination of witnesses without their physical presence, power of the tribunal to appoint experts and the procedure for challenge of experts by the parties. The paper concludes by providing an overview of the level of response of the international arbitration community to the 2010 Rules.

II. Power of the arbitral tribunal to rule on its jurisdiction

The provisions in the 2010 Rules on the power of the arbitral tribunal to rule on its jurisdiction are based on Article 16 of the UNCITRAL Model Law on International Commercial Arbitration, 1985[6], except for a few changes as noted below.

The minor but notable changes in the 2010 Rules vis-a-vis the Model Law are the following:

a) The 2010 Rules clarify that the tribunal has the power to determine its own jurisdiction. In a report submitted to the UNCITRAL on the Revision of the UNCITRAL Arbitration Rules, Paulsson and Petrochilos commented that the 1976 Rules did not expressly empower the tribunal to decide its own jurisdiction in the absence of any objection from a party.[7] This, according to

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Designating and Appointing Authorities, 28(4) ASA BULL. 869, 873 (2010); Justice Clyde Croft, *The Revised UNCITRAL Arbitration Rules of 2010: A Commentary*, VIC. J. SCHOOL 6 (2010) *available at* www.austlii.edu.au/au/journals/VicJSchol/2010/12.pdf (visited on February 25, 2012)

[5] United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules on Transparency,(Oct. 2, 2013) http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf

[6] United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration, 1985 (amended in 2006) (, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html [[hereinafter "Model Law"].

[7] Jan Paulsson & Georgios Petrochilos, *Revision of the UNCITRAL Arbitration Rules* (2006), ¶181, *available at* http://www.uncitral.org/pdf/english/news/arbrules_report.pdf (accessed on April 11, 2013) [hereinafter "Paulsson & Petrochilos"].

them, was not in consonance with "modern arbitration practice".[8] Therefore, the 2010 Rules clarify that the tribunal "shall have the power to rule on its own jurisdiction…"[9] It may be noted that this change merely spells out what was a well-accepted practice.[10]

b) The phrase "null and void" in Article 16(1) of the Model Law has been replaced with the term "null". The reason for the deletion was that "null and void" did not cover certain situations such as the case where the contract had expired due to completion of its duration. Hence, it was decided in the Working Group to retain "null" as it encompassed all other categories of contractual defects. [11]

c) The term "ipse jure" in the above provision has been changed to "automatically".

d) Article 16(1) of the Model Law provided that a plea of lack of jurisdiction shall be raised in the statement of defence and not thereafter. However, it did not deal with the timing of such plea in respect of a counterclaim or a claim for set-off. The 2010 Rules provide that a plea of lack of jurisdiction in respect of counterclaim or a claim for set-off should be made in the reply to the counterclaim or the claim for set-off and not thereafter.[12]

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[8] *Id.*

[9] Model Law, *supra* note 6, Art. 23(1); CARON &CAPLAN, *supra* note 2..

[10] Oracle America, Inc. v. Myriad Group A.G., (9th Cir. 2013) (Jul 26, 2013), available at http://caselaw.findlaw.com/us-9th-circuit/1640198.html (last visited August 15, 2013) ("*By giving the arbitral tribunal the authority to decide its own jurisdiction, both the 1976 and 2010 UNCITRAL rules vest the arbitrator with the apparent authority to decide questions of arbitrability. The only difference is that, under the 1976 rules, the authority of the arbitral tribunal is described as ruling on objections to its jurisdiction and under the 2010 rules the tribunal has the authority to decide its jurisdiction. The 1976 rules are more narrowly phrased than the 2010 rules, but there is not a significant distinction between how these sets of rules treat questions of arbitrability*.")

[11] United Nations Commission on International Trade Law, Report of the Working Group II (Arbitration and Conciliation) on the Work of its Fiftieth Session U.N. Doc. A/CN.9/669, (March 9, 2009), ¶40-43 , [hereinafter "Working Group"]; CARON & CAPLAN, *supra* note 2, p. 454 (for a discussion on the deliberations of the Working Group on this aspect).

[12] Model Law, *supra* note 6, Art. 23(2).

Two substantial changes vis-à-vis the Model Law have been made in the 2010 Rules. One, under the Model Law, where the arbitral tribunal determined that it had jurisdiction on a preliminary issue as to jurisdiction; a party could appeal to the court from the tribunal's determination on that preliminary issue.[13] This provision has not been incorporated in the 2010 Rules because of the difference in purposes of the Model Law and the Arbitration Rules. The objective of the Model Law was to a model of arbitration law that countries could adopt as a legislation on international arbitration. Therefore, the Model Law dealt with the role of courts in the arbitral process. The aim of the Arbitration Rules, on the other hand, is to state the procedure for conducting the arbitral proceedings.[14] The 2010 Rules, however, clarify that in case a party challenges the jurisdiction of the tribunal in a court, the tribunal would nevertheless have the power to continue with the arbitral proceedings and make an award.[15] The second substantial change is that the provision in the 1976 Rules that jurisdictional objections, as a general rule, should be decided as preliminary questions[16] has not been retained. The issue as to whether the tribunal has to decide the jurisdictional pleas as preliminary questions has become fairly controversial, especially in the context of investor-State arbitration. Under the 1976 Rules, the tribunal was more or less bound[17] to decide jurisdictional objections as preliminary questions, but the tribunal was given the freedom to proceed with the arbitration when the circumstances so warranted and decide on such objections in its final award.[18] Thus, the 1976 Rules established a presumption in favour of bifurcation of the proceedings into proceedings pertaining to decision on preliminary objections and decision on merits.[19] However, the Tribunal was not bound to bifurcate the proceedings in the following circumstances[20]:

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[13] Model Law, *supra* note 6, Art. 16(3).
[14] Badrinath Srinivasan, *UNCITRAL Arbitration Rules 2010 & 1976: A Comparison- Part VI* (August 15, 2011), *available at* http://practicalacademic.blogspot.in/2011/08/this-is-sixth-and-last-installment-in.html (last visited September 16, 2013).
[15] Model Law, *supra* note 6, Art. 23(3).
[16] Model Law, s*upra* note 6, Art. 21(4).
[17] Art. 21(4) of the 1976 Rules provided that the tribunal "should" "[i]n general" decide on jurisdictional objections as a preliminary question.
[18] *Id.*
[19] Glamis Gold, Ltd. v. The United States of America, Procedural Order No. 2 (revised) (May 31, 2005), *available at* http://italaw.com/sites/default/files/case-documents/ita0362.pdf (accessed on June 7, 2013). The said order was issued in the

- the jurisdictional objections were frivolous and deciding the same as preliminary questions would not reduce costs or the duration of the arbitration;
- the cost and time in deciding the jurisdictional pleas as preliminary questions would not promote reduction in costs or the time of the subsequent stages of the arbitral proceedings;
- The jurisdictional questions are inextricably linked to the issues on merits that it is impractical to decide the former as preliminary issues.[21]

It is possible that certain jurisdictional questions could be decided as preliminary questions while certain other jurisdictional questions were linked to the issues on merits such that it would be impractical to decide the latter as jurisdictional questions. In such cases, tribunals bifurcate the proceedings by deciding certain jurisdictional questions as preliminary questions and the remaining questions along with the issues on merits.[22]

The 2010 Rules do not contain the said presumption and gives the tribunal the discretion to decide jurisdictional objections in its final award. Notwithstanding this, an authoritative commentary has suggested that there would not be any dilution of the presumption in practice.[23] Nevertheless, it is possible that a Tribunal may interpret this elimination of the presumption as granting wide discretion to the Tribunal to refuse bifurcation requests. This is especially true when the arbitral tribunal would be the one to gain the most if the preliminary issues are decided in the end than as preliminary

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context of Investor-State arbitration and not commercial arbitration. However, the said principles stated in the case would equally apply to commercial arbitration.

[20] *Id.*

[21] *See*, Inna Uchkunova & Oleg Temnikov, *Bifurcation Of Proceedings In ICSID Arbitration: Where Do We Stand?*(August 15, 2013), *available at* http://kluwerarbitrationblog.com/blog/2013/08/15/bifurcation-of-proceedings-in-icsid-arbitration-where-do-we-stand/ (last visited August 15, 2013) (for a survey on the law of bifurcation in ICSID proceedings).

[22] GarantiKoza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, Decision on Objection to Jurisdiction for Lack of Consent (July 3, 2013), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1540.pdf (last visited August 10, 2013).

[23] CARON & CAPLAN, *supra* note 2, at 459.

questions. In order to promote legitimacy of the arbitral process, the presumption as it appeared under the 1976 Rules could have been retained.

A. Immunity to arbitrators and others

Considerable discussion took place in the Working Group on the scope of immunity to arbitrators and their appointees. The 1976 Rules did not contain provisions relating to immunity of arbitrators. Hence, some tribunals incorporated an immunity rule in their procedural orders passed in the arbitral proceedings. For instance, one of the tribunals acting under the UNCITRAL Arbitration Rules, 1976 in investor-State arbitration incorporated the following immunity rule in its procedural order:

"***17 Immunity from Suit:*** *17.1 The Parties shall not seek to make the Tribunal or any of its members liable in respect of any act or omission in connection with any matter related to the arbitration*".[24]

Another tribunal went a step further by providing additionally that neither the tribunal nor any of its members shall be required by the parties to the arbitral proceedings to be a party or witness in any judicial or other proceedings arising out of or in connection with the arbitration.[25]

Since arbitration rules of several institutions contained an immunity rule, it was decided by the Working Group to incorporate a provision on the immunity of arbitrators.[26] The

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[24] Guarachi America Inc. and Anr. v. The Plurinational State of Bolivia, Terms of Appointment and Procedural Order No. 1 (December 9, 2011), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0393_0.pdf (last visited June 13, 2013).

[25] ICS Inspection and Control Services v. The Argentine Republic, Procedural Order No. 1 (May 18, 2010), cited in ICS Inspection and Control Services v. The Argentine Republic, Award on Jurisdiction (February 10, 2012), available at http://italaw.com/sites/default/files/case-documents/ita0416.pdf (last visited June 13, 2013).

[26] United Nations Commission on International Trade Law, Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Fifth Session ¶136 (October 5, 2006), A/CN.9/614, http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last visited January 1, 2013) [hereinafter "A/CN.9/614"].

Working Group was of the view that such immunity should be granted to even the appointing authority under the Rules.[27]

On the scope of immunity, the Working Group contemplated adopting one of the following approaches: the first was to provide for an unequivocal waiver by the parties similar to the then prevailing ICC Rules[28] or the Vienna Rules[29]; the other approach was to grant a similar immunity but with the exception of intentional wrongdoing. The Working Group felt that the current practice of introduction of stricter standards of liability for acts and omissions of judges in vogue in several countries should be taken into consideration in deciding on the scope of arbitrator immunity. The Working Group's stand was that in deciding the scope of arbitrator immunity the interests of the parties should not be compromised by adopting an overly protective arbitral immunity clause. At the same time, it was felt that arbitrators should be protected against claims of negligence or fault by parties.[30] The Working Group therefore opined

"*It was generally agreed that any provision that might be introduced in the Rules to exonerate arbitrators from liability should be aimed at reinforcing the independence of arbitrators and their ability to concentrate with a free spirit on the merits and procedures of the case. However, such a provision should*

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[27] United Nations Commission on International Trade Law, Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules Note by the Secretariat ¶39-40 (July 20, 2006), A/CN.9/WG.II/WP.143/Add.1, http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last visited January 21, 2013 [hereinafter "A/CN.9/WG.II/WP.143/Add.1"].

[28] International Chamber of Commerce, ICC Rules of Arbitration, 1998 (May 2010), Art. 34,http://www.icc.se/skiljedom/rules_arb_english.pdf.

[29] Article 8 of the Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna Rules) states: "*Liability of the arbitrators, the Secretary General, the Board and its members and the Austrian Federal Economic Chamber and its employees for any act or omission in relation to arbitration proceedings, insofar as such liability may be admissible by law, shall be excluded*."

[30] United Nations Commission on International Trade Law, Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Eighth Session, ¶39 (February 29, 2008), A/CN.9/646, http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last visited January 23, 2012) [hereinafter "A/CN.9/646"].

not result or appear to result in total impunity for the consequences of any personal wrongdoing on the part of arbitrators or otherwise interfering with public policy."[31]

In the end, it was decided to take the more common approach of granting limited immunity to the arbitrators.[32] Thus, parties are deemed to have waived all claims against the arbitrator, the appointing authority, or any person appointed by the arbitral tribunal, to the extent permitted by the applicable law.[33] Intentional wrongdoing is the only exception to this waiver. Although a commentary states that the wordings in Article 16 on the exclusion of immunity are ambiguous, the provision requires that the transgression should be more than gross negligence.[34]

B. Revisions related to interim measures

Unlike the 1976 Rules, the 2010 Rules elaborately deal with interim measures. The Model Law was amended extensively in 2006 and several provisions on interim measures by the tribunal were inserted as Chapter IVA.[35] At the time of revising the Arbitration Rules, the Secretariat to the UNCITRAL suggested that the provisions in Chapter IVA could be adopted in the 2010 Rules.[36] Consequently, several provisions in Chapter IVA were incorporated in the 2010 Rules with changes *mutatis mutandis*.[37] Some provisions in the

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[31] *Id.*

[32] A/CN.9/WG.II/WP.143/Add.1, *supra* note 27 at 39, 40. *See*, Introductory Note to the International Bar Association Rules of Ethics for International Arbitrators (1987) ("*The International Bar Association takes the position that (whatever may be the case in domestic arbitration) international arbitrators should in principle be granted immunity from suit under national laws, except in extreme case of wilful or reckless disregard of their legal obligations*").

[33] Badrinath Srinivasan, *UNCITRAL Arbitration Rules 2010 & 1976: A Comparison- Part V* (August 13, 2011), available at http://practicalacademic.blogspot.in/2011/08/this-post-is-fifth-part-in-series-of.html

[34] CARON & CAPLAN, *supra* note 2 at. 516.

[35] PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNCITRAL MODEL LAW JURISDICTIONS 232 (2009) [hereinafter "BINDER"] (commenting that the insertions in 2006 to the Model Law were so extensive that the amendments could have constituted a separate model law on interim measures in international commercial arbitration).

[36] A/CN.9/WG.II/WP.143/Add.1, *supra* note 27, 16.

[37] As regards the provisions of interim measures in the 2010 Rules, a commentary suggests that the Travaux Préparatoires of the provisions of the UNCITRAL Model Law pertaining to interim measures (the original provisions and the 2006 amendments) would be relevant in interpreting the 2010 Rules; CARON & CAPLAN, *supra* note 2, Chapter 17.

said chapter such as recognition and enforcement of interim measures[38] have not been carried forward in the 2010 Rules since the Model Law is a model legislative instrument wherein the role of courts are to be defined while the Arbitration Rules are in the nature of a contractual instrument dealing with the conduct of the arbitration.[39]

The 2010 Rules do not retain the Model Law provisions pertaining to *ex parte* interim measures.[40] Since *ex parte* interim orders were contrary to the "consensual nature of arbitration"[41] and since several national legislations did not grant the tribunal such a power, the Working Group was of the view that such a controversial provision[42] could undermine the acceptability of the Rules.[43]

Apart from the above, following are the features of the provisions in the 2010 Rules on interim measures:

C. Option to exclude the tribunal's power to grant interim measures:

The Model Law afforded option to the parties to agree that the tribunal would not have the power to grant interim measures.[44] No such option is available under the 2010 Rules.[45]

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[38] Model Law, *supra* note 6, Art. 17-H,17-I.

[39] Working Group, *supra* note 11 at 87; *See also*, Georgios Petrochilos, *Interim Measures under the Revised UNCITRAL Arbitration Rules*, 28 ASA BULL. 878 (2010) [hereinafter "Petrochilos"].

[40] Model Law, *supra* note 6 Art. 17-B,17-C.

[41] Working Group, *supra* note 11 at 101; Petrochilos, *supra* note 39 at. 887.

[42] Provisions on *ex parte* interim measures were so controversial that discussions in the Working Group were "*close to breaking point*" when the draft amendments to the Model Law (finally adopted in 2006) were discussed. BINDER, *supra* note 35 at 232.

[43] United Nations Commission on International Trade Law, Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Seventh Session¶ 54-55 (September 25, 2007), A/CN.9/641, http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last visited March 11, 2011) [hereinafter "A/CN.9/641"]; *But see*, Petrochilos, *supra* note 39 at 887 (arguing, citing Art. 17(4), that the 2010 Rules does not prohibit *ex parte* interim measures when permitted by applicable law).

[44] Model Law, *supra* note 6, *Art.*17(1).

[45] Model Law, *supra* note 6, Art. 26(1).

Definition of Interim Measures: In contrast to the 1976 Rules, the 2010 Rules clearly define "interim measures". This definition is in line with Article 17 of the UNCITRAL Model Law which replaced the original Article 17 thereto with effect from 2006. Thus, according to Article 26(2) of the 2010 Rules, an interim measure is any temporary measure ordered by the tribunal prior to issuance of the final award, and which is in the nature of, but is not limited to, one of the following measures:

a) Maintenance or restoration of the status quo pending the final decision on the dispute;
b) Taking an action, or refraining from taking an action, that would prevent
    i. Current or imminent harm;
    ii. Prejudice to the arbitral process;
c) Providing means of preserving assets out of which a subsequent award may be satisfied;
d) Preserving evidence relevant to the resolution of the dispute.

Under the 1976 Rules, it was required that interim measures which the tribunal could order should be "in respect of the subject-matter of the dispute".[46] This requirement does not find its place in the 2010 Rules. Paulsson considered this requirement to be restrictive, especially when the range of interim measures that could be ordered would extend beyond the meaning of the said phrase.[47]Paulsson relied on the then prevailing arbitration rules of other institutions and recommended that the requirement be dropped.[48] It may be noted that the revisions to the UNCITRAL Model Law made in 2006 do not retain the above requirement. Deletion of this requirement was merely to clarify the existing practice of arbitral tribunals of granting interim measures which are not strictly connected to the subject-matter of arbitration.

[46] Art. 26(1) of the 1976 Rules.
[47] Paulsson & Petrochilos, *supra* note 7 at 115-119
[48] Paulsson & Petrochilos,*supra* note 7 at 115-119.

Article 17(2) of the Model Law contains an exhaustive list of the kinds of interim measures that the tribunal could order. In order to bring clarity into the provision of interim measures, the Working Group took a stand that the relevant provision in the 2010 Rules should not unduly restrict the power of the tribunal to those measures enumerated in Article 17(2) of the Model Law alone. Further, it was not clear if the 1976 Rules contemplated certain kinds of interim measures such as order to stay parallel judicial proceedings, order for security for costs.[49] Article 26(2) clarifies that the tribunal has the power to order measures that are not limited to those provided therein.[50]

Conditions for granting interim measures: The party seeking interim measures of the nature specified in (a) to (c) above has to satisfy the arbitral tribunal that[51]:

i. The harm that the interim measures would prevent is not adequately reparable by an award of damages;
ii. The harm that would be caused to the applicant substantially outweighs the harm likely to result to the party against whom such measure is sought to be directed; and
iii. There is a reasonable possibility that the applicant will succeed on the merits of the claim.

With regard to interim measure specified in (d) above, the aforesaid requirements would apply only to the extent to which the arbitral tribunal considers it appropriate.[52]

Modification, suspension and termination of interim measures: The tribunal possesses the power, either on the application of a party or in exceptional circumstances *suomotu*, to modify, suspend or terminate the interim measure it had previously ordered.[53] With regard to *suomotu* exercise of such power, the tribunal is obligated to give prior notice to the parties.[54] The Rules are silent on whether hearing should be granted to a

[49] Petrochilos, *supra* note 39 at 884.
[50] Working Group, *supra* note 11 at 92-93.
[51] Model Law, *supra* note 6, Art. 26(3).
[52] Model Law, *supra* note 6, Art. 26(4).
[53] Model Law, *supra* note 6,Art. 26(5).
[54] Model Law, *supra* note 6, Art. 26(5).

party in such a situation. Nevertheless, if a party requests the tribunal to grant an opportunity to present its case, consistent with Article 17(1) of the 2010 Rules[55], the tribunal should provide such opportunity.

Other ancillary powers of the tribunal in relation to interim measures: The tribunal is also empowered under the 2010 Rules:

a. To order the applicant to provide appropriate security with respect to the measure[56];
b. To order the applicant to promptly disclose any material change in the circumstances on the basis of which interim measure was sought or was ordered by the tribunal;[57]
c. To order the applicant to pay costs and damages where the tribunal is of the opinion, subsequent to granting interim measure, that the interim measure should not have been granted in the circumstances then prevailing.[58]

D. Revisions on costs and fees in arbitral proceedings

UNCITRAL Arbitration Rules have been considered as providing for cost effective arbitration as compared to institutional arbitration or arbitration under other rules.[59] Therefore, it is not surprising that the 2010 Rules contain elaborate revisions aimed at effective management of costs in the arbitral proceedings.

Costs in final award or in another decision: As in the 1976 Rules[60], the tribunal has been given the power to decide on the costs in the final award.[61] Since there could be

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[55] Among other things, Article 17(1) of the 2010 Rules obligate the tribunal to conduct to arbitration by affording reasonable opportunities to the parties to present their case.
[56] Model Law, *supra* note 6, Art. 26(6).
[57] Model Law, *supra* note 6, Art. 26(7).
[58] Model Law, *supra* note 6, Art. 26(8). The power to order such costs and damages is couched in permissive language unlike the analogous provision in the Model Law which casts it in a mandatory language. The reason for the permissive language is to empower the tribunal to pass such an order when law contemplates imposition of such liability. Petrochilos, *supra* note 39 at 886-887.
[59] *See,* PUBLISHER'S EDITORIAL STAFF, LEGAL ASPECTS OF INTERNATIONAL SOURCING §6:6 (West, 2010), citing, David J. Branson & W. M. Tupman, *Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration*, 24 VA. J. INT'L L. 4 (1984).
[60] Model Law, *supra* note 6, Art. 38.

more than one award in arbitration since the tribunal might fix costs in each such award, it was felt that the 2010 Rules should expressly recognise the existence of such a power.[62] Therefore, Article 40(1) of the 2010 Rules provides that the tribunal is empowered to fix "the costs of arbitration in the final award and, if it deems appropriate, in another decision".

Costs to be reasonable: The Secretariat of the UNCITRAL recommended that the term "reasonable" ought to be inserted in the different types of costs enumerated in the definition of "costs".[63] The recommendation was accepted by the Working Group.[64] Accordingly, the 2010 Rules require that costs should be reasonable.[65] Further, the 2010 Rules provide for an additional requirement with regard to the travel and other costs of witnesses. It is stated that only such reasonable travel and other costs would be allowed, and that such costs would have to be approved by the arbitral tribunal.[66] With regard to legal costs, the 2010 Rules state that such costs must be in relation to arbitration and the tribunal must consider such costs to be reasonable.[67] Thus, the 2010 Rules aims at ensuring greater transparency towards accounting of costs incurred by the parties in respect of arbitration proceedings.

Costs of legal representation: The definition of "costs" under the 1976 Rules also encompassed costs incurred by the successful party in relation to legal representation and assistance provided such costs were claimed during the arbitral proceedings and to the

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[61] Generally, the arbitral tribunal passes an interim award or a procedural order in which it expressly reserves all questions concerning costs during final determination of the dispute. *E.g.* ¶47, Ulysseas Inc. v. The Republic of Ecuador (Final Award, June, 12,2012), *available at* http://www.italaw.com/sites/default/files/case-documents/ita1019.pdf (last visited October 6, 2012).

[62] United Nations Commission on International Trade Law, Report of Working Group II (Arbitration and Conciliation) tn the Work of its Fifty-First Session¶ 120 (10 November 2009), A/CN.9/684, http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last visited July 17, 2013).

[63] A/CN.9/WG.II/WP.143/Add.1, *supra* note 27 at 36; Paulsson, *supra* note 7 at. 148.

[64] A/CN.9/646, *supra* note 30 at 18.

[65] Model Law, *supra* note 6, Art. 40(2)(a) read with Art. 41 and Art. 40(2)(b)(e).

[66] Model Law, *supra* note 6, Art. 40(2)(d).

[67] Model Law, *supra* note 6, Art. 40(2)(e).

extent reasonable as determined by the tribunal.[68] The term "representation" in the phrase "costs for legal representation and assistance of the successful party" has not been retained in the 2010 Rules. Further, since the provision deals with the definition of costs and not the method of apportioning of costs, the Working Group considered references to the successful party as inappropriate.[69] Hence, "costs" under the 2010 Rules includes reasonable "legal and other costs incurred by the parties in relation to the arbitration".[70]

Review of costs: Article 41 of the 2010 Rules retains the corresponding provision in the 1976 Rules[71] that the fee charged by the arbitral tribunal shall be reasonable. The 1976 Rules provided that where an appointing authority stated that the tribunal should apply a particular method of computation of fees, the arbitral tribunal was not bound to treat the same as sacrosanct.[72] The 1976 Rules further provided that a party could approach the appointing authority to furnish a statement regarding the basis of determination of fee. However, in all cases, the tribunal had the power to take into account the comment/ statement of the appointing authority to the extent it considered it appropriate.

The position under the 2010 Rules is different. The 2010 Rules imposes a positive duty on the tribunal to inform the parties soon after its constitution the manner in which the tribunal proposes to compute the fee.[73] The parties have the right to approach the appointing authority, if any, within fifteen days after receiving such information to request the appointing authority for review of the tribunal's proposal on fee.[74] Within forty five days of the referral, the appointing authority has to see if the tribunal's proposal is unreasonable considering the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstance of the case. If the tribunal's proposal is unreasonable, the appointing authority is

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[68] Model Law, *supra* note 6, Art. 38(e).
[69] A/CN.9/646, *supra* note 30 at 19.
[70] Model Law, *supra* note 6, Art. 40(2)(e).
[71] Model Law, *supra* note 6, Art. 39(1).
[72] Model Law, *supra* note 6, Art. 39(2).
[73] Model Law, *supra* note 6, Art. 41(3).
[74] Model Law, *supra* note 6, Art. 41(3).

empowered make necessary adjustments to the proposal and such adjustments would be binding on the arbitral tribunal.[75]

In addition to granting the parties the right to challenge the tribunal's proposal on determination of fees and expenses, the 2010 Rules also give the parties another opportunity to challenge the decision of the tribunal on costs. Article 41(4)(b) of the 2010 Rules provides that within fifteen days after receipt of the tribunal's determination of fees and expenses, a party could approach the appointing authority for review of such determination. In case the tribunal's determination is found to be to be inconsistent with the tribunal's proposal on fee communicated to the parties soon after its constitution or is manifestly excessive, that authority is invested with the power to make adjustments to the tribunal's determination, which shall be binding on the tribunal.[76] In such situations, the said authority shall be guided by the principle of reasonableness of fee laid down in Article 41(1) of the 2010 Rules. The authority shall make the aforementioned determination within forty five days after the receipt of referral.[77] Where no appointing authority has been designated or if the appointing authority fails to act within forty five days, a party has the right to approach the Secretary-General of the Permanent Court of Arbitration.[78]

To safeguard the interest of the party seeking review of fee and the party in whose favour the award was passed, the 2010 Rules clarify that an action seeking review of fee shall not:

a) Affect the determination in the award except insofar as the award deals with the tribunal's fees and expenses;
b) Delay the recognition and enforcement of the award except as regards tribunal's determination on fees and expenses.[79]

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[75] Model Law, *supra* note 6, Art. 41(3).
[76] Model Law, *supra* note 6, Art. 41(4)(c).
[77] Model Law, *supra* note 6, Art. 41(4)(c).
[78] Model Law, *supra* note 6, Art. 41(4)(b); *See,* Matthew Skinner, Sam Luttrell, et.al., *The UNCITRAL Arbitration Rules 2010*, 7 ASIAN INT'L ARB. J. 76, 93 (2011) (arguing that the appointing authority would be unwilling to conduct a review of the fees and expenses determined by the tribunal).
[79] Model Law, *supra* note 6, Art. 41(6).

In practice, a party would prefer to challenge the decision of the tribunal on costs rather than challenging the tribunal's proposal on determination of fees and expenses as that party would be apprehensive of questioning the tribunal's fee entitlements. Therefore, non-challenge of such determination should not be considered a ground for dismissing the tribunal's decision on costs and expenses.

E. Other revisions

Examination of witnesses without physical presence: According to Article 28(4) of the 2010 Rules, witnesses could be examined even by means of telecommunication that does not require their physical presence. Thus, the 2010 Rules recognise witness examination through video conferencing, etc. This provision has the potential to save the parties considerable costs, especially in arbitrations involving a number of witnesses.

Tribunal appointed experts and challenges: Under the 1976 Rules, the arbitral tribunal could appoint experts on specific issues without consulting the parties.[80] The 2010 Rules, however, require the tribunal to consult the parties before appointing experts.[81] Further, the 2010 Rules make it clear that the expert must be independent.[82]

A delegation of the Working Group proposed that parties should have the right to challenge experts for the same reasons and in the same way as arbitrators could be challenged.[83] Another proposal was that the experts should, along the lines of the IBA Rules on the Taking of Evidence in International Arbitration[84], declare their qualifications and issue a statement of independence and impartiality before accepting

[80] Model Law, *supra* note 6, Art. 27
[81] Model Law, *supra* note 6, Art. 29(1).
[82] Model Law, *supra* note 6, Art. 29(1)..
[83] United Nations Commission on International Trade Law, Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules Note by the Secretariat ¶ 37 (December 10, 2009), A/CN.9/WG.II/WP.157/Add.1, http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last visited January 24, 2012).
[84] International Bar Association, IBA Rules on the Taking of Evidence,, *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last visited March 11, 2011) [hereinafter "IBA Rules"]

their appointment.[85] These proposals were accepted. The 2010 Rules provide, consistent with the IBA Rules[86], that after the appointment of an expert, a party can challenge the independence of the expert.[87] But such challenge can be made only for reasons that the party came to know after appointment of the expert.[88]

III. UNCITRAL Arbitration Rules and Transparency in Investor-State Arbitration:

At the time of revision of the UNCITRAL Arbitration Rules, there were several proposals to include provisions pertaining to investor-State arbitration such as confidentiality, admissibility of *amicus curiae* briefs, etc.[89] The UNCITRAL was apprehensive in including specific provisions for investor-State arbitration, considering the generic nature of the Rules.[90] Further, the urgent need to revise the Arbitration Rules and the complex issues surrounding investor-State arbitration compelled UNCITRAL to omit investor-State arbitration related provisions in the 2010 Rules. Consequently, the Working Group was of the view that it would seek guidance from the UNCITRAL as to whether to consider specific issues pertaining to investor-State arbitration once the revision of the Arbitration Rules is complete.[91] In its forty first session, the UNCITRAL decided to accord priority to the topic of transparency in investor-State arbitration

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[85] Relevant portion of Art. 6(2) of the IBA Rules provides: "*The Tribunal-Appointed Expert shall, before accepting appointment, submit to the Arbitral Tribunal and to the Parties a description of his or her qualifications and a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal. Within the time ordered by the Arbitral Tribunal, the Parties shall inform the Arbitral Tribunal whether they have any objections as to the `Tribunal-Appointed Expert's qualifications and independence. The Arbitral Tribunal shall decide promptly whether to accept any such objection.*"

[86] Relevant portion of the Art. 6(2) of the IBA Rules reads: "*After the appointment of a Tribunal-Appointed Expert, a Party may object to the expert's qualifications or independence only if the objection is for reasons of which the Party becomes aware after the appointment has been made*."

[87] Model Law, *supra* note 6, Art. 29(2).

[88] Model Law, *supra* note 6, Art. 29(2).

[89] For instance, the Milan Club of Arbitrators, a Non-Governmental Organisation, proposed that the Rules should contain optional clauses dealing with investment arbitration. *See,* A/CN.9/646, *supra* note 30 at 60.

[90] United Nations Commission on International Trade Law, Report of the United Nations Commission on International Trade Law: Forty-first session,June 16 -July 3, 2008,, ¶ 312- 314, U.N.Doc.A/63/17, [hereinafter "A/63/17"].

[91] A/CN.9/646, *supra* note 30 at 54-69.

immediately after the revision of the UNCITRAL Arbitration Rules was complete.[92] The UNCITRAL, however, clarified that the form of the instrument to be adopted should be left to the discretion of the Working Group.[93] Subsequent to the revision of the 2010 Rules, there was a consensus in the Working Group that transparency in investor-State arbitration was an important issue that needed attention.[94] During the deliberations in the Working Group, it was observed that although the ICSID Rules and Regulations were revised to incorporate transparency in ICSID Arbitration, such standards would not squarely apply to non-institutional investor-State arbitration.[95] Therefore, it was stated that it might not be possible to adopt an instrument on the lines of the corresponding provisions of the ICSID Rules and Regulations. Consequently, the Working Group decided to come out with legal standards on transparency in investor-State arbitration. The Working Group was of the opinion that legal standards on increased transparency in investor-State arbitration would add credibility to the process.[96] The Working Group had been working on these standards since the publication of the 2010 Rules. On July 11, 2013, the UNCITRAL adopted the Transparency Rules. Apart from introducing the Transparency Rules, the UNCITRAL has also amended the 2010 Rules by inserting paragraph 4 in Article 1 of the 2010 Rules.[97] The said Article 1(4) provides that the UNCITRAL Rules on Transparency in Treaty based Investor State Arbitration would be a part of the UNCITRAL Arbitration Rules, 2010 in investor-State arbitrations applying the UNCITRAL Arbitration Rules, 2010 reads:

Thus, the Transparency Rules are applicable to investor-State arbitrations initiated under an investment/ investor protection treaty. Salient features of the Transparency Rules are as below:

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[92] A/63/17, *supra* note 90.
[93] A/63/17, *supra* note 90 at 314
[94] A/CN.9/646, *supra* note 30 at 57.
[95] A/CN.9/646, *supra* note 30 at 58.
[96] A/CN.9/646, *supra* note 30 at 58.
[97] Article 1(4) of the 2010 Rules (as amended) reads: "*For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency"), subject to article 1 of the Rules on Transparency*."

- The Transparency Rules are applicable for investor-State arbitrations in which the UNCITRAL Arbitration Rules is made applicable pursuant to a bilateral or a multilateral treaty containing provisions on protection of investors, unless otherwise agreed by the Parties to the treaty.
- Foot note 1 of the Transparency Rules defines "treaty" comprehensively in the following manner:

"*[A]ny bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty.*"

The first part of the definition states the meaning of a treaty while the second part provides an inclusive list of consensual instruments that would be within the purview of "treaty".

- "Parties to the treaty" is defined in foot note 2 of the Transparency Rules as not only including as State but also a regional economic integration organisation which is a party to the treaty.
- The Transparency Rules are applicable to such treaties concluded on or after April 1, 2014, unless the parties to an arbitration agree to make it applicable or the parties to such a treaty agree to apply the Transparency Rules to arbitrations that might be invoked under that treaty.[98]
- If the Transparency Rules are applicable, the parties to the arbitration cannot derogate from the applicability by agreement or by other means, unless the treaty itself permits such derogation.[99]
- The Transparency Rules permit the arbitral tribunal to adapt a particular provision of the Transparency Rules to suit specific circumstances if necessitated from a practical perspective so long as such adaptation is in consonance with the aims of the Transparency Rules.[100]

[98] Model Law, *supra* note 6,Art. 1(1), 1(2).
[99] Model Law, *supra* note 6, Art. 1(3)(a).
[100] Model Law, *supra* note 6, Art. 1(3)(b).

- Wherever the Transparency Rules permit the arbitral tribunal to exercise discretion, such exercise shall take into account public interest and the interest of the disputing parties in fairly and efficiently resolving the dispute.[101]
- The Transparency Rules would not affect an already existing authority of the tribunal under the UNCITRAL Arbitration Rules to conduct the arbitration in a transparent manner.
- In case of conflict between the Transparency Rules and the applicable arbitral rules, including the UNCITRAL Arbitration Rules, the former shall prevail while in case of conflict between the Transparency Rules and the treaty, the treaty provisions shall prevail.[102] In case of conflict between the Transparency Rules and the mandatory provision of the law applicable to the arbitration, the latter shall prevail.[103]
- The said Rules provide for a repository of information published under the Transparency Rules. Article 8 of the Transparency Rules state that the Secretary-General of the United Nations or an institution named by the UNCITRAL would be the repository.[104]
- The Transparency Rules provide that the repository shall make the following information available to public[105]:
    - Notice of arbitration and response
    - Pleadings and other written submissions
    - List of exhibits to pleadings and submissions
    - Written submissions by non-disputing parties to the treaty and by third persons
    - Hearing transcripts wherever available.
    - Orders, decisions and awards.
    - Expert reports and witness statements, on request to the arbitral tribunal.

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[101] Model Law, *supra* note 6, Art. 1(4).
[102] Model Law, *supra* note 6, Art. 1(7).
[103] Model Law, *supra* note 6, Art. 1(8).
[104] Model Law, *supra* note 6, Art. 8.
[105] Model Law, *supra* note 6, Art. 3.

- The Claimant and the Respondent are obligated to provide a copy of the notice to the arbitration. Transmitting the other documents mentioned above is the obligation of the tribunal.[106]
- The tribunal is empowered under the Transparency Rules to permit written submissions by third parties after consultation with the disputing parties. In determining whether to permit such submissions, the tribunal shall take into account the relevant factors, which include but are not limited to the following[107]:
- Whether the third party has a significant interest in the arbitration proceedings.
- The extent to which such submission shall assist the tribunal in determining the issue by providing a perspective, an insight or the knowledge that is different from that of the disputing parties.
- The tribunal is also empowered to allow or invite third party submissions on issues relating to the interpretation of the Treaty.[108]
- The hearings of the tribunal shall be open to public and the tribunal shall make logistical arrangements to facilitate public access, unless public hearing is not feasible.[109] Where there is a need to protect confidential information or the integrity of the arbitral process, the tribunal shall hold that part of the hearing in private.[110]
- Article 7(2) defines Confidential or Protected Information. The expression includes within its scope confidential business information, information protected under the treaty from being made public, information protected under the law of the respondent State from being made public, and information whose disclosure would impede law enforcement.[111] Article 7(1) exempts disclosure of such Confidential or Protected Information. The arbitral shall

[106] Model Law, *supra* note 6, Art. 2.
[107] Model Law, *supra* note 6, Art. 4(3).
[108] Model Law, *supra* note 6, Art. 5(1).
[109] Model Law, *supra* note 6, Art. 6(1) and (3).
[110] Model Law, *supra* note 6, Art. 6(2).
[111] Model Law, *supra* note 6, Art. 7(2) (defines "Confidential or Protected Information").

decide whether information is confidential or not after consulting with the parties.[112]

- The tribunal shall consult with the disputing parties and make arrangements, such as redaction of information from a document, to prevent disclosure of confidential information.[113]
- In case the tribunal determines that information contained in a document should be made available to the public, a party to the arbitration or a third party participating in the proceedings would have the freedom to withdraw all or part of the document containing such information from the record of the proceedings.[114]
- In case disclosure of certain information would jeopardise the integrity of the arbitral process, such information shall not be made to the public.[115] The tribunal, in such cases, could even take appropriate measures to delay or restrain the publication of information after consultation with the parties.[116]

IV. Conclusion

The 2010 Rules do not contain the more innovative provisions such as those relating to emergency arbitrators, etc. which are found in the SIAC Rules, 2010 and the ICC Rules, 2012.[117] These innovations do not find place in the 2010 Rules for several reasons: one, it was decided that the revised Rules should not contain "unnecessary amendments" altering non-controversial practices under the Rules which were in vogue for a long time[118]; two, unlike the Rules of arbitral institutions, UNCITRAL Arbitration Rules did not have the comfort of having an arbitral institution to correct a problematic

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[112] Model Law, *supra* note 6, Art. 7(3).
[113] Model Law, *supra* note 6, Art. 7(3).
[114] Model Law, *supra* note 6, Art. 7(4).
[115] Model Law, *supra* note 6, Art. 7(6).
[116] Model Law, *supra* note 6, Art. 7(7).
[117] *See,* Art. 26 read with Schedule I of the SIAC Rules, 2010 and Art. 29 read with Appendix V of the ICC Arbitration Rules 2012.
[118] *See,* James Castello, *Plusça change, plus c'est la même chose: Eight Revisions not Adopted in the 2010 UNCITRAL Rules*, 28 ASA BULL. 855, 867 (2010) (hereinafter "Castello") (arguing that "the rejection of certain [suggested] revisions demonstrates that delegates [of the Working Group] approached each proposal with a critical eye. They declined to embrace change just for the sake of "modernization" and, instead, sought to examine whether the concrete effect of each proposal would benefit users and improve the arbitral process.")

provision[119]; three, it was felt that since one of the main advantages of the Rules was its capability of being applied in different kinds of arbitrations such as commercial arbitrations, arbitrations between State and State, arbitrations between Individual and State, etc., changes specific to certain kinds of arbitration should not be made[120]; four, it was decided that the concepts and terminologies used in the revised Rules should be in harmony with the Model Law and other instruments of the UNCITRAL. Although the UNCITRAL has been cautious in revising its rules[121], the international arbitration community has welcomed the 2010 Rules with open hands. Several arbitral institutions have based/ revised their arbitration rules based on the 2010 Rules.[122] Several arbitral institutions have agreed to act as appointing authority under the said Rules.[123] This, in itself, is indicative of the success of the UNCITRAL Arbitration Rules 2010. By adopting the Transparency Rules, the 2010 Rules do not only make a strong case for popularity but also for credibility.

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[119] *Id.* At 868.

[120] A/CN.9/614, *supra* note 26 at 16- 18.

[121] *See*, Castello, *supra* note 118 at. 855; *See also.*, Badrinath Srinivasan, *UNCITRAL Arbitration Rules 2010: A Review*, 2 Christ U. L. J. 117-152, 152 (2013).

[122] Several institutions have adopted or modelled their dispute resolution rules on the 2010 Rules. *E.g.* the Arbitration Rules of the Cairo Regional Center for International Commercial Arbitration, *available at* http://www.crcica.org.eg/arbitration_rules.html (last visited January 7, 2013); CEAC Hamburg Arbitration Rules, http://www.ceac-arbitration.com/index.php?id=19 (last visited January 7, 2013); Rules for Arbitration of the Kuala Lumpur Regional Centre for Arbitration, *available at* http://www.rcakl.org.my/scripts/view-anchor.asp?cat=10#15 (last visited January 7, 2013); the P.R.I.M.E. Finance Arbitration Rules, *available at* http://www.primefinancedisputes.org/index.php/arbitration.html (last visited January 7, 2013); Swiss Rules of International Arbitration, *available at* https://www.swissarbitration.org/sa/download/SRIA_english_2012.pdf (last visited January 7, 2013); the Permanent Court of Arbitration Arbitration Rules 2012, *available at* http://www.pca-cpa.org/showfile.asp?fil_id=2054 (last visited January 7, 2013).

[123] Examples of such institutions are the Permanent Court of Arbitration, Singapore International Arbitration Centre, and Arbitration Institute of the Stockholm Chamber of Commerce.

DEFINING THE CONTOURS OF A COMMERCIAL ARBITRAL TRIBUNAL: CAN ICSID DECISIONS CONFER AN INHERENT POWER ON THE TRIBUNAL TO REGULATE APPOINTMENT OF COUNSELS?

Ridhi Kabra[*]

Abstract

International arbitration dwells in an ethical no-man's land. There exists no supra-national norm of sufficient clarity that allows arbitrators to regulate the behaviour of a counsel whose participation is detrimental to the fair adjudication of the dispute. In such circumstances, if a party appoints a counsel much after the tribunal has been formed, such that the independence and impartiality of the tribunal is put to test, important questions about the scope of inherent powers of the tribunal are raised. Two ICSID decisions have sought to address this problem, by advocating the existence of an inherent power, exercisable under certain circumstances to terminate the appointment of such a counsel. This paper attempts to expand the use of such a power in the field of international commercial arbitration, in the absence of any codification of law on the issue. The fundamental assumption of this paper is that this power is to be exercised only in situations where the tribunal has been formed and a party has exercised mala fides in appointing a counsel post such formation. It proposes the adoption of a middle path between the two ICSID decisions in order to ensure legitimacy of the arbitral process.

I. Introduction

Consider a situation where two parties agree to settle their disputes by resorting to arbitration, and mutually appoint an arbitrator to preside over the tribunal. However, one party notifies the other of the appointment of a counsel, who has the potential of raising justifiable doubts as to the impartiality and independence of the presiding arbitrator, on the day of the formation of the tribunal, much after such mutual consent to the arbitrator's appointment has been given. Also, consider that the arbitrator is a renowned expert in the field of commercial arbitration and international trade law. In order to make this situation a little more complex, assume that the applicable rules of law do not regulate such an appointment by the party; instead, they confer on the party a fundamental right to choose its representation and at the same time, have detailed

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procedural rules to challenge the appointment and continuation of an arbitrator. Given these circumstances, can a tribunal constituted as a result of the agreement between the parties adjudicate on the cancellation of the counsel's appointment?

Ethical obligations of a counsel in international arbitration have always opened a Pandora's Box. This is primarily because international arbitration offers legal advisers the opportunity to practice law outside of their jurisdiction, its regulations, *et al.*[1]However, this gives rise to conflict situations which cannot be addressed because of the lack of supranational norms to govern them. Moreover, recourse to national courts remains unavailable, given the minimal hold courts have over international commercial arbitration.[2] Thus, there exists an evident void in international arbitration when it comes to regulation of such behaviour. This glaring void in the international regime becomes problematic in situations where the tribunal has been constituted and sufficient time and money has been spent in its formation.

This paper seeks to resolve the aforementioned situation by relying on the *inherent power doctrine*to remove the counsel, as laid down in two recent ICSID decisions. Relying on these decisions, the paper first addresses the paucity in the current codified regime. It then discusses the two starkly different approaches that ICSID tribunals have adopted in the backdrop of the apparent conflict between one's right to representation and the maintenance of the integrity of the tribunal. Part IV of the paper examines the feasibility of adopting ICSID's approach in international commercial arbitration, putting forth arguments in its favour. The conclusion then discusses the need for a codified regime, given the proposed applicability of these decisions in the field of commercial arbitration.

II. Insufficiency of the present laws regulating lawyer's ethics in international arbitration

A common attribute of numerous legal professions, at least in their initial years, is the absence of formal rules to regulate the behaviour of counsels, and this trend has been

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[1] Sam McMullan, *Holding Counsel to Account in International Arbitration,* 24(2) L.J.I.L. 491 (2011).

[2]CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION119 (Franco Ferrari and Stefan Kroll, eds., 2011) [Hereinafter "Ferrari and Kroll"]; Ashraf El Motei, *Local Court Intervention in International Arbitration*, http://motei.com/news-insights-pdf/local-court-involvement-in-international-arbitration.pdf (last visited March 2013) .

witnessed with the international legal profession as well.[3] Interestingly, while rules have been formalized to govern the behaviour of counsels under international arbitration, their glaring insufficiency has resulted in a plethora of jurisdictional issues for the arbitrators;[4] including conflicts raised by a counsel with the arbitrator as a result of his/her appointment. The International Bar Association Principles on Conduct for the Legal Profession is the primary document that assists arbitrators in regulating counsel behaviour.[5]However, even after numerous revisions, its latest edition in 2011 still lacks the basic regulation explicitly requiring counsels to uphold the integrity of the arbitral process by rejecting cases that raise issues of impartiality of the arbitrator.

While one may argue that it is implied in the obligation on the counsel to maintain *"the highest standards of honesty, integrity and fairness towards the…court"*, [6]the same is qualified by its recognition of the applicability of differing standards by the counsel towards his/her client and the concerned court.[7]This difference in the expectation of integrity towards the counsel and the court is based on the logic that the counsel has a duty to present the party's case with the degree of dependence and partiality that his/her role necessitates, which means that the integrity of the proceedings can still be ensured so long as the dependence does not violate the applicable rules governing ethics and professional conduct.[8]This essentially creates a situation where national rules are inapplicable by virtue of international arbitration being designed in a manner that the counsels are generally not licensed in the seat of the arbitration, making the applicability of the concerned counsel's

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[3]Detlev F. Vagts, *The International Legal Profession: A Need for More Governance*, 90(2) AM. J. INT'L L. 250 (1996).

[4]Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration* http://www.ssrn.com/abstract= 1559012(last visited March 2012).

[5] IBA International Principles on Conduct for the Legal Profession (May 28, 2011), https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&sqi=2&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3D1730FC33-6D70-4469-9B9D-8A12C319468C&ei=t0NDUtfpGtDQrAff6oAo&usg=AFQjCNEP6k5NFU2QmzK_40q-dzTxXrnkeQ&sig2=OJeL6FE_yBT-yI7qQw2AUw&bvm=bv.53217764,d.bmk [Hereinafter "IBA Guidelines on Counsel's Ethics"].

[6]*Id.*principle 2.

[7] *Id.* principle 2.

[8]Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of a Counsel, ¶19, (Jan. 14, 2010), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1370_En&caseId=C72 [Hereinafter Rompetrol v. Romania]

national codes and the code of the seat murky.[9] Therefore, reliance has to be placed on supra-national guidelines such as the IBA Guidelines on Counsel's Ethics, which provides a scope to establish that a counsel's actions are within the parameters specified in the IBA Guidelines and are therefore conducted with *honesty, integrity and fairness towards the Court*.

Moreover, reliance on domestic codes of ethics of the seat of arbitration and the counsel's national codes may not be the best solution to the problem. As Jan Paulsson, in his article describes it, there might arise a situation where the domestic code of the counsel's State may conflict with the code of the seat;[10] in such situations, reconciling the two may not be within the jurisdiction of the arbitral tribunal, since interpretation of codes implicates issues of public policy. In addition, institutional rules and arbitration statutes of most nations cannot be alluded to, since none of these regimes confer an explicit power on the tribunal to regulate attorney appointments.

Therefore, it becomes evident that the tribunal cannot rely on any explicit power, either in the designated arbitration rules and the law of the *situs* or international principles mandating ethical behaviour by counsels. In such a case, the tribunal has no option but to confer upon itself extraordinary powers, as was adopted in two recent ICSID decisions, in order to uphold the legitimacy of the proceedings before it. The ICSID decisions are discussed in Segment IV.

III. The Conflict- party's right to legal representation vis-à-vis the right to be heard by an independent and impartial tribunal

Before we indulge in a discussion on the ICSID Cases, it is important to keep in mind the conflict between a party's right to representation and the right to be heard by an independent tribunal, which is the *only* argument against the acceptance of an inherent power.

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[9]Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration,* 23 Mich. J. Int'l. L. 341, 356 (2002). [Hereinafter "Rogers"].
[10]Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration,* 3 Am. Rev. Int'l Arb. 214 (1992).

The right to legal representation finds explicit acknowledgment in the arbitration rules of most institutions[11] and has also been recognized by judicial decisions[12].Even though some jurisdictions do place a limitation on this right in the form of a bar on the unauthorized practice of law,[13] the peculiar nature of international arbitration, as discussed above, prevents the exercise of these rules in regulating counsel behaviour. Therefore, it presents a major roadblock in conferring any power to the tribunal to regulate this right.

On the other hand, parties enjoy the right to be judged by an independent and impartial tribunal, a principle that has been given universal recognition by all arbitral institutions.[14] Arbitral impartiality and independence has been opined to constitute the moral or ethical aspect of arbitral fairness and a party is generally not permitted to contract out of this

[11]LCIAArbitration Rules, Rule 18.1, http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx; UNCITRAL Arbitration Rules, Art. 5, http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf; CIETAC Rules, Article 20, http://cn.cietac.org/rules/rules.pdf [hereinafter "CIETAC"]; Swiss Rules of Arbitration, Art. 3, https://www.swissarbitration.org/sa/download/SRIA_english_2012.pdf; ICC Rules, Art. 21(4), https://www.swissarbitration.org/sa/download/SRIA_english_2012.pdf.

[12]Partial Award in ICC Case8879 (unpublished)*;* Anne Pasque v. Gerald Council, 186 N.J. 127 (2006) (USA); Whaling and Seals Claims against Russia, on account of arrest and seizure of four American vessels Cape Horn Pigeon', 'James Hamilton Lewis', 'C. H. White' and 'Kate and Anna', IX 1960 RIAA 51-78.

[13]Mich. Comp. Laws §600.916 (1961), http://www.legislature.mi.gov/(S(5aldyj45yor3bq554wuynh45))/mileg.aspx?page=GetObject&objectname=mcl600-916; Singapore Legal Professions Act, Section 29 and 30, http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A%225dd4c39e-610a-475e-ba7b-260ace00872a%22%20Status%3Apublished%20Depth%3A0;rec=0; Williamson v. John D. Quinn Construction Co., 537 F.Supp. 613 (S.D.N.Y 1982) (USA); Lawler, Matusky & Skeller v. Attorney General of Barbados, Civ. Case No. 320 0f 1981 (Barbados).

[14]Jeff Waincymer, *Reconciling Conflicting Rights in International Arbitration: The Right to Choice of Counsel and the Right to an Independent and Impartial Tribunal*, 26 (4) Arb. Int'l 597 (2010) [Hereinafter "*Waincymer*"].

fundamental principle.[15] Therefore, a threat to this right, raised by the exercise of the right of representation, raises uncomfortable questions of reconciliation.

Over and above these rights, parties have a fundamental right of due process and fair hearing which involves the reasonable opportunity to present one's case.[16] This makes the issue more complex since both the continuance and restriction of a counsel on a party's legal team may adversely affect the exercise of this right. On the one hand, if a party is not permitted to continue with a counsel, it can argue that its right to be heard completely has been restricted; and on the other, the continuance of a counsel which jeopardizes the impartiality of the tribunal, may also be argued to be a violation of this right.

These principles together constitute the *'Magna Carta'* of international commercial arbitration making the resolution of a conflict between them immensely controversial.[17]

IV. Addressing The Conflict: Birth of the *inherent power*

Two recent decisions of the ICSID have provided an interesting solution to fill the lacuna that currently exists in international arbitration, keeping in mind the conflict discussed above, by proposing the existence of an inherent power in the tribunal to regulate such appointments. The holdings in these two cases are discussed in the following paragraphs.

The first case to come up before an ICSID tribunal is *Hrvatska Elektroprivreda d.d. v. The Republic of Slovenia.*[18] The dispute in this case revolved around the appointment of Mr. David Mildon on the Respondent's legal team. This appointment raised doubts over the

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[15] Horacio Grigera Naón, *Factors to Consider in Choosing an Efficient Arbitrator*, 9 ICCA Congress Series 289 (1999); SAM LUTTRELL, BIAS IN INTERNATIONAL COMMERCIAL ARBITRATION: THE NEED FOR A 'REAL DANGER' TEST 10 (2009).

[16] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(b), June 10, 1958, 21 U.S.T. 2517; J.D.M. LEW, L.A. MISTELIS & S.M. KROLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 95 (2003) [Hereinafter "Lew/Mistelis/Kroll"].

[17] *Id.,* at 95.

[18] ICSID Case No. ARB/05/24, Order Concerning the Participation of a Counsel (May 06, 2008), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC950_En&caseId=C69. [Hereinafter 'Hrvatska v. Slovenia']

independence and impartiality of the president of the Tribunal, Mr Williams, since he was a door tenant as Essex Court Chambers, of which the Respondent's counsel was also a member. Claimant alleged *mala fides* also on the grounds that the disclosure of this appointment was made at the eleventh hour based on the IBA Guidelines on Conflict of Interest, the provisions of which require prompt disclosure[19]. Given these circumstances, Claimant sought to challenge David Mildon's appointment.

In deciding the matter, reliance was placed on numerous provisions of the ICSID Convention. While the tribunal accepted that the freedom of representation was a cardinal rule and the Convention contained no explicit provision to place fetters on this rule, it stated that such fundamental principles must give way to *"overriding exceptions"* such as that of the *immutability of properly constituted tribunals*, which was enshrined in Article 56(1) of ICSID Convention.[20] Based on this exception, the Tribunal concluded that the freedom of representation remained absolute only if the legal team was amended prior to a tribunal's constitution; however, any subsequent amendment jeopardizing its legitimacy was subject to scrutiny by a tribunal. It is this need to preserve the integrity of the proceedings that drove the Tribunal to declare that it had the *inherent power* to take measures such as removal of a party's counsel.[21]It also stated that international courts and tribunals in general had broad *"inherent powers to deal with issues necessary for the conduct of matters falling within its jurisdiction"*. Relying on these considerations, the Tribunal declared that David Mildon's participation was improper; however it was quick to maintain that there is *"no hard and fast rule preventing barristers from the same Chambers from acting as arbitrators and counsel in the same case"*. It is evident then that the decision of the Tribunal was heavily influenced by Respondent's late disclosure of the participation of David Mildon on its legal team.

This case was followed by the decision in *Rompetrol Group N.V. v. Romania*[22]which undertook a more nuanced understanding of the issue and sought to curb the scope of the decision in *Hrvatska v. Slovenia*. This case dealt with the appointment of Mr Barton

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[19] IBA Guidelines on Conflict of Interest of Arbitrators, (May 22, 2004) General Standards 3 and 7.[hereinafter "IBA on Conflict of Interest"] .
[20] Hrvatska v. Slovenia, *supra* note 18, ¶¶24, 25.
[21] *Id.* ¶33.
[22] Rompetrol v. Romania, *supra* note 8.

Legum and his colleagues on claimant's legal team, a fact that raised doubts over the impartiality and independence of a member of the Tribunal, since both the arbitrator and the counsel were members of the same law firm. On a challenge to Mr. Barton's appointment, the Tribunal concluded that if an inherent power be attributed to the Tribunal, it would only be exercisable "*in extraordinary circumstances, these being circumstances which genuinely touch on the integrity of the arbitral process as assessed by the Tribunal itself*".[23] In doing so, it sought to distinguish its decision in *Hrvatska*by granting a party's right to legal representation a fundamental status, as a result of which only an *overriding and undeniable need* to protect the integrity of the arbitral process could justify the invocation of such a power.[24]

The Tribunal also granted recognition to the fact that international arbitration is a closed, tight-knit community, where encounters with acquaintances are not a rarity.[25]Therefore, it buttressed its argument on the extraordinary nature of the inherent power by holding that a mere subjective claim of an association between a counsel and an arbitrator is not sufficient unless it could be based on an objective and dispassionate assessment of the relevant circumstances by a fair-minded and informed observer.

Moreover, it placed emphasis on the absence of a specific provision regulating such appointments, in coming to its conclusion. A fundamental distinction was drawn between the nature of a counsel's appointment and the appointment of an arbitrator- while the arbitrator is required to exercise complete impartiality, a counsel is allowed to partial to his client, to the extent that it does not violate the applicable ethical codes.

Finally, it sought to reconcile the apparent contradiction between a party's right to fair trial by ensuring the independence and impartiality of the tribunal, and its right to appoint a representative of its choice, by holding that neither takes precedence over the other and it's a matter to be decided based on the circumstances of each case. It added as

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[23] Rompetrol v. Romania, *supra* note 8, ¶15.
[24] Rompetrol v. Romania, *supra* note 8*,* ¶16.
[25] Catherine A. Rogers, *The Vocation of an International Arbitrator,* 20 AM. U. INT'L L. REV. 957, 977 (2005); KATHERINE LYNCH, THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION 95 (2003).

a caution, though, that the removal of a counsel must not be sought as a *handy alternative* to a challenge against the tribunal itself.[26]

A third ICSID proceeding dealt with the issue of conflict of interest, though the facts were different. The proceeding involved a challenge to the Claimant's counsel on the ground that he had represented the Respondent in a related matter five years ago. The Committee adjudicating on the issue recognized that it had the duty to treat parties fairly and equally and to ensure that a counsel upholds the general principles on conflict of interests.[27] However, the applicability of this decision to decide on the strength of the *Hrvatska* and the *Rompetrol* decisions seems suspect since the facts are clearly distinguishable. Moreover, *Rompetrol* clearly relied on the fact of existence of an alternative remedy to challenge the appointment of the arbitrator itself, in reaching its conclusion. The fact, that this decision did not involve such a conflict between the arbitrator and the counsel could also take away from the materiality of this decision in concluding the debate.

V. The Solution - Justifications to apply the ICSID decisions in international commercial arbitration

This section justifies the applicability of these decisions to regulate counsel behaviour in international commercial arbitration. It begins with a discussion on the best way forward given the vast difference in the line of reasoning in the ICSID Cases. It then argues for expanding the scope of these decisions to make them applicable to commercial disputes. This section concludes with a discussion on the viability of conferring such a power on the tribunal.

A. The better approach - Hrvatska or Rompetrol?

The Tribunal in *Hrvatska* conferred upon itself a blanket inherent power to regulate a counsel's appointment. In arriving at such a wide power, it was driven by considerations of late disclosure by the party.[28] Over and above this, overarching considerations of costs

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[26] Rompetrol v. Romania, *supra* note 8, ¶21.

[27] Doak Bishop. *Ethics in International Arbitration*, http:// www.arbitration-icca.org/media/0/12763302233510/icca_rio_keynotespeech.pdf (last visited March 2012). [Hereinafter "Bishop"]

[28] *Id.*

and delay in continuing the proceedings had a huge bearing on the outcome in that case, since the party in question altered its legal team after the tribunal had been formed.[29]

In stark contrast to this approach, the Tribunal in *Rompetrol* was hesitant to confer such a power upon itself unless the existence of compelling circumstances could be established. In very explicit terms, it rejected the binding value of the decision in *Hrvatska*, to hold that there did not exist an inherent conflict between the right to legal representation and the impartiality of the tribunal. Moreover, it placed immense faith on the qualifications an arbitrator possesses, by holding that it is not wise to question the qualification of an arbitrator one has himself selected on the mere suspicion that the person presenting those arguments is likely to create a bias in his mind. Thus, in its attempt to neutralize the impact of the decision in *Hrvatska* and to prevent parties from misusing this inherent power, the Tribunal restricted the exercise of inherent powers to extraordinary circumstances.

On a first reading, the *Rompetrol* decision seems the better road ahead. However, we must keep in mind that our hypothetical counsel has been appointed after the formation of the tribunal; moreover, the presiding arbitrator objectively has immense standing in the field of international arbitration and has been appointed by mutual approval. Therefore, keeping in mind this factual background, the tribunal in *Hrvatska* took into account an important consideration, which cannot be discounted in choosing the scope of this power.

First, the Tribunal was affected by the late disclosure of the counsel's appointment. This obligation to disclose potentially conflicting relations is one that is cast upon the arbitrators under the widely accepted International Bar Association Guidelines on Conflict of Interest.[30]Violation of this duty has been considered a disqualifying factor in itself.[31] However, this does not mean that all cases of non-disclosure should be

[29] Hrvatska v. Slovenia, *supra* note 18, ¶16.
[30] IBA Guidelines on Conflict of Interest of Arbitrators, *supra* note 19, General Standard 3; Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968).

[31] Olsonv. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157 (8th Cir. 1995).

considered a relevant circumstance.[32] But, a fact such as the one presented here, where the arbitrator was made aware of the appointment by the opposing party and still refused to submit a new declaration disclosing his potential interest, could be a compounding factor in favour of conferring such a power. In addition, even parties have been placed with an obligation to inform the arbitrator and the opposing party of relations that may create justifiable doubts.[33] This obligation involves an exercise of due diligence since the party is required to perform a reasonable search of publicly available information.[34] Therefore, the potential defence that knowledge of the relation was not available to the party stands defeated by virtue of this obligation.

Second, the Tribunal placed fetters on the party's right to representation since such right was exercised after the formation of the tribunal. While the concerns raised in *Rompetrol* hold great relevance, one cannot overlook the fact that once the Tribunal has been constituted, replacement of a mutually appointed arbitrator would lead to inefficient outcomes in terms of delay and additional expenses.[35] In such cases, recourse to lengthy proceedings involving challenges to the impartiality and independence of the tribunal may not be the most practicable solution for business houses looking to resolve their dispute quickly and efficiently. Therefore, while *Rompetrol's* hesitance in giving the inherent power absolute legitimacy might be completely justified when such appointment is made prior to the constitution of the tribunal; the same cannot be applied to a situation where such a step has been undertaken by a party after the formation of the tribunal.

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[32]Tidewater, Inc. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator (Dec. 23, 2010). https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2031_En&caseId=C96; GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 343 (3rd ed. 2010) [Hereinafter "Born"]; ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 560 (4th ed. 2005) [Hereinafter "Redfern &' Hunter"] .

[33]IBA Guidelines on Conflict of Interest of Arbitrators, supra note 19, General Standard 7.

[34]IBA Guidelines on Conflict of Interest of Arbitrators, *supra* note 19, General Standard 7(b).

[35]Waincymer, *supra* note 14, at 611.

Therefore, if we take into consideration the concerns raised by the Tribunal in *Hrvatska*, it is proposed that a middle path be taken. While a general inherent power in all situations may not be advisable, if there exists a situation where a delayed disclosure is made by the parties and the arbitrator himself has chosen not to amend his disclosure, the tribunal should refrain from indulging into an assessment of the propinquity of the relationship between the counsel and the arbitrator, to decide whether it has jurisdiction. Instead, the fact of delayed disclosure, formation of the tribunal and the administrative hurdles involved in removing the arbitrator, must in itself create a *prima facie* situation extraordinary to invoke this power.

B. Applying ICSID Decisions to International Commercial Arbitration

The first challenge that the applicability of these decisions faces is the absence of certain provisions in institutional rules of all bodies except the ICSID. One of the primary reasons why *Hrvatska* decided in favour of such an inherent power was the existence of the principle of immutability of properly constituted tribunals in the ICSID Convention.[36]Moreover, the Convention allows tribunals to decide *"any question of procedure"*.[37] Therefore, these provisions allowed the Tribunal to rule in favour of such a power. Over and above this, the ICSID is a public international body implicating issues of public interest, a fact that was acknowledged in the decision itself.[38] A combined effect of the two may create a *prima facie* case for rejecting the principle of these decisions to resolution of commercial disputes, since the basis of such resolution is party autonomy[39] and none of the arbitration rules grant such wide powers to a tribunal.

While one cannot deny that the ICSID Convention confers certain special powers on a tribunal which are absent in commercial arbitration rules, one can also not deny that the decision in *Rompetrol* was given without relying on these provisions. The tribunal, in that

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[36] Convention on the Settlement of Investment Disputes between States and Nationals of other States art. 56(1) March 18, 1965, 17 U.S.T. 1270. [Hereinafter "ICSID Convention"]

[37]*Id.,* Article 44.

[38]Hrvatska v. Slovenia, *supra* note 18, ¶33.

[39] UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 19(1); Redfern & Hunter, *supra* note 32, at 315; Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure,* http://www.arbitration-icca.org/media/0/12223895489410/limits_to_party_autonomy_in_international_commercial_arbitration.pdf,. (last visited March 2013).

case, was clear about the existence of such a power if exceptional circumstances could be established. However, one can still contest that this does not pose a valid counter to the issue of the tribunal being governed by considerations of public international law.

Therefore, one may rely on Article 19 of the UNCITRAL Model Law on International Commercial Arbitration. The Article grants broad discretionary powers to a tribunal to decide on procedural issues, if the parties do not reach an agreement and therefore can be assumed to be similar to Article 44 of the ICSID Convention.[40] However, in his article on the issue, Professor Jeff Waincymer poses some interesting problems in tracing the source of the power from this provision. He argues that *first;* parties may contract out of this provision, thereby making it impossible to use the provision to source the power. *Secondly*, he opines that Article 18, which grants the party the right to present its case, is a fundamental principle that would gain priority over Article 19, which merely grants discretion to a tribunal to decide on procedural issues.[41] However, one must remember that Article 19 of the Model Law is also a fundamental principle forming part of the same *"Magna Carta"* that was referred to in previous sections.[42] Moreover, provisions recognizing another fundamental right, i.e., the impartiality of the tribunal enjoy the same status as that of Article 18.[43] Therefore, both concerns raised by Professor Waincymer do not hold ground and it is submitted that priority would be accorded to one right over the other based on the circumstances of the case, as was proposed in the *Rompetrol* decision.

Even assuming that one cannot rely on Article 19 of the UNCITRAL Model Law to source such an inherent power, commercial arbitration tribunals have held that such a power falls squarely within the scope of an arbitration agreement between parties, since it involves a procedural issue directly affecting the integrity of the proceedings. In ICC Case 10776, the tribunal was of the opinion that that an arbitral tribunal has the duty to address such matters which directly affect the proper conduct of the arbitral proceedings

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[40]*Waincymer*, s*upra* note 14, at 613.
[41]*Id.*.
[42]Born, *supra* note 32, at 1278; Thomas R. Klotzel, *The Right to be Heard and the Right to Hear: Cultural Dimensions of International Commerial Arbitration*, 72 Arbitration 27 (2006).
[43]HOWARD M. HOLTZMANN AND JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 390 (1989).

and are therefore inherent in nature.[44]This position has also been accepted by Courts in national jurisdictions. *Caanan Partners* is one such example. The Connecticut Supreme Court, in that dispute, laid down the *positive assurance test*, to hold that unless there is positive assurance that the arbitration clause cannot be interpreted to cover the dispute in question, the jurisdiction of the tribunal to adjudicate on the issue cannot be denied.[45]

Moreover, inherent powers have been invoked frequently and across multiple issues by international tribunals. The doctrine has been applied to grant interim relief when the applicable arbitration rules do not confer any such explicit power;[46] such a power has allowed tribunals to reopen cases outside the procedural issues, in cases of fraud,[47] to suspend proceedings and to deny hearing to vexatious claims[48]. Additionally, Courts have been unequivocal in declaring that the recognition of an inherent power is not dependant on references in procedural rules.[49]Therefore, the extension of such a power to authorize the termination of an attorney's appointment does not seem a remedy, not within the bounds of the arbitral tribunals.

C. Is the Tribunal the best authority to settle the dispute

Historically, it has been argued that arbitrability of such a dispute does not fall within the jurisdiction of a tribunal, since it implicates issues of transnational public policy.[50] Transnational public policy involves those violations which are contrary to the

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[44]ICC Court of Arbitration Case 10776 of 2000 (unpublished); Horacio Grigera Naón, *Choice of Law Problems in International Commercial Arbitration*, 289 Recueil Des Cours 9 (2001)

[45]*Canaan Venture Partners, L.P. v. Salzman*, 1996 WL 69314 (4th Cir. 1992).

[46]Ferrariand Kroll, *supra* note 2, at 412.

[47]LOUKAS A. MISTELIS, CONCISE INTERNATIONALARBITRATION 223 (2009).

[48]Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76(1) B.Y.I.L. 195 (2005).

[49]Prosecutor v. Beqa Bajaj, Case No. IT-03-66-T-R77, Judgment on Contempt Allegations, May 27, 2005 (ICTY).

[50]Bidermann Industries Licensing, Inc. v. Avmar N.V., N.Y.L.J., October 26, 1990 (N.Y. Supreme Court) [hereinafter "Bidermann];Munich Reinsurance America, Inc. v. ACE Property & Casualty Insurance Co., 2007 WL 1056707 (S.D.N.Y. April 10, 2007); Born, *supra* note 32 at 1278.

fundamental moral or legal principles recognized in all civilized countries.[51] The regulation of a counsel's appointment requires application of substantive laws regulating legal profession and implicates fundamental interests and public policy, matters which are within the judicial powers of the Courts and not an arbitral tribunal.[52] Moreover, it involves a departure from the fundamental right of legal representation conferred on parties.[53]

However, as has been argued above, this historical position has undergone a sea change, and it is now an accepted position that such a dispute falls within the scope of the arbitration agreement and unless there is a positive restriction on the exercise of this power, arbitrability of the dispute cannot be disputed. In fact, courts in USA which historically maintained that the regulation of counsels is the sole prerogative of the Courts,[54] have itself retracted from that position and have now accepted that this subject is capable of arbitration.[55]

This, however, is not the only concern that needs to be addressed before we declare that this is the best solution available. Due process requires that a person should not be allowed to be a judge in his own cause.[56] However, Courts in various jurisdictions permit a challenge to the judge's impartiality to be made before the judge itself, in order to avoid expenses and unnecessary delays.[57] Institutional rules such as the CIETAC Rules also

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[51]PIETER SANDERS, COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION (1987).

[52]Born, *supra* note 50, at 518; STEVEN C. BENNET, ARBITRATION ESSENTIALS 177 (2002).

[53]ICC Court of Arbitration Case No. 8879 of 1997 (unpublished); UNCITRAL Model Law on International Commercial Arbitration, 1985 art. 18. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html

[54]Bidermann, *supra* note 50; Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Benjamin, 1.A.D.3d 39, 44, 766 N.Y.S.2d 1 (N.Y. App. Div. 2003).

[55]Hibbard Brown & Co. v. ABC Family Trust, 959 F.2d 231, 1992 WL 69314 (4th Cir. 1992).

[56] The principle of *nemo debet esse judex in propria causa* is a fundamental principle in adjudicatory process. B.A. Wortley, *Some Principles Common to Public and Private International Law* 85 Recueil Des Cours316 (1954); Judgment of January 31, 1907, DFT 33 I 143 (Swiss. Federal Tribunal).

[57]*Waincymer*, *supra* note 14, at 620.

allow for delegation of powers to the tribunal, to decide on all procedural issues.[58] In fact, if the tribunal consists of three members and the bias affects only one of the three arbitrators, there exists no threat of the decision being violative of due process and procedural fairness. However, even if such concerns are considered valid, it is always possible to restrict the adjudication of the issue by arbitrators whose relations have not been brought into question.

VI. Conclusion

International arbitration dwells in an ethical no-man's land.[59]Since international arbitration involves a complex interplay of laws, it becomes obvious that unambiguous rules defining the contours of the powers a tribunal enjoys would make for an efficient and convenient adjudicatory process. However, law-making in international law is slow and often not the best recourse available.[60] In such a situation, viable alternatives need to be found, till an effective *lex scripta* is made available.[61] It has been the attempt of this paper to establish that international commercial tribunals enjoy the competence and more importantly, have an obligation to ensure fairness and efficiency in adjudication. While it is not one's case to expand the powers such to make counsel termination a handy alternative to challenges to arbitrators, circumstances which mandate the exercise of such a power, must not be restricted in future by a tribunal, by rejecting the ICSID precedents. If that is done, the day is not far away, where parties will deploy the appointment of counsels with conflicting associations, solely to delay the arbitral process, since the only recourse available would be a lengthy challenge to the appointment of the arbitrator!

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[58]CIETAC, *supra* note 11, Arts. 6.2, 6.3.

[59]Rogers, s*upra* note 9.

[60]Charles G. Fenwick, *Codification of International Law*, 12(2) AMERICAN POLITICAL SCIENCE REVIEW 301 (1918).

[61]Charles N. Brower and Stefan W. Schill, *Regulating Counsel Conduct before International Arbitral Tribunals* in MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 510 (Pieter Bekker, Rudolf Dolzer and Michael Waibel, eds., 2010).

THE CURIOUS CASE OF ARBITRATION OF TRUST DISPUTES

Shradha Rakhecha[*]

Abstract

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

I. Introduction

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

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

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

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

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

The Indian Trusts Act, 1882 defines a Trust as "*an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner".* It is often proposed that a Trust Deed is not a contract. It is an instrument of unilateral transfer of property to the Trustee, coupled with specific terms and conditions, and not a contract in the strict sense of the term.[3]

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[1] (2013) 1 SCC 641.
[2] *Id.*
[3] Commissioner of Income-tax, Kanpur v. Kamla Town Trust, AIR 1996 SC 620.

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

On the other hand, it is also argued that the terms and conditions of a Trust are always discussed and negotiated between the Settlor and the Trustee. There is thus ample evidence of offer and acceptance, the most important attributes of any contract.[7] Moreover, the Trustee also often puts his signature on the Trust Deed, by which he agrees to his fiduciary obligations and to the undertaking to arbitrate any disputes arising under the Trust Deed.[8] Such a contention was also rejected by the Bombay High Court in *IDBI Trusteeship Services Ltd. v. Kiri Industries Ltd.*[9], stating that a Trust Deed is a species of a contract executed between the parties. Sir Arthur Underhill defines a Trust as, "*A Trust is an equitable obligation, binding a person (called the Trustee) to deal with property owned by him (called the Trust property, being distinguished from his private property) for the benefit of persons (called the beneficiaries) of whom he may himself be one, and any of them may enforce the obligation*."[10] Even if the Trustee does not put his signature, an arbitration clause contained in such a Deed

[4] Schoneberger v. Oelze, 96 P.3 d 1078 (Ariz. Ct. App. 2004); Robsham v. Lattuca, 797 N.E.2d 502 (Mass. App. Ct. 2003); In re Estate of Washburn, 581 S.E.2d 148, 152 (N.C. Ct. App. 2003).
[5] Schoneberger v. Oelze 96 P.3 d 1078 (Ariz. Ct. App. 2004).
[6] Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique,* 26 OHIO ST. J. ON DISP. RESOL. 627 (2011) [hereinafter 'Stephen Wills Murphy'].
[7] Bhagwandas Goverdhandas Kedia v. M/S. Girdharilal Parshottamdas, AIR 1966 SC 543.
[8] Lawrence Cohen, Marcus Staff, *The Arbitration of Trust Disputes*, 7 J. INT'L TRUST & CORP. PLANNING, 217 (1999) [hereinafter 'Lawrence Cohen, Marcus Staff'].

[9] Arbitration Petition No.1334 of 2012.
[10] SIR ARTHUR UNDERHILL, DAVID HAYTON**,** UNDERHILL'S LAW RELATING TO TRUSTS AND TRUSTEES (2002).

cannot be said to be invalid. By virtue of both parties being eye-to-eye, the arbitration agreement contained in it need not necessarily be signed by both the parties.[11]

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

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

III. Arbitration Agreement and its requirements

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

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

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

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

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

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

Arbitration agreement.- (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) A document signed by the parties;

(b) An exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) An exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Thus, existence of an arbitration agreement is a *sine qua non* for reference of a dispute to arbitration.[16] It must disclose parties' definite intention to refer disputes in respect of a defined legal relationship for arbitration.[17]Third party to the said arbitration agreement cannot by any stretch of imagination take advantage of the said arbitration clause and get it enforced.[18]A point of some formal importance emphasised by these provisions is that the reference should be by means of a written agreement.[19]Unilateral communication

[16] Maharshi Dayanand University v. Anand Coop L/C Society Ltd., 5 SCC 719 (2007); Wellington Associates Ltd. v. Kirit Mehta, (2000) 4 SCC 272.
[17] Unipack Industries v. Subhash Chand Jain and Ors., (1) Arb.LR 174 (Delhi) (2002).
[18] General Manager, Oriental Fire & General Insurance Co. Ltd. and Anr. v. Mahendra Prasad Gupta, AIR 1983 Pat 190.
[19] Union of India v. Rallia Ram, AIR 1963 SC 1685; Chander Nath Ojha v. Suresh Jhalani, 8 SCC 628 (1999).

cannot be said to be a valid arbitration agreement.[20]The scope of Section 7 was expounded by the Supreme Court in *Jagdish Chander v. Ramesh Chander*[21], where Justice Raveendran set out the chief essentials of an arbitration agreement, as follows.

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

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

    a) Agreement should be in writing.
    b) Parties should have agreed to refer any disputes between them to the decision of a private tribunal.
    c) Private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it.
    d) Parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

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

iv. However, mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. A mere hope that the parties may agree to arbitrate does not sufficiently qualify it as an arbitration agreement. It is merely an agreement to enter into an arbitration agreement in future.

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[20] Food Corporation of India v. Shri S.K. Sasan and Anr., decided on January 3, 2007 by Delhi High Court.
[21] 5 SCC 719 (2007).

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

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

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[22] Jagdish Chander v. Ramesh Chander and Ors., 2007 (2) Arb LR 302 (SC); Unipack Industries v. Subhash Chand Jain and Ors., (1) Arb LR 174 (Delhi) (2002).
[23] Babaji Automotive v. Indian Oil Corpn.Ltd., 1 Arb LR 566, 569 (2006).
[24] JUSTICE S.B. MALIK, COMMENTARY ON THE ARBITRATION AND CONCILIATION ACT (2011); Section 7(2)(b) of Arbitration & Conciliation Act, 1996.
[25] Mikesh Corporation v. Picotee Exports, (1) Raj 182 (Bom) DB (2010).
[26] Owners and Parties Interested in the Vessel MV Baltic Confidence v. State Trading Corporation of India, 7 SCC 473 (2001).
[27] Smita Conductors Ltd. v. Euro Alloys Ltd., 7 SCC 728 (2001).
[28] 14 SCC 240 (2008).
[29] MUSTILL& BOYD**,** *supra* note 11.
[30] AIR 1998 SC 1297.

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

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

IV. Arbitrability of trust disputes

Irrespective of whether a valid arbitration agreement exists or not, it is important that the subject matter of the dispute is arbitrable. Subjects or disputes which are deemed by a particular national law to be incapable of resolution by arbitration or are of such a nature that they cannot be adjudicated in a private forum are deemed to be non-arbitrable. Both international arbitration conventions and national law provide that agreements to arbitrate such non-arbitrable matters need not necessarily be given effect[31] and that arbitral awards concerning such matters need not necessarily recognized.[32] The issue of arbitrability can arise at three stages in arbitration. First, on an application to stay the

[31] D. ROEBUCK & B. DE FUMICHON, ROMAN ARBITRATION 772-778 (2004).
[32] *Id.,* at 2863-2864.

arbitration; second, in the course of arbitral proceedings on the hearing of an objection that the tribunal lacks substantive jurisdiction; and third, on application to challenge award or to oppose enforcement.[33]

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

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

i. Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public fora (courts).
ii. Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the 'excepted matters' excluded from the purview of the arbitration agreement.
iii. Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the arbitral tribunal, or

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33 DAVID ST JOHN SUTTON, JUDITH GILL, MATTHEW GEARING, *supra* note 11, at 15.
34 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 768 (2009) [hereinafter 'BORN'].
35 Haryana Telecom Limited v. Sterlite Industries India Ltd., (5) SCC 688 (1999).
36 DAVID ST JOHN SUTTON, JUDITH GILL, MATTHEW GEARING**,** *supra* note 11, at 28.
37 AIR 2011 SC 2507 [Hereinafter 'Booz Allen'].

whether they do not arise out of the statement of claim and the counter claim filed before the arbitral tribunal.

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

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

It has been interestingly noticed by the Supreme Court that all the above mentioned cases relate to actions in rem.[39] A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals.[40]Rights in rem being rights exercisable against the world at large, disputes relating to the same are incompatible for private arbitration and are generally adjudicated in public forums. On the other hand, rights in personam relate to specific individuals, hence are considered to be amenable to arbitration.[41]Parties are free to choose their own arbitrators.[42]

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[38] *Id.*
[39] *Id.*
[40] *Id.*; HDFC Bank Ltd. v. Satpal Singh Bakshi, 193 DLT 203 (2012); Tata Capital Financial Services Limited v. M/s. Deccan Chronicle Holdings Limited and Anr., (2) ARBLR 181 (Bom) (2013).
[41] MUSTILL& BOYD**,** *supra* note 11**.**
[42] Section 10 of 1996 Act.

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

Nonetheless, it is the opinion of the author that the Supreme Court has created confusion as to the arbitrability of disputes in the *Booz Allen* judgment, by stating incoherently that all disputes with relate to rights in rem cannot be adjudicated in a private forum i.e. an arbitral tribunal. On the other hand, it also stated that this is not an inflexible rule as disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable. Such perplexity in a situation where a number of arbitrations with subject matter of the dispute being rights in rem[47], including in Trusts has been seen in the past, is not quite welcomed. Moreover, in none of such cases the question of arbitrability was raised. Thus, it can be logically concluded that Trust disputes are not in arbitrable per se. A situation of dilemma is faced when non-parties to arbitration agreement contained in the Trust Deed wish to exploit it.

V. Arbitration of Trust Disputes: Judicial Decisions

International arbitrations often make reference to extension of an arbitration agreement to non-signatories. The rationale for such a reference being that it is not an extension, but identification of true parties that consented to the agreement to arbitrate.

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

[44] *Id.*

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

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

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

Notwithstanding lack of signature, the party's actions constitute its consent to agreement.[48]One arbitral award puts this clearly as:

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

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

In a recent case decided before the Bombay High court, *Jayesh Shah v. Kaydee Family Trust*[51], an arbitration agreement was entered into in Clause 20 of the Trust Deed which provided for arbitration of all disputes "*regarding the interpretation of any of the clauses of provisions or the contents of this Trust Deed or between the Trustees, or the Trustees and beneficiaries, or the beneficiary inter se regarding the rights, titles or interest flowing or arising from this Trust Deed or consequential thereto*…" Dispute arose between the beneficiaries for non-payment of due share of the Applicants from the amounts received by way of lease rent by leasing out the Trust premises. As a result of the refusal of the Respondents to appoint an arbitrator, the Applicants i.e. the beneficiaries filed an application under Section 11(6) of the 1996 Act.

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

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

Paragraph 10 of the judgment states that *"beneficiaries under the said Trust Deed are not only claiming through the Trustees when they were minor, but are claiming independently under the Trust Deed after attaining the age of majority and are thus, entitled to agitate the dispute having arisen between the applicants beneficiaries and the Trustees as well as beneficiaries inter se by invoking arbitration clause recorded in the Trust Deed"*. Moreover, the arbitration clause in the Trust Deed itself provided *inter alia* for resolution of disputes between "*beneficiary inter se*" by arbitration. Thus, the Bombay High Court resorted to a harmonious construction of Clause 20 to show evidence of the fact that the beneficiaries are also parties to the arbitration agreement within the 1996 Act.

With due respect, it is submitted that accepting the proposition of the Bombay High Court would imply the beneficiaries to be future parties to the contract, and consequently a futuristic arbitration agreement. Intention to refer matter to arbitration should be express or implied. It cannot be uncertain or meaningless.[55] Above all, the

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[52] Robert W. Goldman, *Simplified Trial Resolution: High Quality Justice in a Kinder, Faster Environment*, *in* 41ST ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, UNIVERSITY OF MIAMI SCHOOL OF LAW (2007); Gerardo J. Bosques-Hernandez, *Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective*, REVISTA PARA EL ANÁLISIS DEL DERECHO (2008), *available at:* http://www.raco.cat/index.php/InDret/article/viewFile/124284/172257 accessed ?
[53] Stephen Wills Murphy, *supra* note 6.
[54] Lawrence Cohen, Marcus Staff, *supra* note 8.

[55] Nilesh C. Sanghavi v. Rakesh v. Zaugada, (1) Arb.LR 179 (Bom.) (2008).

principle criticism against such an approach is that the recognition of such a line of thought would be against the spirit of the 1996 Act.

A. Beneficiary as a "Party"

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

Meaning and scope of "party" cannot be expanded in the garb of harmonious construction in a manner that goes against the essence of the Act. Since, the meaning of the term was not given in the 1940 Act, it has been the subject matter of dispute of a number of judicial decisions under Section 20 of the 1940 Act as well.[57]These decisions stated that the person who challenges the existence of the agreement must be understood as having reference to a person who is put forward as being a party to an arbitration agreement, but who does not admit its existence. It is thus apparent that the definition has been introduced in the 1996 Act for the purpose of making it clear that non-parties to contract have no rights under Arbitration Agreement,[58] and it leaves no scope for reading into an implied arbitration agreement into it. The new Act has been crafted in a way to make it crystal clear that all the rights under the 1996 Act have been given only to parties to the arbitration agreement, including the right to appoint an arbitrator under Section 11.

However, in the *Jayesh Shah* judgment of the Bombay High Court, mere statement in the Trust Deed that disputes between *"beneficiaries inter se"* should be resolved by arbitration is not sufficient to qualify as an arbitration agreement. Requirements under Section 7 must

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[56] United Steelworks of Am v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (U.S. S.CT. 1960); Bridas SAPIC v. Government of Turkmenistan, 345 F.3d 347, 353-54 (5th Cir. 2003); Intertec Contracting A/S v. Turner Steiner Int'l, SA 2000 WL 709004 (S.D.N.Y. 2000).

[57] C.M. MathuKutty v. VareeKutty, AIR 1950 Mad 64; Vallabh Pitte v. Narsingdas Govindram Kalani, AIR 1963 Bom 157 (DB); Ram Nagina Singh v. Thakur Ram Janki, AIR 1976 All 21.

[58] P.C. MARKANDA, LAW RELATING TO ARBITRATION & CONCILIATION (2003).

be met with. The Madras High Court is of the view that a general reference stating that all disputes would be referred to arbitration cannot be reasoned to be a valid arbitration agreement.[59]

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

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

[59] Sankar Sealing Systems P. Ltd. v. Jain Motor Trading Co., AIR 2004 Mad 127.
[60] 150 (2008) DLT 673 (NULL).
[61] Union of India v. Kishorilal Gupta & Bros. 1 SCR 493 (1960); See also National Insurance Co. Ltd. v. BogharaPolyfab Pvt. Ltd. AIR 2009 SC 170.
[62] (2) Arb LR 302 (SC) (2007).
[63] Taipack Ltd. v. Ram Kishore Nagar Mal, (3) Arb LR 402 (Del) (2007).
[64] United Bank of India v Ramdas Mahadeo Prashad, 1 SCC 252 (2004).

obligation to refer disputes to arbitration, does not constitute a valid and binding arbitration agreement."[65]

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

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

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[65] *Supra* note 62.
[66] AIR 1933 PC.
[67] Mohri Bibi v. Dharmodas Ghose, 30 Cal. 539 (1903).
[68] *Supra* note 58.
[69] Patanjal and Anr. v Rawalpindi Theatres (P) Ltd., AIR 1970 Delhi 19.

VI. Position of third parties in arbitration

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

The theory of implied consent was discussed by the Supreme Court recently in *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc.*[72], which may be applied to bind non-signatories to an arbitration agreement. The circumstances must demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties. The principle that the rights and obligations of an arbitration agreement apply only to the agreement's parties is a straightforward application of the doctrine of privity of contract, recognized in both civil and common law jurisdictions.[73]

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

The Supreme Court held that where a suit is commenced in respect of a matter which falls partly within the arbitration agreement and partly outside and which involves the parties, some of whom are parties to the agreement while some are not, the subject

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[70] ALAN REDFERN AND MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (2004).
[71] *Supra* note 1.
[72] *Supra* note 1.
[73] BORN**,** *supra* note 34.
[74] (2003) 5 SCC 531.

matter of the suit could not be referred to arbitration, either wholly or by splitting up the causes of action and the parties. The court refused to join the non-signatories and refer them to arbitration.[75]This view was reaffirmed by the Supreme Court later in *India Household & Health Care Ltd. v. LG Household & Health Care Ltd.*[76]

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

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

The question dealt by the Apex Court in *S.N. Prasad Hitek Industries (Bihar) Ltd. v. Monnet Finance Ltd. & Ors.*[78], was whether a guarantor is bound by an arbitration

[75] (2003) 5 SCC 531, 535-537.
[76] (2007) 5 SCC 510.
[77] (2010) 5 SCC 306.
[78] (2011) 1 SCC 320.

clause in a contract that has not been executed by him or not. The Court held that in the absence of valid arbitration agreement which satisfies the requirements of Section 7 of the 1996 Act, an award against the appellant cannot be enforced merely on the fact that he stood as the guarantor. Supreme Court clearly stated that if there is a dispute between a party to an arbitration agreement, with other parties to the arbitration agreement as also non-parties to the arbitration agreement, reference to arbitration or appointment of arbitration can be only with respect to the parties to the arbitration agreement and not the non-parties.

In *Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar &Anr.*[79], the Supreme Court had to answer the question of non-signatory in the context of multiplicity of agreements. The respondent filed an application under Section 11 of the 1996 Act on account of disputes arising under the one of the agreements, to which the appellant was not a party. Supreme Court applied the principle in *S.N. Prasad's* case and held that reference to arbitration or appointment of an arbitrator can only be with respect to the parties to the arbitration agreement and not the non-parties.[80]

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

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

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[79] (2011) 11 SCC 375.
[80] *Id.*
[81] (2012) 1 SCC 594.
[82] Special Leave Petition (Civil) Nos.965-967 of 2012.

VII. Comparison with wills

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

Interestingly, in the same year, the Rajasthan High Court stated in *Raghu Nandan Sharma v. Vijay Kumar and Ors.*[84] that an "Arbitration clause incorporated by a father in his will, is binding on the sons after his death, even if they are not the signatories of the will and it shall be treated as arbitration agreement as defined under Section 7 of 1996 Act." It is submitted that the proposition of the Rajasthan High Court cannot be considered to be good law as it is against the spirit of the 1996 Act. It relied on the 1939 judgement of the Calcutta High Court[85], which was passed before the enactment of the Arbitration Act of 1940 and 1996. Thus, it does not hold water in the present legal scenario.

VIII. Legal Position in Other Countries

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

A. USA

Arbitration clauses in Trusts and Wills are called "donative arbitration clause", as they are inserted by the contracting parties to force the beneficiaries to arbitrate their disputes. However, difficulty is faced by courts in enforcing such a clause by reason of the

[83] *Supra* note 60.
[84] AIR 2008 Raj 160.
[85] Raj Kumar v. Shiva Prasad Gupta, AIR 1939 Cal 500.

inherent problem in such arbitrations. Beneficiaries and Trustees do not sign the will or Trust itself, and thus under current law those parties cannot be bound by any arbitration provision contained therein.[86]However, a small group of commentators argue that such clauses should be enforceable, and a smaller group of states, like Hawaii, Florida, and Arizona, have legislation to that effect.[87]

Few states like Hawaii, Florida, and State of Washington already have legislations in place to have an arbitration clause in Trust Deeds enforceable. State of Washington adopted the Trust and Estate Dispute Resolution Act in 2000. It does not directly deal with arbitration clauses contained in the Trust Deed, but creates an alternate dispute resolution system that applies to Trust matters and is designed to promote the same.

B. UK

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

C. ICC

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

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

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

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

arbitration agreement holding that they were not drafted so as to extend to third-party beneficiaries.[89]

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

> *"All disputes arising out of or in connection with the Trust created hereunder shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed by the ICC International Court of Arbitration, in accordance with the said Rules."*[90]

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

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

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

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

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

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

3. *EMM Capricorn Trustees Limited* v *Compass Trustees Limited*[93], the Royal Court of Jersey held that a Trust instrument containing an exclusive jurisdiction clause should not be given the same weight as one in a contract, and that the policy considerations that justified parties being held to a contract to which they had freely agreed did not apply to beneficiaries of a Trust who had never been parties to the agreement between the Settlor and the Trustee.

4. *Hal Rachal, Jr., v John W. Reitz*[94], Supreme Court of Texas determined whether an arbitration agreement contained in a Trust Deed of an *inter vivos* Trust was binding on the beneficiaries or not. The First Instance and Court of Appeals held that by reason of the Trust beneficiaries not having consented to any binding arbitration provision contained in an enforceable contract, they cannot be bound it. The Supreme Court, on the other hand, supported the deemed acceptance doctrine, and stated that a beneficiary acquiesces to the obligation to arbitrate while he acquiesces to other aspects of the Trust document. He cannot pick and choose which parts of the Trust he wishes to accept.

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

[93] [2001] J.L.R. 205.

[94] (No. 11-0708 May 3, 2013).

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

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

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

IX. Conclusion & Suggestions

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

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[95] District of Columbia Court of Appeals, In re Mary Calomiris, judgment of 2 March 2006, 894 A 2d 408.

[96] California Court of Appeals 2 Dist., Diaz v. Bukey, judgment of 10 May 2011.

[97] William W. Park, *An Arbitrator's Dilemma: Consent, Corporate Veil and Non-Signatories*', *in* MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION, p.3 ¶1.09 (2009).

incorrect in admitting the application under Section 11 of the 1996 Act by the beneficiary in the *Jayesh Shah* judgement.

There is an inherent problem of incompatibility of arbitration clauses with Trusts and Wills. Even though the drafters of the agreement lucidly indicate their inclination towards taking any dispute arising thereunder to the private forum of arbitration, the same becomes difficult when the situation so arises. The inconsistent approaches taken by different courts further add to the dilemma of uncertainty. Therefore, this calls for the legislator to take a step ahead and resolve such ambiguity. The legislator must add a proviso to Section 7 stating explicitly the position of third parties to an agreement to arbitrate, whether they can invoke to provisions of the 1996 or not.

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

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

THE KISHENGANGA HYDRO-ELECTRIC PROJECT ARBITRATION DISPUTE - PARTIAL AWARD (PAKISTAN V. INDIA): AN ANALYSIS

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Abstract

Arbitration has emerged as an effective form of dispute resolution. The medium of arbitration has proved to be a quick and practical settlement for cross-border disputes, especially in cases wherein the parties are from different socio-cultural and political backgrounds. This is mainly because of the presence of a neutral third party in the dispute resolution process and other considerations such as the requirement of expertise over the relevant subject matter etc. The foremost pillar of any arbitration process is the disputing party submitting themselves to the process and relying upon the fair judgement of the appointed arbitrating agency or individual. The partial award discussed presently arose out of the first ever arbitration proceeding under the Indus Water Treaty entered into between India and Pakistan, the two parties. The dispute comprises various intricate issues which have arisen out of the provisions of the Indus Water Treaty. The Treaty serves to lay down a comprehensive set of rules for the sharing of river waters between the two countries. This arbitration is of special significance as its outcome will purport to serve future disputes arising out of the Treaty especially in light of the socio-political relationship between the two parties. The partial award given by the Permanent Court of Arbitration with the erstwhile help of the World Bank has proved to be an elixir for future arbitration disputes of such nature. The varied challenges that are faced by states over water resources world-wide originate from a multitude of factors, including the perpetual rise in population, urbanization, environmental degradation, and industrialization which makes the nature of the dispute more composite in nature involving the participation of individuals, states and corporations. It is in light of such complexities that such disputes go beyond the traditional issues of water quantity, etc., and take on a graver form by focusing on issues of water quality, water rights, etc.,. This myriad web involving the participation of different actors and the wide ranging consequences of the same call for the development and the expansion of dispute settlement institutions. Thus, formal institutions of dispute settlement like the Permanent Court of Arbitration serve to dissect through the complexities and cull out the most reasonable solution to the dispute at hand.

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The Kishenganga Arbitration dispute deals with the construction of a Hydro Electric Project by India on the river Kishenganga. Due to its tributary being Jhelum, a water sharing treaty is present between Pakistan and India. It entails the erection of a 37m-high concrete dam in the Gurez Valley, which will divert the Kishenganga River via a 22km long tunnel south into Lake Wular passing through an underground power-house. The construction will result in the diversion of the water in Pakistan through a different route and is the root cause of the dispute. The main issue of the dispute centres on the diversion of water which will create a different route for entry in Pakistan. The first issue raised by the Court in the above matter deals with the permissibility of delivering waters to another tributary through the Kishenganga Hydro Electric Project ("KHEP"). The second issue deals with the contentious problem of reservoir depletion under the Treaty. The paper shall deal with the background of the case and the dispute settlement mechanism under Indus Water Treaty. After discussing the various facts and issues that arose in the dispute, an analysis of the interim order has been done by discussing the various technicalities and objections raised in the order in detail. The paper shall also deal with the effect of the partial award on future disputes of such nature.

I. Introduction

The Kishenganga Arbitration Tribunal constituted under the 1960 Indus Waters Treaty rendered a partial award in February, 2013 over a dispute between India and Pakistan over the construction of the KHEP by the former on the Kishenganga River. The tribunal in its award allowed India to go ahead with the diversion of the waters of the Kishenganga, a tributary of the Jhelum River, for the purpose of Hydro Electric Power Generation. The Court however restricted India from adopting the draw-down flushing technique for clearing sedimentation in the plant. The Court asked India to resort to other methods for flushing. This method of dispute resolution has long been used successfully in recognising rights and settling differences between countries when it comes to several cross border disputes. The Permanent Court of Arbitration which normally decides such disputes has once again proved its effectiveness by rendering the partial award which more or less goes on to settle the rights of the parties and give a clear indication of where the final result of the dispute is heading towards. The Court expects to be able to render its final award by the end of 2013 which would determine the minimum amount of water India would be required to release in the

Kishenganga/Neelum River. The contents of the partial award will thus be analysed in detail in this paper.

II. Background of the Case

The Kishenganga arbitration dispute arises from the construction of a Hydro Electric Project by India on the Kishenganga river which is a tributary of the Jhelum (one of the western rivers allocated to Pakistan under the Indus Water Treaty). Before going into the nuances of the dispute, it would be appropriate to briefly discuss the Indus Water Treaty ["*IWT*"], a landmark document marking the efforts of years of negotiation between India and Pakistan on the basis of an intelligently drafted World Bank Proposal.[1] The IWT aims to "*attain the most complete and satisfactory utilisation of the waters of the Indus system of rivers*". Given the very delicate socio-political scenario of the two countries, the Treaty aims to balance the interests of both the parties on the contentious issue of river water sharing. It accomplishes this aim by allocating the complete use of the western rivers i.e. the Indus, the Jhelum and the Chenab to Pakistan[2] and the complete use of the eastern rivers i.e. the Sutlej, the Beas and the Ravi to India.[3] The IWT is unique in this nature, as it defies the conventional mode of most water sharing agreements,[4] by allocating entire basins to the parties. This does give rise to certain problems as it leads to limiting the potential for co-operation between the two parties. However, the dispute resolution mechanism of the Treaty provides for an elaborate system of resolution of such disputes.[5]

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[1] Shapiro-Libai, Nitza, *Development of International River Basins: Regulation of Riparian Competition, 45* I.J.L. (1969).

[2] Indus Waters Treaty 1960, between the Government of India, the Government of Pakistan and the International Bank for Reconstruction and Development, Pak.-India, art III, Sep. 19, 1960, 419 U.N.T.S. 126 ["IWT"].

[3] *Id.* At Article II.

[4] It is rather unusual to allocate entire streams instead of determining the respective volumes of water to be allocated based on the parties needs or uses, *e.g.* in accordance with the diverse factors listed in Article VI of the UN Convention on the Non-Navigational Use of Watercourses.

[5] *Supra* note 2, at ArticleIX.

III. The dispute settlement mechanism of the IWT

The IWT envisages three levels of conflicts (Questions, Differences and Disputes) between the parties and provides corresponding resolution mechanisms for the same.[6] It is imperative to understand the nuances of the dispute resolution mechanism of the IWT to fully appreciate and understand the Kishenganga Arbitration Dispute. The Treaty initially charges the Permanent Indus Commission,[7] a body formed under the IWT consisting of two commissioners, one from each of the parties, with the task to resolve any "*question*" arising between the parties relating to any provision of the Treaty.[8] If the Commission fails to resolve the original "*question*" then such a question takes the form of a "*difference*".[9] The differences pertaining to technical issues as defined in Annexure F Part I of the Treaty can be referred to a neutral expert. It is pertinent to note that the parties have once used this mode of resolution to resolve the issues surrounding the Baglihar Hydroelectric Plant.[10]If, however, the difference does not fall within the competency of a neutral expert or if the neutral expert informs the Commission that the difference should be treated as a "*dispute*", the parties shall resolve the "*dispute*" in accordance with Articles IX(2)(b) – IX(5) of the IWT.

As soon as a dispute has been identified, the Commission is to forward all relevant facts to the two governments (Article IX(3)). Following receipt of the Commission's report, or if one government determines that the preparation of the report is being unduly delayed, one government may invite the other to resolve the dispute by agreement (Article XI(4)).

Finally, Article IX(5) also provides for the establishment of a Court of Arbitration (regulated by Annexure G, IWT) upon agreement by the parties (Article IX(5)(a)).Upon request by either party if after one month that party determines that the other party is unduly delaying the negotiations (Article IX(5)(c)) or at the request of either party if

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[6] *Supra* note 2, at ArticleIX.
[7] *Supra* note 2, at ArticleVIII.
[8] *Supra* note 2, atArticleIX (1).
[9] *Supra* note 2, at ArticleIX (1).
[10]Indus Waters Kishenganga Arbitration (Pak. v. India) (Partial Award of Feb. 18, 2013), http://www.pca-cpa.org/showfile.asp?fil_id=2101 (last visited June 3, 2013) [*"Partial Award"*].

negotiations pursuant to Article XI(4) appear unlikely to resolve the dispute (Article IX(5)(b)). It was with reference to this last provision (Article IX(5)(b)) that Pakistan submitted a request for arbitration on 17 May 2010 with respect to the Kishenganga Hydro-Electric Project.

IV. The facts surrounding the dispute

The dispute arises from the construction of the KHEP in the Baramulla district of the Indian province of Jammu and Kashmir. The project involves the erection of a 37 metre-high concrete dam in the Gurez Valley, which will divert the Kishenganga River, a tributary of the Jhelum, via a 22 kilometre long tunnel into the Wullar Lake, passing through an underground power house along the way. One of````` the contentious issues of the dispute centres on the diversion of waters of the Kishenganga River, which at present flows across the Line of Control to Pakistan where it becomes the Neelum. However, the said diversion will create a different route for the Kishenganga's entry into Pakistan and such diversion will create problems for the proposed Neelum-Jhelum Hydroelectric Project ["*NJHP*"] as the Kishenganga will join Pakistan's Jhelum River downstream of the NJHP.

ISSUES OF THE DISPUTE

Pakistan invoked the jurisdiction of the Permanent Court of Arbitration on 17th May, 2011 on the basis of two counts of alleged violation by India of the IWT. First, Pakistan argued that that the proposed construction of the KHEP violates India's obligation to 'let flow' the waters of the Kishenganga and other such western rivers according to the provisions laid down in the IWT.[11] India's contention to the issue is based on the exception to the said provision, specifically Article II(2)(d) which states that India has ability to generate Hydro Electric power within the ambit of the provisions of Annexure D. Annexure D provides in relevant part "***"****…the works connected with a plant shall be so operated that…where a plant is located on a tributary of the Jhelum on which Pakistan has any agricultural use or hydroelectric use, the water released below the plant may be delivered, if necessary, into another tributary but only to the extent existing agricultural use or hydroelectric use by Pakistan on the*

[11] *Supra* note 2, at Article III(2).

former tributary would not be adversely affected."[12] *Pakistan thus had to prove to the Court that effect of the said diversion would affect its existing hydro-electric plans and agricultural use adversely. Thus, the Court had to look into the fact whether the NJHP would constitute an already existing project as envisaged by the provision.*

Pakistan's second contention related to the permissibility of India to deplete the reservoir level of the run-of-river plant below dead storage level. Dead storage level, according to the Treaty, refers to the water level which corresponds to the portion of storage that is not used for operational purposes.[13] *The depletion of a run-of-river plant below the dead storage level thus necessarily contemplates the complete discontinuation of the release of any water except for the purposes of sediment control. The Bagliharplant difference which was referred to a neutral expert considered a similar question in relation to the issue at hand.*[14]

V. Interim Order

*The Court had issued an order on interim measures on 23 September 2011 following Pakistan's application for restraining India from proceeding with the planned diversion of the Kishenganga until the time the Permanent Court of Arbitration decided on the legality of the KHEP. The Court recognising that some interim measures were necessary to "avoid prejudice to the final solution of the dispute" passed an order in favour of Pakistan by applying the standard laid down s*olution of the dispute".[15] In reaching this conclusion, the Court applied the standard laid down by paragraph 28 of Annexure G, IWT (which provides that interim measures are permissible to: safeguard the interests of the requesting party, to avoid prejudice to the final solution, or to avoid aggravation/extension of the dispute) instead of following India's invitation to apply the considerable jurisprudence of the International Court of Justice. In particular, India was ordered to hold the construction of permanent works "on or above the Kishenganga/Neelum riverbed at the Gurez site that may inhibit the restoration of the full flow of that river to its natural channel."[16] However, India was said to be free to

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[12] *Supra note 2, at Annexure D,* ¶15(iii).
[13] *Supra* note 2, at Annexure D, Article 2(a).
[14]Baglihar Hydroelectrical Plant, Executive Summary, http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546117199634025 5/BagliharSummary.pdf(last visited July 20, 2013).
[15] Indus Waters Kishenganga Arbitration (Pak. v. India) (Order on the Interim Measures Application of Pakistan dated June 6, 2011 of Sep. 23, 2011), www.pca-cpa.org/showfile.asp?fil_id=1726 (last visited July 1, 2013).
[16] *Id*., at ¶ 152.

continue with all other components of the project including the erection of temporary cofferdams and the construction of the dam's sub-surface foundations.[17]

VI. Analysis of the Award

A. First issue

The first issue raised by the Court in the matter deals with the permissibility of delivering waters to another tributary through the KHEP. It had to decide whether India is permitted under, the Treaty, to deliver the waters of the Kishenganga/Neelum river into another tributary in the course of the operation of the KHEP.

On considering the various issues of the dispute, India's general obligations under Articles III and IV (6) of the IWT have been considered. Pakistan contended that certain provisions of the Treaty restrict the use of western uses of the river regardless of the use of hydro-electric power generation. It invoked Article III of the Treaty which sets out both India's fundamental obligation to "let flow" the waters of the western rivers and its right to employ those waters, under certain conditions, for hydro-electric power generation and other uses. However, according to the Court, Article III (2) does not apply any geographic restriction on the use of electricity or any other product of the use of the waters. It restricts what India may do with the waters of the western rivers, and not with the products that may be generated from their use.[18]

Pakistan has also contended that India had breached its Article IV (6) obligation to assess adequately the environmental impact of the KHEP's inter-tributary transfer which invokes India's general obligation to *"use its best endeavours to maintain the natural channels of the rivers*" as stipulated in the Treaty. Pakistan asserted that the aforesaid diversion will significantly reduce the flow of the river and cause material environmental damage.

The Court has also considered Pakistan's arguments under Annexure D of the IWT which prescribes various requirements for the design and operation of run-of-river plants. The Court rejected the arguments made and allowed inter-tributary transfers, provided that the diverting works complied with three conditions; First, the work must

[17] *Id.*, at ¶ 143.
[18] Partial Award.

be a run-of-river plant; Second, the plant must be "*located on*" a tributary of the Jhelum and finally; Third, the inter-tributary transfer must be within the terms laid down in Paragraph 15(iii)[19]. According to the terms of the Treaty, a run-of-river plant has been defined as a hydro-electric plant which develops power without live storage, an exception being pondage and surcharge storage. It also states that the volume of water stored for hydro-electric power generation is the defining characteristic of the run-of-river plant. The KHEP has also been designed and notified to Pakistan as a run-of-river plant.

The Court further turned to the question of whether inter-tributary transfer is necessary for any run of the river plant. Paragraph 15(iii) of the Treaty provides that "the water released below the plant may be delivered, if necessary, into another tributary." It is deduced from the Treaty that the material action for the use of the term necessity is the delivery of water.

The Court therefore, concluded that the relevant question for the interpretation of the term 'necessity' of paragraph 15(iii) is whether the delivery of water into another tributary is necessary to generate hydro-electric power. The Court finds that necessity is to be determined by reference to the purpose for which the water is to be delivered into another tributary which, in the case of the KHEP, is the generation of hydro-electric power.

According to the findings of the Court, no run-of-river plant operating without making use of the difference in elevation between the two tributaries of the Jhelum would begin to approach the power-generating capacity of the KHEP. Hence, diversion is necessary for any attempt to generate hydro-electric power on the scale contemplated by India, and Annexure D imposes no limit on the amount of electric power.

The Court next turned to the "*essence*" of the first dispute which enumerates the requirement under Paragraph 15(iii) that any Indian inter-tributary run-of-river plant can operate only till the extent of not jeopardising the interest of Pakistan. On that basis, Pakistan argued that an ambulatory interpretation of Paragraph 15(iii) of Annexure

[19] *Supra* note 12.

D[20]which if adopted would create a sharp effect on the undertaking of any inter-tributary project on the Kishenganga/Neelum River, the practicability of which will depend on the whims and fancies of the other party. Hence, no project proponent, financing creditor or government agency will be forthcoming to invest in the project.

India, on the other hand argued on a static approach which emphasises on a tentative date. It stressed on the party's firm intention to proceed with the project. Hence, India argued that Pakistan's agricultural and hydro-electric uses must maintain a status quo at the stage when the various intricacies and designs of the project is finalised.

The Court did not find the aforesaid approaches to be satisfactory. It combined certain elements of both approaches for a sound interpretation. It emphasised on the object and the purpose of the Treaty which is to generate a balance on the rights of both the countries to use waters of the western rivers and hydro electricity generation. Accordingly, the Court needed to establish the critical period at which the KHEP crystallized and it needed to determine whether the NJHEP was an "*existing use*" that India needed to have taken into account at the time the KHEP crystallized. On determining the critical period approach, the Court left to the conclusion that the KHEP preceded the NJHEP, such that India's right to divert the waters of the Kishenganga/Neelum for power generation by the KHEP is been protected under the Treaty. The Court has further also concluded that the right of India to divert waters

[20] Subject to the provisions of ¶17, the works connected with a plant shall be so operated that (a) the volume of water received in the river upstream of the plant, during any period of seven consecutive days, shall be delivered into the river below the plant during the same seven-day period, and (b) in any one period of 24 hours within that seven day period, the volume delivered into the river below the plant shall be not less than 30%,and not more than 130%, of the volume received in the river above the plant during the same 24-hour period: Provided however that:[…]

(iii) where a plant is located on a Tributary of The Jhelum on which Pakistan has any Agricultural use or hydro-electric use, the water released below the plant may be delivered, if necessary, into another Tributary but only to the extent that the then existing agricultural use or hydro-electric use by Pakistan on the former tributary would not be adversely affected.

should not been absolute. The existing use of Pakistan needs to be taken into consideration for its agricultural and hydro-electric use.

The Court also found support in duty in contemporary customary international law requiring states to take "*environmental protection into consideration when planning and developing projects that may cause injury to a bordering State*." The principle of sustainable development has been applied to large-scale construction projects, as recently certified in the *Pulp Mills*[21] case by the International Court of Justice, which states the importance under general international law for initiating an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a trans-boundary context, in particular, on a shared resources. Further, it has also been observed by the International Court of Justice that due diligence, and the duty of vigilance and prevention would not be considered to have been exercised, if the project is considered liable to affect the *regime* of the river or the quality of its waters and thus it will be assumed that the concerned party did not undertake an environmental impact assessment on the potential effects of such works. Finally, the International Court of Justice emphasized that such duties of due diligence, vigilance and prevention continue *"once operations have started and, where necessary, throughout the life of the project."*

Similarly, the Court in the present dispute recalled the acknowledgement by the Tribunal in the *Iron Rhine* arbitration[22] of the "*principle of general international law*" that states have "*a duty to prevent, or at least mitigate*" significant harm to the environment when pursuing large-scale construction activities. As the *Iron Rhine* Tribunal determined, this principle "*applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties*" It is established that principles of international environmental law must be taken into account even when interpreting treaties concluded before the development of that body of law.[23] The *Iron Rhine* Tribunal applied concepts of customary international environmental law to treaties dating back to the mid-nineteenth century, when principles of environmental protection were rarely if ever considered in international agreements

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[21]Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), (20 April 2010) ¶204, available at http://www.icj-cij.org/docket/files/135/15877.pdf
[22] Arbitration Regarding the Iron Rhine ("*Ijzeren Rijn*") Railway *(Belg. v. Neth.*), Award, 24 May 2005, PCA Award Series (2007), ¶59.
[23]*Id.*

and did not form any part of customary international law. It acknowledged that India recognized this continuous duty by committing to ensure a minimum downstream flow of water. However, the information presently at its disposal did not allow the Court to objectively fix the exact rate of the minimum downstream flow, and it requested the parties to provide the relevant information to fix this rate in its final award.

The above arbitration case seems to be a very complex endeavour. The various technicalities and intricacies of the case highlight the exceptional work done by the Court. A very commendable aspect of the case is the equilibrium struck by the Court by respecting the rights of both the parties. The Court has exercised immense patience in deciding the question of territorial sovereignty of the rivers purely on the basis of IWT, thus paving the way for future disputes between the two countries to be resolved amicably. The critical period approach adopted by the Court in resolving the issue clearly lays down a path that can be followed in several such river sharing disputes wherein the time period as envisaged by such disputes are always too vague to be resolved with clarity. The ingenuity of the Court in coming up with an approach that is well rounded in nature is truly commendable and is a clear reflection of the emergence of international arbitration as an effective means of dispute resolution between countries despite the socio-political and cultural problems that exist between them. The Court has thus, struck a very positive chord with its approach by ensuring that the rights of both parties are not adversely affected by the outcome of the award yet ensuring that India's right to the use of the western rivers is not unduly restricted by a narrow interpretation of the Treaty. However, the Court required a precise rate of the minimum flow of the river in order to determine the stability and predictability of the availability of water for both the parties.

B. The Second Issue

The second issue deals with the contentious problem of reservoir depletion under the Treaty. The parties disagreed as to whether India within the terms of the Treaty could periodically lower the level of the water at the aforesaid run-of-river plant on the western rivers for controlling sediment flow through a process of draw-down flushing. The issue is of primeval importance to both parties as the process of drawdown flushing of the reservoir necessarily affects the rate and timing of the flow below the dam, Pakistan particularly raised objections to the process of sedimentation that was used by India for

this purpose. In addition, the Treaty in recognising this right had laid down the principle of India to 'let flow' and 'non-interference' with the western rivers. India however had differing views on the same, relying on the premise that, draw-down flushing would greatly enhance the process of sedimentation. The tribunal's decision would not only affect the KHEP project but would also affect all other run of the river plants that might have been built in the future. India as one of its contentions had objected to the admissibility of this particular issue itself on the basis that the neutral expert in the Baglihardam dispute had already decided on such grounds and thus this issue had already been effectively resolved. However, the Court found otherwise and on commenting on the requirement of the Treaty to refer such technical matters to a neutral expert, the tribunal found in Pakistan's favour stating that the Indus Treaty never mandated the requirement to refer a dispute to a neutral expert as a first step and a dispute could always be referred to for arbitration if so desired. Moreover, the tribunal found that the issue had substantial questions of law that were not merely technical in nature and squarely fell under the jurisdiction of the tribunal and also that no dispute could be brought before a court of arbitration could be rendered inadmissible due to technical questions.[24] In order to understand the crux of the dispute, it is important to understand the concept that the Treaty envisages. The primary objective of the Treaty is to strictly limit and minimise the instance of storage of water of the western rivers by India and eastern rivers by Pakistan as this would ultimately defeat the entire purpose of the Treaty; that of allowing the parties to use the water of the rivers effectively. Commenting on the Treaty, the Court observed that it strived to strike a considerable balance by allowing India the hydro-electric use of such waters of the western rivers without forsaking Pakistan's right over them for its own use by limiting the possibility of water storage on the upstream reaches of those rivers having an unduly disruptive effect on the rivers flowing into Pakistan.[25] The only exception to the restriction on storage is limited to the provision of dead storage in the design of any run-of-the-river plant or any such plant. This approach of the Treaty clearly outlines the contours of the *Principle of Equitable Utilisation of River Water*. Keeping this in view, the parties had widely divergent

[24]Indus Waters Kishenganga Arbitration (*Pak.* v. *India*) (Partial Award of Feb. 18, 2013), http://www.pca-cpa.org/showfile.asp?fil_id=2101 (last visited June 3, 2013).
[25] *Id.*

contentions on the issue. While Pakistan characterised this prohibition as construing to prohibiting the use of techniques like draw-down flushing, India contended that the exception of dead storage would also imply an express authorisation to design the dam in the most effective manner for sediment control. The Court came to the conclusion that India has a right to the effective generation of hydro-electricity and acknowledged that Pakistan's objections to India would render the plant ineffective. However the Court also acknowledged that the system of draw-down flushing would affect the downstream flow of the river water, thus effectively encroaching on Pakistan's right to effectively use the water. It thus tried to strike the middle path by allowing India to store water for sediment control as long as it did not employ such techniques that would render negatively on Pakistan's right to the effective use of the water. The Court thus suggested that sluicing be used as method for such sediment control in order to preserve India's right to use the western rivers for their hydro-electric needs. The Court thus laid down a general principle for all such run-of-the-river plants that India can effectively construct on the western rivers, wherein the Court did not really apply the 'best practices' principle in resolving the dispute but rather, in its own words, provided for an optimal design and operation of hydroelectric plant within the ambit of the Treaty. The Court, through this award has thus, effectively struck a very fine balance of maintaining Pakistan's right to the waters of the western rivers, on the one hand and India's right to the limited use of the western rivers in the form of hydroelectric generation, on the other hand.

VII. Effect of the Partial Award on Future Disputes

The award by the Hague-based Court of Arbitration to divert only a minimum flow of water from the Neelum/Kishenganga River for power generation has proved to be a green signal for India.

The Court has clarified that the decision of the aforesaid dispute will neither impact the existing projects nor those under implementation. The effect shall only be binding on future disputes of such nature. The intention of the Court has been to set precedence for the future disputes.

The *'partial award'* given in the dispute, has prohibited the use of drawdown flushing in the upcoming KHEP and all other projects to be set up in future. The verdict will have a

wide ranging effect as all the other projects subsequent to it shall have to be redesigned and reconstructed to manage the massive sedimentation load that kills power dams and reservoirs. The award also discussed about the reservoir depletion below a Dead Storage Level ("*DSL*") by India wherein it held that the IWT does not permit reservoir depletion below a dead storage level an exception being unforeseen emergencies. The Court also held that accumulation of sediment in a reservoir will not constitute to be an unforeseen emergency. Hence, India has been barred from employing the technique of draw-down flushing at the reservoir of KHEP to an extent that would entail depletion of the reservoir below DSL. Major rivers in Jammu and Kashmir and their tributaries have massively silted flows and Chenab, the major power house of the state, has sediment load as a major crisis. The award shall provide effective relief to such disruptions. It is to be noted that the use of sluicing had already been permitted for the *Baglihar*[26] project by the World Bank with certain changes. However, an effective de-silting system needs to be developed for an effective and long term utilisation and to avoid huge costs.

The above award highlights a very positive picture for dispute resolutions between the two countries. The judgement has proved to be an epitome of amicability and immense cooperation and tolerance between the two countries. When seen from a regional perspective, the cultural, historical and political contexts that supplement any dispute between India and Pakistan often prevent amicable and peaceful settlements.[27] In the past, this has led to armed conflict and revolutions, but most often it has led to sheer disregard of the people directly affected by the stalemate.[28] The Kishenganga dispute serves as a valuable reminder of the potential of pacific dispute settlement in resolving thorny disputes in tense situations. For India and Pakistan, the award attempts to exemplify the co-operative spirit that underlies the IWT and to strike a fine balance between the competing rights of the two states. More broadly, the award represents an interpretive approach towards technical treaties informed by contemporary international law principles relating to environmental protection and sustainable development.

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[26] *Supra* note 14.
[27] *See* generally, David Bloomfield ,Yash Ghai & Ben Reilly, *Analysing Deep-Rooted Conflict*, Democracy and Deep-Rooted Conflict: Options for Negotiators, http://www.idea.int/publications/democracy_and_deep_rooted_conflict/upload/ddrc_full_en.pdf (last visited Sept. 30, 2013)
[28] *Id.*

VIII. Conclusion

The lacunae in effective legal principles coupled with the unique nature of each case when it comes to inter-country river water disputes have carved out the need for effective dispute resolution mechanisms for determining the rights of parties. With bilateral treaties proving to be effective in such cases, the question boils down to adequate safeguards in place for dispute resolution. India alone faces a multitude of issues with its neighbouring countries when it comes to river water sharing; the construction of the hydro-electric plant on the *Yarlun-Zangbo* River (the Brahmaputra) in the Autonomous Tibet region; the joint project by Nepal and India known as the *Sapta-Kosi* High Dam Multipurpose Project and *Sun Kosi Storage*-cum-Diversion Scheme or; the river water sharing with Bangladesh especially the *Farakka* Dam issue on the sharing of the waters of the river Ganges. India has several such disputes which have an overall bearing on its development. It is with these instances in mind that one needs to appreciate the effectiveness of the IWT. Its dispute resolution mechanism has so far proved to be more than sufficient in meeting the requirement of both the parties, especially keeping in mind the contentious political background between the two countries. Whether it be the Indus- Baglihar Dispute which was taken care of by a neutral expert as provided for in the Treaty or the Kishenganga Dispute's partial award, alternate methods of dispute resolution has proved to be the way forward. In the light of recent trends in the world, disputes concerning rivers are no longer restricted to dam and diversion matters or water quantity issues alone for example; the *Gabcikovo-Nagymaros* case, the dispute between Namibia and Botswana over their borders across the *Chobe* River etc. Disputes now deal with water quality issues and other such problems for example The Rhine River which is shared by France, Germany, Luxembourg and the Netherlands is one such instance where detailed attention has been paid to the environment which gave rise to the *Rhine Iron* Case. Thus, the need for settlement institutions is not restricted to the ICJ alone as such water disputes do not necessarily have to arise between two states. It can also arise between states and private actors. Hence, the strengthening of institutions likes the Permanent Court of Arbitration, the ICSID, and national courts are required. The rendering of the Kishenganga partial award by the PCA clearly goes on to exemplify that regardless of the high stakes involved in the dispute, the political background of the aggrieved parties, the Court has carved out a

well-balanced solution setting a precedential example for other such river water disputes to follow.