ISSN: 2320 –2815
eISSN: 2320 –2823

INDIAN JOURNAL OF ARBITRATION LAW

Volume III April, 2014 Issue 1

EDITORIAL

ARTICLES

CONTEMPORARY INTERNATIONAL ARBITRATION IN ASIA: A STOCKTAKE
- Harishankar K.S.

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

ONLINE ARBITRATION FOR RESOLVING E- COMMERCE DISPUTES: GATEWAY TO THE FUTURE
- Ujjwal Kacker & Taranpreet Saluja

P.R.I.M.E. FINANCE ARBITRATION – A LIGHTHOUSE SAFE HARBOUR IN THE MARE MAGNUM OF FINANCIAL DISPUTE RESOLUTION?
- Piergiuseppe Pusceddu

AMALGAMATING THE CONCILIATORY AND THE ADJUDICATIVE: HYBRID PROCESSES AND ASIAN ARBITRAL INSTITUTIONS
- Deekshitha Srikant and Arka Saha

USE OF INDEMNITY COSTS TO COMBAT DILATORY TACTICS IN ARBITRATION: ADVOCATING THE HONG KONG APPROACH
- Gourav Mohanty & Shruti Raina

Volume III: Issue 1 **2014**

PUBLISHED BY

The Registrar, National Law University, Jodhpur

ISSN : 2320–2815 | *e*ISSN : 2320–2823

Volume III: Issue 1 **2014**

CONTENTS

Contemporary International Arbitration in Asia: A Stocktake 1

Judicial Intervention In International Commercial Arbitration: Critiquing the Indian Supreme Court's Interpretation of The Arbitration And Conciliation Act, 1996 6

Online Arbitration For Resolving E- Commerce Disputes: Gateway To The Future 31

P.R.I.M.E. Finance Arbitration – A Lighthouse Safe Harbour in the Mare Magnum of Financial Dispute Resolution? 45

Amalgamating The Conciliatory And The Adjudicative: Hybrid Processes And Asian Arbitral Institutions 77

Use of Indemnity Costs to Combat Dilatory Tactics in Arbitration: Advocating the Hong Kong Approach 101

Centre for Advanced Research and Training in Arbitration Law
(CARTAL)
National Law University
NH-65, Mandore
Jodhpur-342 304
Rajasthan (INDIA)
E-mail: info@ijal.in, nlu-jod-rj@gmail.com

CONTEMPORARY INTERNATIONAL ARBITRATION IN ASIA: A STOCK TAKE

Harisankar KS[*]

Over the past decades, the world community has witnessed an increasing number of cross-border transactions, especially investments in the Asian region; along with a concomitant rise in cross border business disputes. Parties to these transactions favour international commercial arbitration for the resolution of disputes. There is little doubt that the choice of arbitral seat is influenced inter alia by the arbitral infrastructure and the involvement of judiciary in the place of arbitration. Asian countries have responded to these demands through effective development of their infrastructure for arbitration, coupled with significant efforts to update their arbitration laws. Following this surge in international commercial arbitration, there have also been several developments in the conflict of laws jurisprudence in legal systems like, Singapore, Hong Kong, Malaysia, Dubai and India.

I. Importance of International Commercial Arbitration in Asia

The International business community all across the globe has accepted international commercial arbitration[1] as an effective mechanism for resolving its commercial disputes. Unwillingness of parties to have matters resolved in the national court of the other disputing party, with perhaps unfamiliar law, language and culture, is treated as one of the major reasons for this preference. The history of arbitration as an informal mechanism of dispute settlement in the Asian continent can be traced back to ancient times.[2] The political and economic conditions that existed in various countries in the continent created major stumbling blocks for the growth of commerce and trade until the beginning of

[*] Assistant Professor and Executive Director, Centre for Advanced Research & Training in Arbitration Law (CARTAL) at the National Law University, Jodhpur, INDIA. An earlier draft of this paper was prepared for a presentation at the 10th Annual Conference of the Asian Law Institute (ASLI) held at National Law School of India University Bangalore on 23-24th May 2013, and a substantial portion has been taken from the author's article 'International Commercial Arbitration in Asia and the Choice of Law Determination', published in Journal of International Arbitration 30(6), by Wolters Kluwer.

[1] The terms 'International Arbitration' and 'International Commercial Arbitration' are used interchangeably in this paper.

[2] *See* SIMON GREENBERG et al., INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA PACIFIC PERSPECTIVE, (2011). For example, Arbitration in China can be traced back to about 2100 – 1600 BC.

the 20th century. The region has also manifested hostility towards trans-national arbitration for the resolution of commercial disputes. Asian presence in the international arbitration scene was felt, for the first time ever, in the very first arbitration administered by the International Chamber of Commerce.[3] Many nations in the region gained a significant economic momentum after the Second World War and witnessed an impressive record of growth in the last few decades. For instance, Japan emerged as an economic superpower after World War II; while China and India survived the global financial recession, and continue to be the fastest growing economies, forming part of the BRIC countries[4]. In addition, more than half of the Next 11[5] countries, which could greatly impact the global economy in the near future, are located in the Asia-pacific region. The trade liberalisation policies of the Asian economies have helped the increasing number of international commercial transactions.

This unprecedented growth of the Asian countries, especially after the financial crisis, resulted in a surge in trade and investments in the region. One of the inevitable consequences of these commercial activities was, of course, the growth of cross border disputes involving multinational corporations and even sovereign states. The Asian international business community has shown no reluctance in embracing International Arbitration as a viable dispute resolution mechanism, as its counterparts in the western world did from the beginning of the 20th century. Thus it can be said with little doubt that International Arbitration has emerged as the most preferred mechanism for resolving trade and investment disputes in 21st century Asia. The positive changes in the arbitration landscape of the Asia-Pacific are evident from the significant number of countries that have ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[6] so far.[7] The latest addition is Myanmar, which consented to be bound by the Convention on 16th

[3] *Id.* at 34 (Authors note that, when the ICC Court administered its first case in 1923, the claimant was Thai).

[4] In 2001, Goldman Sachs created and coined the term 'BRIC' to identify the world's fastest growing economies Brazil, Russia, India & China.

[5] In 2005, Goldman Sachs identified the Next 11 (N-11) largest populations after BRIC, which (combined with economic and political conditions) could greatly impact the global economy. The N-11 countries include Bangladesh, Egypt, Indonesia, Iran, Korea, Mexico, Nigeria, Pakistan, Philippines, Turkey and Vietnam; *See Beyond the BRICS: A look at the Next-11 (Apr. 2007)*, GoldmanSachs.com, http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/brics-book/brics-chap-13.pdf (last visited Apr. 8, 2014)

[6] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention].

[7] Excluding a few countries like, North Korea, Taiwan, Bhutan, Maldives, Iraq, etc. most of the Asian countries are parties to the New York Convention.

April 2013.[8] As an inducement for foreign investments in the country, many legislatures have updated their national arbitration laws in line with the UNCITRAL Model Law.[9] These legislative changes,[10] reflecting the best practices in international arbitration, have increased the receptiveness of a new arbitration culture in Asia. Apart from legislative reforms, the development of an international arbitration infrastructure as well as pro-arbitration judgments from various courts in the region has made Asia an arbitration hotspot of the present times.

II. Proliferation of arbitral institutions

The debate on the advantages of institutional arbitration over ad hoc arbitration is still a live topic of discussion in the realm of international arbitration law. However, there is little doubt that the presence of well-developed arbitral institutions will give parties a better option for structured arbitration. In the recent past, a number of globally well-known arbitral institutions have established their offices in various cities in Asia including the Singapore International Arbitration Centre set up in Mumbai last year. Traditionally, western institutions like the International Chamber of Commerce, the London Court of International Arbitration, the American Arbitration Association, etc. have dominated the field and almost all the international commercial contracts contained an arbitration clause favouring these institutional rules, but proliferation of indigenous institutions in the region has revolutionised the whole scenario. One of the reasons for this evolution is governmental interest and support involved in importing arbitration services to the respective countries. Many of the Asian institutions are in fact state sponsored bodies, whose aim is to provide cost effective dispute resolution through state-of-the-art facilities. This contest for 'invisible exports' of the arbitration industry has helped the Asian economy in a tremendous way. As a sign of this, significant numbers of arbitral institutions have sprung up across the region. Many of these institutions attract extra ordinary support from the international trading community and have emerged as competitors of the traditional institutions in Europe and America.

---

[8] *See Accession Myanmar to New York Convention,* NEW YORK ARBITRATION CONVENTION (Apr. 29, 2013), http://www.newyorkconvention.org/news/accession-myanmar-to-new-york-convention.

[9] Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985) [hereinafter UNCITRAL Model Law].

[10] The major arbitral systems like Singapore, Australia, Hong Kong, Malaysia, Thailand, and India follow the UNCITRAL Model Law whereas, countries like China and Indonesia have updated their arbitration legislations without adopting the UNCITRAL Model Law.

In the past few years, many Asian arbitral institutions have really come of age, in terms of their case load. In particular, the Singapore International Arbitration Centre (SIAC) registered a record number of cases in 2013 and the average monetary value involved in disputes increased significantly, which helped the centre cement its position as the world's fastest growing international arbitral institution. Similarly, the Hong Kong International Arbitration Centre (HKIAC), one of the busiest institutions, also has an ever growing number of dispute resolution matters, including international arbitration. It is noteworthy that the acceptance of Hong Kong as an international arbitration venue has mirrored the evolution of China as an economic power. Malaysia is also an important jurisdiction for the arbitration community with its leading institution Kuala Lumpur Regional Centre for Arbitration (KLRCA) having a significant international presence. Similarly, the Japanese Commercial Arbitration Association, the Korean Commercial Arbitration Board and the China International Economic and Trade Arbitration Commission, representative institutions for international commercial arbitration respectively in Japan, South Korea and China, add to the prominence of institutional arbitration in Asia.

Another notable development is the trend in liberalising the legal services sector in the region. Many legal systems have removed the barriers to foreign law firms allowing leading law firms from United States and Europe to establish their offices in these jurisdictions. Not surprisingly, jurisdictions that have opened their markets to the import of legal services have, eventually, become favourable arbitration destinations. Here, it is worth mentioning that, though India has not yet opened its legal market, the 2010 decision of the Madras High Court was aimed at removing these barriers in the context of international arbitration.

III. Pro-arbitration judiciary

All the major Asian economies are now capable of emulating their western counterparts, having updated their national legislations and established world class arbitration centres. However, the credibility of an arbitral regime depends more on the attitude of the national courts. Essential to this attitude is the determination to support arbitrations happening in the 'locality' and a better understanding of international arbitration law. A number of Asian courts have demonstrated this in the past few years by showing reluctance to set aside an award or refuse the enforcement of foreign awards. The manner in which courts respond to these matters have resulted in the different legal systems getting either a 'hostile' or 'friendly' stamp towards arbitration.

As a matter of illustration the Indian Supreme Court has recently overruled its earlier infamous decisions in order to turn arbitration-friendly. In the case of Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc. , the court

clarified that Indian state courts cannot supervise arbitration taking place abroad. Recently the Supreme Court, in Enercon (India) Ltd. & Ors. v. Enercon GmBH & Anr , held that the courts would strive to make the arbitration agreement workable provided the intent to arbitrate is evident from the contract. Similarly, the Singapore High Court upheld the validity of a pathological arbitration clause to make it operable. In another decision, the Singapore court of appeal confirmed the legal position that Singapore courts will not interfere with the decision of the arbitral tribunal. No doubt, the court decisions are in line with the modern standards of international arbitration and it has made Asian cities more attractive as a venue for international arbitration. In many ways, Hong Kong and Singapore have now emerged as two of the leading venues for international arbitration, alongside traditional locations such as London, New York, Paris and Geneva. Due to the positive developments, as mentioned in the above paragraphs, global corporations are ready to 'place' their arbitrations in various Asian cities. As a consequence, the judiciaries of these countries have concentrated on addressing issues at the gateway of arbitration including the enforcement of arbitration clauses as well as matters post arbitral decision making that involves challenges to the awards and its enforcement.

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

Ajay Kr. Sharma[*]

ABSTRACT

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

I. Introduction

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

---

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

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

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

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

(iv) the Government of a foreign country;"

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

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

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

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

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

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

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

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

---

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

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

[20] The Arbitration and Conciliation Act, *supra* note 13, § 16(1), reads:
"The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-
(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

---

[49] *See id.*, ¶ 162.

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

[51] 1 crore = 10 million.

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

[53] *Id.,* ¶ 5.

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

---

[54] *Id.,* ¶ 9.

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

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

[57] *Id.,* ¶ 29.

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

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

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

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

---

[58] *Id.,* ¶ 33.

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

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

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

---

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

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

[62] BALCO, *supra* note 7.

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

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

[65] BALCO*, supra* note 7, ¶ 45.

[66] *Id.,* ¶ 38.

[67] *Id.,* ¶ 39.

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

VI. Conclusion

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

[81] *Id.*, ¶ 45.

ONLINE ARBITRATION FOR RESOLVING E- COMMERCE DISPUTES: GATEWAY TO THE FUTURE

Ujjwal Kacker[*] *& Taran Saluja*[•]

ABSTRACT

The article aims at studying the multivariable options to establish and facilitate Online Alternative Dispute Resolution ("OADR") in e-commerce. An attempt has been made to determine the direction of the codification of law. Globalization across borders and the concrete setup of bodies like World Trade Organization have enabled the development of e-commerce across the globe. With the advent of any system there exists a parallel need for establishing a mechanism to facilitate it. In the 21st century, mankind has a materialistically sophisticated orientation which imbibes in it the promotion of e-commerce. The growing acceptance of e-commerce amongst people within and across countries itself is the basic tenet which strives for creating a dynamic set of transnational substantive rules of e-commerce.

The article aims at exploring the viability of Lex Informatica Principle for online dispute resolution and attempts to identify a set of dynamic transnational rules for governing e-businesses and the pragmatic implementation and application in the current business community.

I. Introduction

While determining the substantive set of dynamic rules for the e-business community, it is imperative to mention that the parties in a global community are free to select a national law for deciding their rights and obligations under an e-commerce contract[1]. This implies that, as the primary initiative is in the hands of the parties themselves, negotiations may be initiated depending on the situation, circumstances and negotiation. If such negotiation fails, then from the terms and conditions of the contract itself, the parties can subject themselves to the Alternative Dispute Resolution Mechanism ("*ADR*").[2] The practice, which has been accepted by the international community by and large, i.e., the applicability

[*] Associate (Banking & Finance), Amarchand & Mangaldas & Suresh A. Shroff & Co.

[•] Student, B.L.S., LL.B. (Hons.), Rizvi Law College, Bandra, Mumbai

[1] Bekker C., *The Proper Legal Regime for Cyberspace*, 55 U PIT L R 993 (2012)

[2] K.P.Berger, *Law and Borders - The Rise of Law in Cyberspace* , 48 STANFORD L R 1367 (2008)

of the national laws by the arbitrators in the absence of the choice of law being mentioned by the parties, is in pursuance of the conflict of laws method.

A dilemma arises in the modern day world with respect to the application of rules and laws in the resolution of disputes by online arbitration tribunals. Currently in the formative stages, there is an urgent need for development of flexible, transnational legal standards that can be applied by arbitration tribunals in cross-border e-business disputes. This approach is desirable and convenient from the consumer's perspective, as he/she may be located in a jurisdiction different from that of the seller. The main advantage of the approach necessitating the application of OADR in e-commerce is that, it not only manifests the dynamic nature of the system, but also facilitates confidence in the Business to Consumer Model ("*B2C*") and the Business to Business Model ("*B2B*") which is in the interest of the global business community.

II. Promising Future of Lex Informatica Principle: Precedents Setting the Pathway for Future

Lex Informatica principles have assured a promising mechanism for providing proper adjudication of disputes at transnational level.[3] There are certain principles and rules which have already emerged and have been accepted as fundamental principles in the international arena, like the functional equivalence of written and electronic documents.[4]Furthermore, e-signatures are manifested in several e-business instruments and their importance is widely recognized the world over. On the same lines, the principle of technological-medium neutrality is reflected in various instruments and enjoys wide consensus. Development of certain areas, which are still in dormant stages could prove handy for the application of the aforesaid OADR mechanism in the adjudication of disputes by online arbitrators. For instance, e-business custom demonstrates the obligation of professional parties to use state-of-the-art security technology as a means of protecting the confidentiality and integrity of their transactions. Another e-

[3] This use of the term should be distinguished from the use that refers to a set of rules for information flows imposed by technology and communication networks. Such technological rules constitute a useful extra-legal instrument of policymaking that may achieve objectives that otherwise challenge conventional laws and governmental attempts for regulation across jurisdictions. *See* Joel R. Reidenberg, *Lex Informatica*: *The Formulation of Information Policy Rules through Technology*, 76 TEX. L. REV. 553 (1998) [hereinafter Joel].
[4] G.A. Res. 60/21, Art. 8(1) and Art.9(2), U.N. Doc.A/RES/60/21 (Nov. 23, 2005).

business custom may be the presumption of IT competence of professional parties who engage in e-business and possess the necessary skills and equipment. Therefore, the parties may not claim incompetence, asserting a security breach or incapacity to perform a contractual obligation, in order to defend themselves.

III. Developing a Uniform Set of Rules for the Resolution of Online Disputes

For subjecting any matter to online arbitration, there should be a certain set of rules or laws for the arbitrator to act upon. Thus, foreseeing the contingencies which "may" arise in the future, an attempt has been made through this article to develop a set of rules for governing OADR.

A. General Principles of Law and the Relevance of Lex Mercatoria Principles:

Principles of *Lex Mercatoria,* laying down general principles of law, are identical to *Lex Informatica,* which again help in developing definite code for the adjudication of matters by online ADR.[5] It is pertinent to note that the connotation attached to 'General Principles of Law' might sometimes be deceptive, as the subjectivity in its application might create a hindrance in it being accepted as a general principle of law.[6] For instance, general principles like good faith and fair dealing may assume a specific meaning in cross-border e-business, requiring clarification or specific justification from an e-business perspective.[7] The point here is that market cultures vary across the globe in accordance with the cultures of the land. Thus, formulating a general principle of law for the application of OADR in settling e-commerce disputes is a troublesome task for which an objective test has to be defined and a uniform opinion has to be generated amongst the masses of the world.

---

[5] V. J. J. M. BEKKERS & SJAAK NOUWT, EMERGING ELECTRONIC HIGHWAYS: NEW CHALLENGES FOR POLITICS AND LAW 153 (1996).

[6] Liber Amicorum Karl-Heinz Böckstiegelet et al., *Law of International Business and Dispute Settlement in the 21st Century,* ICCA 267-276 (2001).

[7] Antonis Patrikios, *Resolution of Cross Border E-Business Disputes by Arbitration Tribunals on the Basis of Transnational Substantive Rules of Law and E-Business Usages: The Emergence of the LexInformatica,* 38 U. TOL. L. REV. 271 (2006).

B. International Instruments in Shaping the Uniform Laws:

The United Nations Commission on International Trade Law ("*UNCITRAL*") initiatives have aided in the development of rules at a global level which are of immense importance in developing *Lex Informatica* principles and rules. The principles governing e-commerce[8] and e-signatures[9] have undergone significant development due to the codification and framing of Model Laws by UNCITRAL on these subjects. It thus becomes implicit to explain the instant terminology before going ahead. It is defined as follows:

Model laws are examples of instruments that demonstrate international consensus stemming from their legislative history and the numerous jurisdictions that have adapted their legislation based on their provisions.[10]

The Model Law on Electronic Commerce demonstrates international consensus on issues such as the legal recognition of data messages,[11] incorporation by reference,[12] admissibility and evidential weight of data messages,[13] formation and validity of contracts, and attribution of data messages. The Model Law on Electronic Signatures includes provisions on issues such as equal treatment of

[8]United Nations Commission on International Trade Law, Model Law on Electronic Commerce with Guide to Enactment, U.N. Sales No.E.99.V.4 (Nov. 20th, 1996) [hereinafter "UNCITRAL 1996"].

[9] United Nations Commission on International Trade Law, Model Law on Electronic Signatures with Guide to Enactment, U.N. Sales No.E.02.V.8 (2001).

[10] 53 countries have adopted, have adapted or have been influenced by the Model Law on Electronic Commerce, *See*:http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html27 nations have adopted legislation based on the Model Law on Electronic Signatures *See:* http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_status.html

[11] G.A. Res. 51/162, Art. 5, U.N. Doc.A/RES/51/162 (Jan. 30, 1997) [hereinafter G.A. Res. 51/162].

[12] UNCITRAL 1996, *supra* note 8 at Art. 5.

[13] G.A. Res. 51/162, *supra* note 11, at Art. 9.

signature technologies,[14] compliance with a requirement for a signature, conduct of the signatory and conduct of the relying party.[15]

The *United Nations Convention on the Use of Electronic Communication in International Contracts*[16] reflects broad consensus despite the fact that it was opened for signature only two years ago.[17] It includes provisions on issues such as legal recognition of electronic communications,[18] form requirements,[19] the principle of "functional equivalence of electronic documents" and electronic signatures, time and place of dispatch and receipt of data messages, use of automated systems for contract formation, availability of contract terms, and error in electronic communications.[20] Depending on its adoption by a significant number of States, and most importantly, the acceptance of its rules by the international e-business community, the e-Contracting Convention may develop an instrument directly applicable to online arbitrators in e-business disputes pursuant to *Lex Informatica* analysis.[21]

The aforesaid provision has been cited to put forth certain rules which already exist and could be of immense importance for arbitrators while resolving an e-

---

[14] G.A. Res. 56/80, Art. 3, U.N. Doc.A/RES/56/80 (Jan. 24, 2002) [hereinafter G.A. Res. 56/80].

[15] *Id.*

[14] G.A. Res 56/80, *supra* note 14; The official text of the Convention, incorporating the changes agreed at the 38th UNCITRAL session, was released as an annex to UNCITRAL's report to the General Assembly. See Rep. of UNCITRAL on its 38th Sess., Annex I,65, 2005, U.N. Doc. A/60/17 (July 26, 2005), The Convention complements and builds upon the Model Laws of Electronic Commerce and Electronic Signatures.

[17] The Convention was adopted by the U.N. General Assembly on Nov. 23, 2005, and is open for signature from Jan. 16, 2006 to Jan. 16, 2008. Press Release, General Assembly, General Assembly Adopts Convention on Use of Electronic Communications in International Contracting, U.N. Doc. GA/10424 (Nov. 23, 2005). For the use of international treaties not in force by arbitrators as a means of determining broad consensus

[18] *Id.* at Art. 8.

[19] *Id.* at Art. 9.

[20] G.A. Res. 56/80, *supra* note 14.

[21]Similar to the direct application of the CISG by international arbitrators in sales of goods disputes. The CISG is currently estimated to be applicable to two-thirds of world trade. *See* Pace Law School, *CISG Database*, available at: http://www.cisg.law.pace.edu. Its rules are commonly being applied by arbitral tribunals for the resolution of international sales of goods disputes.

dispute. Beyond providing specific rules for the issues of their respective area of application, they may also be employed as sources of general principles of e-business, such as the functional equivalence of written and electronic documents[22] and signatures[23] or technological-medium neutrality.[24] The same view is also accepted worldwide that:

> *"In the context of applying Lex Informatica, the UNCITRAL instruments can be used by online arbitrators as instruments directly applicable in online arbitration, as benchmarks in the context of comparative law analysis for the establishment of the broad acceptance of a given transnational rule, as means of identification of e-business usages, or as means of interpretation."*

C. *National and Supranational Sources of Law:*

It is submitted that after analyzing the provisions enshrined under national statutes,[25] their application is completely contingent upon the extent of acceptance of a given rule by the international community. Thus, the jurisdiction of the online arbitrator is limited to the extent of acceptance of such a rule by the international community. The instant rule is equally effective for supranational instruments, such as the European Union ("EU") directives on e-commerce[26] and e-signatures.[27] Their importance lies in the fact that:

---

[22]The principle of functional equivalence of electronic communication by means such as telex and telefax is so widely accepted that it already forms a part of *lexmercatoria*; *See* KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA 9-113 (1999).

[23]G.A. Res. 56/80, *supra* note 14, Art. 8(1) & 9(3).

[24] G.A. Res. 56/80, *supra*note 14, Art. 3

[25]*See* Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001-7031 (2006) ("U.S. E-Sign Act"); Uniform Electronic Transactions Act, 5 U.S.C (1999); Electronic Communications Act, 2000, c. 7, Long Title (U.K.); the Electronic Commerce Regulations, 2002, c.10 (U.K.); Electronic Signatures Regulations, 2002, c. 68 (U.K.); *Electronic Transactions Act 1999* (Cth) (Austl.); *Electronic Communications Act1999* (Cth) (Austl.); Digital Signature Act, June 13, 1997 (F.R.G.); Electronic Transactions Ordinance 2001 (H.K.); Electronic Transactions Act 1998 (Sing.).

[26] Council Directive 2000/31/EC, 2000 O.J. (L178) (EC) (on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market).

[27] Council Directive 1999/93/EC, 1999 O.J. (L13/12) (EC) (on a Community Framework on Electronic Signatures).

"These directives are important because they demonstrate transnational recognition of electronic contracts and signatures and contain a consensus model for their regulation, which is applicable to both common and civil law systems. Hence they provide a clear cut model for the online arbitrators in resolving the disputes pertaining to e-commerce."[28]

Another important rule that the online arbitrators should focus upon while determining the "trans-nationality" of a given rule is,

"*Not only on the wide acceptance of the rule in comparative law, but also on the current practice in the particular sector of e-business. If a recent rule reflects current practice, but is not supported by the results of comparative law analysis, its "trans-nationality" could be founded on usage*."[29]

D. E-Business Custom and Usages:

The phenomenal increase in the volume of international e-business transactions is resulting in growth and development of new usages in cross-border e-business. It is submitted that while tracing the roots of usages, it is not always convenient to identify the usages and if they are identified, then the principle of wider acceptance creates an impeding factor in their application. Besides, it is practically difficult for the online arbitrators to call any practice a usage, or as a part of customary international law in e-business, because the strings are still very soft and the laws are in a transitional phase which might result in a disputable situation in the future. Given the high volume of e-commerce transactions, elements of customary practices are already identifiable or are even being formulated by international agencies such as the Internet Chamber of Commerce ("ICC").[30] Therefore, the development of customs in international e-business is likely to be faster than it is in international trade. In this regard, it is submitted for online arbitrators that:

[28] A. F. M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*,14 A. U. INTL. L. R. 657 – 660 *et seq.* (1999).
[29] UNCITRAL 1996, *supra* note 8.
[30] UNCITRAL 1996, *supra* note 8.

They should consider this in determining which given set of rules are applicable to a particular economic relationship. For that purpose the kind of milieu from which parties belong to and the nature of business relationships which they share are of utmost importance.[31]

Finally, it can be argued that elements of non-codified customs are also observable. For example, in important interactions over the internet, there exists an obligation to use appropriate security technology to protect the confidentiality, integrity, and attribution of communications.[32] The decision regarding confidentiality is left to the discretion of the parties. Confidentiality is desirable for business houses as reports of disputes might adversely affect their goodwill. For example, non-compliance by a bank or a professional end-user in the context of online banking may trigger liability for compensation.[33] Similarly, non-compliance by an online arbitral institution may lead to liability if the confidentiality of the proceedings is compromised.[34]

E. Codes of Conduct and Guidelines:

Innumerable guidelines and codes of conduct addressing issues of consumer protection provide which set a norm to be followed and thus aid in the development of a uniform set of rules for resolving e-commerce disputes. For example, the validity and enforceability of electronic contracting, the time and place of dispatch and receipt of electronic communications, or attribution of communications, have started to emerge and may be evidenced by the provisions of existing

[31] K.P.Berger, Do *the UNIDROIT Principles of International Commercial Contracts Form a New LexMercatoria?,* 15(2) ARB INTL. L. R. 115 (1999).

[32] Lowenfeld, *Self-Regulation in Global Electronic Markets Through Reinvigorated Trade Usages*, 31 Idaho LR 863 (2008)

[33] Paul P. Polanski & Robert B. Johnston, *International Custom as a Source of Law in Global Electronic Commerce*at, *in* PROCEEDINGS OF THE 35TH HAWAII INTERNATIONAL CONFERENCE ON SYSTEM SCIENCES 7 (2002), (exploring the possibility of e-custom as a potential solution to legal disputes in contractual global e-commerce)

[34] *See* Ch. 2.2 of Antonis C. Patrikios, *Transnational Online Arbitration as the Centrepiece of Co-regulation for Cross-border E-business* (2006) (unpublished Ph.D. thesis, on file with author).

international instruments like UNCITRAL and UNIDROIT principles.[35]

F. Role of Online Tribunals and Arbitral Case Laws:

Online tribunals and their case laws are of paramount importance in the formulation of a uniform code for aiding the arbitrators in resolving e-disputes. The awards given by the arbitrators/arbitral tribunals define or clarify transnational rules and usages. One major step needed instantly is the publication of the arbitral awards for the interpretation of the uniform codes which is currently not materialized.[36] The publication of awards is likely to raise awareness, increase predictability and facilitate development, acceptance and application of the uniform code by the online arbitrators. Therefore, a solution that permits the publication of e-business awards while preserving the confidentiality of the arbitration is essential.

---

[35] *See,* Org. for Econ. Cooperation and Dev. ("OECD"), Guidelines for Consumer Protection in the Context of Electronic Commerce (1999), http://213.253.134.29/oecd/pdfs/browseit/9300023E.pdf (used by most member countries); Canadian Working Group on E-Commerce and Consumers, Principles of Consumer Protection for Electronic Commerce, A Canadian Framework (Industry Canada 1999), http://strategis.ic.gc.ca/pics/ca/principlese.pdf; Canadian Code of Practice for Consumer Protection in Electronic Commerce (Industry Canada 2003), http://cmcweb.ca/epic/Internet/incmc-cmc.nsf/vwapj/EcommPrinciples2003 e.pdf/ $ FILE/EcommPrinciples2003 e.pdf; Office of the NSW Privay Comm'r, Building Consumer Sovereignty in Electronic Commerce: A Best Practice Model for Business (2004), http://www.lawlink.nsw.gov.au/lawlink/privacynsw/llpnsw.nsf/vw files/sub reviewbpg.pdf/$ file/sub reviewbpg.pdf; Commonwealth of Australia, Australian Guidelines for Electronic Commerce (2006), http://www.treasury.gov.au/documents/1083/PDF/australianguidelines for electronic commerce.pdf; New Zealand Model Code for Consumer Protection in Electronic Commerce (Ministry of Consumer Affairs, 2000), http://www.consumeraffairs.govt.nz/policylaw research/pdfpapers/model code.pdf; Global Business Dialogue on Electronic Commerce ("GBDe"), Consumer Confidence (1999), http://www.gbde.org/pdf/recommendations/ consconf99.pdf; GBDe, Summary of Recommendations Affecting Consumer Confidence (2000), http://www.gbde.org/pdf/recommendations/consconfsummary00.pdf; Transatlantic Consumer Dialogue, Core Consumer Protection Principles in Electronic Commerce (No. Ecom-10-99, 1999), http://www.tacd.org/db files/files/files-78-filetag.pdf.

[36] Lowenfeld, E., *LexMercatoria: An Arbitrator s View,* 6 ARB INT. l 133 (1990).

IV. Rule of Interpretation Applied in Online Alternative Disputes Resolution

On the basis of the three UNCITRAL initiatives, a basic framework of fundamental transnational principles and rules for the conduct of cross-border e-business can be articulated. Beyond providing specific rules for the issues of their respective area of application, they may also be employed as sources of general principles of e-business such as functional equivalence of written and electronic documents,[37] functional equivalence of written and electronic signatures,[38] or technological/medium neutrality.[39] In the context of application of the *Lex Informatica*, the UNCITRAL instruments can be used by online arbitrators as instruments directly applicable in online arbitration,[40] as benchmarks in the context of comparative law analysis for the establishment of the broad acceptance of a given transnational rule, as means of identification of e-business usages, or as means of interpretation.[41]

First, the tribunal will carefully consider the intent of the parties, as expressed in the 'choice of law' clause, and in particular examine whether the parties themselves have given any methodological instructions.[42]

However, where inconclusive terminology is used, online arbitrators should attempt to interpret it in the light of the circumstances of the particular case. If

---

[37] *See* Model e-Commerce Law articles 5 and 6; e-Contracting Convention articles 8(1) and 9(2). The principle of functional equivalence of electronic communication means such as telex and telefax is so widely accepted that already forms a part of lex mercatoria, see e.g. rule 57 in the list of Berger, Creeping Codification, supra note 5, 302; CENTRAL Principles Rule No. XIII.2 on Proof of written Content.

[38] *See* Model e-Signatures Law articles 2 and 6; Model e-Commerce Law article 7; e-Contracting Convention articles 8(1) and 9(3).

[39] *See* Model e-Signatures Law article 3; e-Contracting Convention article 9(3).

[40] The UNIDROIT Principles are increasingly adopted in international contracts and used in dispute resolution, see Bonnel, M.J., UNIDROIT Principles 2004 The New Edition of the Principles of International Commercial Contracts Adopted by the International Institute for the Unification of Private Law , ULR 5 (2004)

[41]See further Guide to Enactment of the Model e-Commerce Law paragraph 5 and Guide to Enactment of the Model e- signatures law paragraph 11.

[42] *See* Julian D. M. Lew et al., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 18-57 (2003) [hereinafter "Julian D. M. Lew"].

necessary, the tribunal may request clarification of submissions.[43] In any case, the objective is the identification of the intent of the parties and this is the guiding principle directing arbitrators in adjudicating any matter.

Secondly, the arbitrator will examine, on the basis of functional comparative law analysis, whether the submissions of the parties are supported by a rule with wide acceptance which constitutes a transnational rule of law or an established e-business usage. In performing the comparative analysis to determine the acceptance of a specific rule, the arbitrator should consider:

i. Compilation of the *lex mercatoria* principles including codifications and lists;
ii. Pertinent international instrument reflecting consensus;
iii. Relevant published Awards;
iv. Comparative law resources such as specialized publications. *If the rule is merely idiosyncratic of a particular system, it should be rejected.* However, a rule can be elevated to the status of a transnational rule of law or established e-business usage even if there is no universal or unanimous acceptance of the rule.[44]

Finally, in case of a conflict between the custom and current usage, preference should be given to current usage over custom.[45] Also, the ICC General Usage for International Digitally Ensured Commerce II (GUIDEC II) including the Principles of Fair Electronic Contracting (POFEC), aim to serve as an indicator of terms and contain definitions and best practices. GUIDEC II aims to balance different legal traditions and cover both the civil and common-law treatment of the subject, as well as pertinent international principles and provided a comprehensive statement of best practices for a global infrastructure.[46]

[43] I*d.,*at 18-54.
[44]JULIAN D. M. LEW, *supra* note 42.
[45]Joel, *supra* note 3.
[46]See foreword to the GUIDEC II by William Kennair, http://www.iccwbo.org/home/guidec/guidec_two/foreword.asp. GUIDEC II is available athttp://www.iccwbo.org/law.

Discretion of the Arbitrators:

In the absence of choice of law on the part of the parties, the arbitrators are vested with the discretion to apply national laws indirectly.[47] The application of law shall be made pursuant to conflict of law method, i.e., by checking that the national law to be applied is not in conflict with the international law on that particular subject. The national law however, can be applied directly if the arbitrators think it fit for the concerned dispute.

Loopholes:

i. Parties having exposure to different States are unaware of the laws applicable in those States. The resulting lack of confidence between parties might be detrimental to resolution of the dispute through arbitration.
ii. As the application of OADR is still in the formative stages, it confuses the arbitrators as to which rules are to be applied by them while adjudicating a dispute, as there are no settled rules on OADR. This enhances the possibilities of the discretion of the arbitrator being exercised in an unreasonable manner.

The possibility of a transnational approach to the determination of these rules of law appears to be acceptable to the stakeholders in international consumer protection. For instance, the 2003 New York Recommendations of the Global Business Dialogue on Electronic Commerce ("GBDe") incorporates an agreement reached between GBDe and Consumers International on Alternative Dispute Resolution guidelines applicable to international B2C e-Commerce.[48]

The guidelines state that ADR is advantageous, as opposed to the difficult, cumbersome, and costly research on detailed legal rules regarding court procedures because "ADR dispute resolution officers may decide in *equity* and on the basis of *codes of conduct*. This flexibility regarding the grounds for ADR

[47]Antonis Patrikios, *Resolution of Cross Border E-Business Disputes by Arbitration Tribunals on the Basis of Transnational Substantive Rules of Law and E-Business Usages: The Emergence of Lex Informative*, 38U.TOL.L.REV.271 (2006).

[48] *See generally*: GBDe Summit (New York), Recommendations, available at http://www.gbde.org/pdf/recommendations/NYCRecommendations.pdf.

decisions provides an opportunity for the development of high standards of consumer protection worldwide."[49]

As a measure of security while adjudicating any dispute, the fundamental principle of *contra proferentum* must be applied. In basic terms it suggests that:

'While adjudicating any dispute between two parties, equity demands the verdict to be in favor of the weaker party.'[50]

Thus, the aforesaid principle is of utmost significance while resolving any dispute categorized under B2C category. If the arbitrator has to exercise his discretion pertaining to the granting of the award, then the elementary principle which is supposed to be followed is:

'The award should be granted in the favor of the weaker party i.e., consumer in the B2C Model cases, after applying the principle of contra proferentum.' [51]

V. Recommendations

1. If a comprehensive study is carried out and a vent is allowed for those customs comprising a blend of e-commerce and arbitration, provided that the custom is not in contravention with International norms, then customs must be applied instead of the international norms.
2. The articulation of a body of transnational rules for cross-border e-business is needed for facilitating online alternative dispute resolution mechanism. It is time an initiative is taken by the legislators and international organizations like UNCITRAL, UNIDROIT etc. This is necessitated for comprehensive and ongoing research in order to clarify the exact content of the existing transnational principles, rules, customs and usages of e-business. In addition, further research is needed to monitor the constant development of the *Lex Informatica*.
3. It is submitted that the culture of markets varies across the globe in accordance with the culture of the land. Thus, formulating a general

[49] JULIAN, *supra* note 42.
[50] Appelbaum, R.P., Felstiner, L.F., Gessner V., (eds.), *Rules and Networks; the Legal Culture of Global Business Transactions*, Oxford University Press, pg. 159-167, (2001).
[51] *Supra* note 3.

principle of law for the application of OADR in settling e-commerce disputes is a herculean task for which an objective test has to be defined and a uniform opinion has to be generated amongst the masses of the world.

4. The awards granted by the arbitral tribunal should be published so that it may facilitate the formulation of the uniform code for adjudicating e-commerce disputes by online arbitrators.
5. It is submitted, regarding the application of customs and usages in resolving e-commerce disputes by the online arbitrators, that while tracing the roots of usages it is not always convenient to identify it and if it is identified, then the principle of 'wider acceptance' creates an impeding factor in its application. To alleviate the instant problem, it is suggested that the expert opinion should be sought.[52]
6. It is highly asserted that during the time of the formation of the arbitration agreement, the parties themselves should decide the laws applicable in case of disputes till no uniform law comes into force for OADR in e-Commerce.
7. In the absence of such provisions demonstrating the application of the law in cases of dispute, the arbitrator should be given discretion. However, the details of such law should be provided to the parties and only after the consent of both the parties should the arbitration proceedings begin.

VI. Conclusion

It is submitted that after realizing the different factors influencing the formulation of the uniform code for ascertaining and resolving e-commerce disputes by online arbitrators, the most important factor is that the intention of the parties for an amicable solution must be given within a reasonable time. The work to formulate a uniform code for OADR should be carried out extensively and the different governments of the world should strive forth and establish an international body/organization, which would in turn co-ordinate with its member countries and the concerned forum of the United Nations. This will definitely aid in the creation of a set of transnational rules manifesting the interest and the will of the different sovereigns.

[52]Katsh, E., Journal of Online Law, Cybertime, Cyberspace and Cyberlaw (2011), available at *http://www.law.cornell.edu/jol/katsch.htm*.

P.R.I.M.E. FINANCE ARBITRATION – A LIGHTHOUSE SAFE HARBOUR IN THE MARE MAGNUM OF FINANCIAL DISPUTE RESOLUTION?

*Piergiuseppe Pusceddu**

ABSTRACT

Attention to litigation in financial matters is becoming an important issue for both investors and lending institutions. The recent trend has witnessed a shift from litigating before Courts towards arbitrating disputes on complex financial instruments. Quite recently, a new institution has been established in The Hague with the aim of becoming a milestone in the settlement of disputes on complex financial transactions: P.R.I.M.E. Finance. A Panel of financial markets and dispute resolution experts support the activity of such institution. The aim of this paper is to assess whether or not the use of arbitration in financial disputes and transactions may constitute a valid option, when compared to Court litigation. Furthermore, a particular focus will be on the institutional aspects of P.R.I.M.E. Finance arbitration.

I. Introduction. Financial Disputes Settlement: Arbitration and Litigation on Comparison.

The involvement in the resolution of disputes between lenders and borrowers is a corollary of the world's bifurcation into debtors and creditors.[1] Usually, credit agreements provide that potential controversies will be settled in the Bank's home jurisdiction or before Courts of some important financial centre, while an alternative would be an agreement to resolve any dispute by arbitration. Traditionally, litigation has been favoured over arbitration to settle such disputes for several reasons.[2] As Financial Disputes relate mainly to the payment of sums, banks may want to retain the possibility to appeal a decision before higher courts, whereas through arbitration parties would certainly exclude any further

* LL.M., New York University School of Law – National University of Singapore, Faculty of Law; JD (equivalent), University of Cagliari, Faculty of Law; Cultore di Materia, University of Cagliari (Italy), Faculty of Law, Department of International and European Law. The author wants to express his sincere gratitude to Advocate Shelly Saluja, Reliance Industries Limited, for giving the insightful suggestions and comments in the draft of this paper. All errors are the author's. Email: piergiuseppe.pusceddu@gmail.com.

[1] *See* W. W. Park, *Arbitration in Banking and Finance, in* ESSAYS IN INTERNATIONAL FINANCIAL AND ECONOMIC LAW (The London Institute of International Banking, Finance & Development Law) 5 (1997) [hereinafter Park].

[2] While, to the other hand, arbitration has long been common in settling commercial disputes, where it is well established that its use tends to reduce litigation costs, avoid the application of complex rules of Private International Law as well as the complicacies related to the other side's "hometown justice". *See* Park, *supra* note 1 at 5.

appeal. Moreover, disputes on arbitral jurisdiction, as well as the absence of summary judgments issued by arbitral tribunals, make arbitration time consuming and less efficient than court proceedings. Banks might also be concerned by the limited precedential value of the arbitral awards as well.[3] This traditional preference of judges over arbitrators is not surprising: since a debtor may be either unable or unwilling to pay, it may be not necessary to resort to arbitration when the complaint does not relate to contractual terms.[4] The bargaining power owned by major banks in international transactions resulted in the application of a governing law of their choice, as well as on the choice of a friendly jurisdiction: very often New York or English laws and Courts.[5] Such governing laws are considered bank-friendly,[6] and such Courts have judges with an understanding of sophisticated financial instruments.

The reverse side of the medal, however, is that it could be difficult to enforce a New York judgment outside the U.S. or an English judgment outside the European Community, while the enforcement of arbitral awards might be relatively easier pursuant to the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards.[7] As the number of transactions with counterparties that did not have assets in the U.S. or the E.U. increased, banks were persuaded of the opportunity of including arbitration clauses in such agreements.[8]

The financial community may find arbitration and ADR beneficial,[9] particularly in connection with securities transactions, guarantees, documentary credits,

---

[3] *See* Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 2007 ARBITRATION INTERNATIONAL, 23(3).

[4] Quoting Park, *supra* note 1 at 6, it may appear as an unnecessary invitation to a "split the difference" award.

[5] *See* Sheppard, Arbitration of International Financial Disputes, KLUWER ARBITRATION BLOG (Mar. 19, 2009), http://kluwerarbitrationblog.com/blog/2009/03/19/arbitration-of-international-financial-disputes/[hereinafter Sheppard]

[6] *See* Sheppard, *supra* note 5.

[7] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 3 (New York Convention).

[8] Even then, banks very often preferred to keep their options open, id est to provide that a dispute will be referred to courts, with an option – exercisable by the bank once the dispute arises – to refer the dispute to arbitration instead. Such option has been held to be valid by the New York and English courts. *See,* for instance, Sablosky v. Edward S. Gordon Co., 535 N.E.2d 643 (N.Y. 1989) in New York and Law Debenture Trust Corp. plc v. Elektrim Finance BV [2005] EWHC 1412 (Ch.) in England. Those cases have been reported by Sheppard, *supra* note 5.

[9] *See* S. F. Ali and J. K. W. Kwok, The Future of Financial Dispute Resolution in Hong Kong: Promoting a Comprehensive "Multi-Tier Dispute Resolution System" with

consumer loans, public sector lending and M&A. The success of arbitration in the settlement of financial disputes will depend on an accurate drafting of the arbitration agreement, as well as on the interaction and interconnectedness of the elements of a given financial transaction.[10] Arbitration should be kept distinct from other non-judicial forms of alternative dispute resolution, for it implies not only the consent of the parties to settle their dispute out of court, but also a binding and final award. An arbitration agreement and an arbitral award imply that assets can be attached and competing litigation precluded, while other ADR mechanisms, for instance mediation or conciliation, may be neither binding, nor enforceable.

Bankers sometimes need to enforce court judgments in their favour outside the place where judgments have been rendered, but not all banks will benefit from an adequate Treaty and regulation network for the recognition of foreign judgments.[11] These instruments, providing for a mechanism of enforcement of court judgments, are useless in non-Treaty countries and outside the EU. In contrast, a thick network of bilateral and multilateral treaties provides for the enforcement of arbitral awards. The most important, as mentioned, is the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards; moreover, many Latin American countries have adopted the Inter-American Arbitration Convention (Panama Convention).[12] Both systems

---

reference to the "Lehman Brothers Mediation Scheme" (2010) (unpublished paper,from the Selected Works of Shahla F. Ali), http://works.bepress.com/shahla_ali/5.

[10] *See* Park, *supra* note 1 at 6, who also suggests that arbitration merits special consideration when borrower's assets are found in jurisdictions lacking judgment treaties with the probable litigation forum, when loans are subject to exchange controls, and when debtors might file punitive damage or "lender liability" actions. It may also be appropriate when there exists a need for special expertise, such as in the settlement of documentary credit disputes subject to the Uniform Customs and Practices of the International Chamber of Commerce. Generally speaking, to resort to arbitration may be useful when there is a need of evaluating the application of customs and practice in an industry sector.

[11] *See* the Convention On Jurisdiction And The Enforcement Of Judgments In Civil And Commercial Matters, Brussels, Sep. 27, 1968 O.J. C. 27, 26.1, 1968 [hereinafter Brussels Convention]; *see* the Convention On Jurisdiction And The Enforcement Of Judgments In Civil And Commercial Matters, Lugano, Sep. 16, 1988, O.J. (L 319) 9 [hereinafter Lugano Convention]; *see* Council Regulation (EC) 44/2001 (Dec. 2000) [hereinafter EU Reg. 44/2001].

[12] Inter-American Convention on International Commercial Arbitration, Panama, Jan. 30, 1975, 9 U.S.C.Sect. 305, 1975.

See http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp. Are members of the Panama Convention the following Countries: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States, Uruguay, and Venezuela.

provide for a vast recognition of foreign arbitral awards.[13] The arbitral procedure set by the Washington Convention,[14] is also relevant since many investment treaties define investment as "all categories of assets," including claims to money.[15]

Another advantage of arbitration over litigation is that arbitrators can ignore "Act of State" defences arising from foreign exchange controls in cases of financial disputes.[16] Borrowers sometimes see these defences as an argument against loan recovery, on the assumption that such controls constitute a foreign "Act of State". For instance, the United States has eliminated the Act of State defence in actions to enforce arbitration agreements and awards.[17] Another principle often invoked to avoid the repayment of loans is that of the "sovereign immunity", which operates to prevent one country from commencing a suit against another country in its courts.[18] Sovereign immunity and the Act of State doctrine have the least common multiple that judges should not interfere with the executive branch of government in its conduct of foreign relations.[19] The grant of immunity to foreign Governments and their agencies is subject to several exceptions, like immunity covering "public" rather than "commercial" acts. Immunity from a suit will be further restricted by an arbitration clause, as

[13]However, the Panama Convention provides for a more limited enforcement scheme.
[14]Convention on the Settlement of InvestmentDisputesbetweenStates and Nationals of OtherStates, Washington, Mar. 18, 1965, 4 I.L.M, 524, 1965.
[15]*See* Park, *supra* note 1 at 9. See (although not exhaustively): BIT between Germany and Afghanistan, art. 1(1)(c); BIT between Albania and United Kingdom, art. 1(a)(iii); BIT between United Kingdom and Angola, art. 1(a)(iii) and BIT between Italy and Angola, art. 1(1)(c); BIT between Antigua and Barbuda and Germany, art. 1(1)(c) and BIT between Antigua and Barbuda and United Kingdom, art. 1(a)(iii); BIT between Argentina and Australia, art. 1(a)(iii); BIT between Argentina and United Kingdom, art. 1(a)(iii); BIT between Argentina and India, art. 1(a)(iii); BIT between Argentina and United States of America, art 1(a)(iii); BIT between India and United Kingdom, art. 1(b)(iii); BIT between United Arab Emirates and United Kingdom,art. 1(a)(iii). A list of international investment agreements can be found here;http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Tools.aspx
[16] *See* Park, *supra* note 1, at 13.
[17] *See* 9 U.S.C. § 15: "Inapplicability of the Act of State Doctrine. Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine".
[18] *See* Park, *supra* note 1 at 14.
[19] *See* Park, *supra* note 1 at 14.

some national legal systems,[20] deny sovereign immunity in an action to enforce an arbitration agreement or to confirm an arbitral award. An arbitration clause in a loan agreement may also be effective when the borrower is an International Organization.[21]

As to interbank disputes, court selection clauses to have a dispute settled by a neutral judge in a neutral country may be cumbersome since some jurisdiction may not allow the judge to hear the case provided that the selected forum lacks enough links with the parties or the controverted facts.[22] In particular, a Court may decline to hear a case, basing such decision on the ground of inconvenient forum, especially when both litigants are foreign entities and the transaction or the controversy does not have sufficient connection with the State where the claim has been filed.[23] On the contrary, arbitrators will rarely refuse to hear a dispute because of *forum non conveniens* issues even though arbitration may have some uncertainty, particularly when consolidation of related claims becomes desirable.

Another field where arbitration is relied on is securities-related disputes,[24] involving broker-dealers. In the United States, arbitration can be useful to reduce costs and delay dealing with such disputes, as well as the risk of punitive damages awarded by juries, and it is presumed by the securities industry that arbitrators will be more reasonable in awarding such damages than the latter; moreover, the law of some States may prohibit arbitrators from giving a claimant anything more than compensation for actual loss.[25]

International business transactions often rely on a payment mechanism known as "documentary credit" (or letter of credit).[26] The advantage of a documentary credit lies in its independence from the underlying business relationship. But, not

---

[20] *See* Park, *supra* note 1 at 14.Regarding the United States of America, United Kingdom, Hong Kong (that however grants the applicability of Sovereign immunity),Germany, Brazil, *see* Mayer Brown, White Paper, *Sovereign Immunity and Enforcement of Arbitral Awards: Navigating International Boundaries* (2012): http://www.mayerbrown.com/files/Publication/2e0f7077-9b25-430e-8b70-6a8f8c1a9d76/Presentation/PublicationAttachment/1be4c54c-bfc2-4d78-9403-85e37c560f43/12270.PDF.

[21] *See* Park, *supra* note 1 at 16.

[22] *See* Park, *supra* note 1 at 16, also discussing the US perspective.

[23] *See* Park, *supra* note 1 at 19.

[24] *See* M. C. Boeglin, *The Use of Arbitration Clauses in the Field of Banking and Finance, Current Status and Preliminary Conclusion*, 1998 JOURNAL OF INTERNATIONAL ARBITRATION 15(3) at 20 [hereinafter Boeglin].

[25] *See* Park, *supra* note 1 at 22.

[26] *See* Park, *supra* note 1 at 26.

surprisingly, documentary credit transactions often give rise to disputes (concerning different interpretation of the letter of credit terms) between banks and their customers as well as between issuing and confirming banks. To reduce costs and delays of documentary credit litigation, parties sometimes agree to submit their controversy to arbitration under the rules of an experienced institution in documentary credit disputes.[27] An alternative would be a settlement made by "experts" under the auspices of the International Chamber of Commerce ("ICC"), also known as "Rules for Documentary Credit Dispute Resolution Expertise".[28]

The advantages of arbitration are granted only if an arbitration agreement exists. The most important rule in drafting an arbitration agreement is to ensure clarity and avoid any uncertainty that may add an unpleasant layer of contention to business relationships.[29] The most important aspects of an arbitration clause include, among others:

- a mechanism for appointing arbitrators;
- designation of the place of arbitration;
- the standard for fixing the arbitrators' fees;
- the language of the arbitration;
- the number of arbitrators; and
- a choice of law clause should be provided.

Many of these issues are covered by procedural rules of arbitral institutions. However, the choice of the seat of arbitration is the most important component of the arbitration agreement because national arbitration laws provide some grounds for setting aside awards made within their own territory,[30] which thing may go to the advantage of a party seeking to resist to the enforcement of an award. The most suitable place for arbitration would be in a Country where the judiciary does not interfere with the arbitration. Furthermore, if the provision of a right of appeal on points of law would maximize judicial certainty, the other side of the medal is to make the entire dispute time consuming, to the detriment

[27] *See* Park, *supra* note 1 at 29.
[28] *See* Park, *supra* note 1 at 29.
[29] *See* Park, *supra* note 1 at 34.
[30] Quoting Park, *supra* note 1 at 37, "judicial review of awards under national law at the place where rendered (as contrasted with the enforcement forum) falls into several categories. The first model allows appeal on the legal merits, as well as for procedural irregularities such as arbitrator bias and excess of authority. The second limits courts to review of procedural fairness only. Under a third but less popular paradigm, the arbitration seat provides no grounds at all on which an award may be set aside. Under the arbitration law of many countries, grounds for judicial review are hybrids of the above paradigms".

of the whole scope of arbitration, namely a quick settlement of disputes. Even though the parties assume some risk of a "bad award", in the case the arbitrator gets wrong on the facts or the law, this does not mean that they agree on a departure from fundamental procedural fairness, or may accept that arbitrators may exceed their mandate.[31]

Another feature that may constitute an advantage of arbitration over litigation is the absence of US style discovery,[32] thereby limiting the amount of documents that have to be disclosed. As a matter of fact, the taking of the evidence in International Commercial Arbitration is more flexible than in Court litigation, for the exigency of celerity would be jeopardized by a time consuming discovery of evidence and constitute a danger for precious proprietary information. The standard followed is embodied in the IBA Rules on the Taking of Evidence in International Arbitration, which set the grounds in which a request to produce documents can be made.[33]

Last but not least, the rules of some arbitral institutions, as well as some national laws on arbitration, allow consolidation of arbitrations.[34] Through consolidation separated arbitral proceedings with connected subject matters are brought together and decided in a single arbitration. Not providing for a consolidation of different arbitration proceedings may have inconsistent results in connected financial disputes. However, when a dispute implicates a party that has not signed any arbitration clause at all, consolidation of claims may not be possible.

In the pursuit of a more efficient dispute settlement strategy, a lending institution would want to give a twofold option: to arbitrate the dispute or to go to court, leaving a unilateral right to arbitrate. It is not easy to respond whether or not such optional clauses are enforceable, but it has been reported that courts have sometimes invoked the principle of "mutuality" (of remedy or obligation) to invalidate unilateral arbitration agreements: if both parties are not bound, then neither is bound.[35] As far as choice-of-court clauses are concerned, there has been a tendency to impose a double standard in forum selection, the bank reserving the right to sue customers at their domiciles but requiring litigation against itself to be brought only in the contractually chosen forum (namely, the bank's headquarters or designated branch office). To this extent, the Brussels,[36]

---

[31] *See* Park, *supra* note 1 at 37.
[32] *See* K. P. Berger, *The aftermath of the financial crisis: why arbitration makes difference for banks or financial institutions*, in LAW AND FINANCIAL MARKET REVIEW (2009) at 57.
[33] *See* IBA Rules on the Taking of Evidence in International Arbitration, May 29, 2010, ISBN: 978 0 948711 54X, Art. 3(3).
[34] *See* Park, *supra* note 1 at 47.
[35] *See* Park, *supra* note 1 at 38.
[36] *Supra* note 11.

and Lugano Conventions,[37] seem to admit unilateral jurisdiction selection, as well as the EU Reg. 44/2001.[38]

The preference of arbitration over litigation is not automatic. Rather, it relies on different factors such as the experience of the person who decides a financial controversy and the legal framework governing the merits of the dispute.[39] In this context, professionals working in the financial services industry are called to evaluate the reliability of arbitration agreements versus court selection clauses, the effectiveness of which will depend from the interplay of the geographic and transactional context. One has to always bear in mind that in some countries court judgments and jurisdiction clauses will not benefit from enforcement treaties. To the contrary, the New York Convention mandates enforcement of arbitration agreements and awards throughout the world. Arbitration, of course, has some extent of uncertainty, for instance, the consolidation of related claims.

After careful revision of these factors, an arbitration clause can sometimes prove more reliable and efficient than a court selection agreement, for several reasons. First of all, when borrower's assets are located in a jurisdiction where are lacking agreements to enforce foreign judgments, to enforce an arbitral award pursuant to the New York Convention may be more effective Second, when loans are subject to possible exchange controls, an arbitration clause reduces the likelihood of an Act of State defence to loan enforcement. Third, an arbitrator may be more reasonable than a jury in considering punitive damages claim (if any), or a lender liability action against a banker. Lastly, arbitration may be used occasionally to resolve documentary credit disputes more efficiently than in judicial proceedings.

The interplay of these diverse elements however, makes it dangerous to rely on a "one size fits all" dispute resolution clause in financial transactions, based on a matter of practice rather than informed analysis. Financial lawyers need to learn tailoring the dispute resolution clause to each particular type of transaction.

---

[37] *Supra* note 11.

[38] However there is a caveat, since the enforceability of such unilateral clauses may be subject to the scrutiny of the judiciary and the outcome may be uncertain. See for instance the case dealt with by the French Court of Cassation, Arrêt n° 983 du 26 septembre 2012, (claimant: *La société Banqueprivée Edmond de Rothschild Europe*; defendant: *Mme X*...) where a unilateral jurisdiction clause under Council Regulation (EC) No 44/2001 has been invalidated.

[39] *See* Park, *supra* note 1 at 57.

II. Complex Financial Transactions and the Reasons why a Centralized Dispute Settlement System is Desirable.

Of late, the market has experienced an increasing use of financial derivatives, i.e., complex instruments linked to a specific financial instrument, indicator or commodity, and traded in financial markets in their own right. Financial derivatives are traded either through specialized stock exchanges (ETD) or through over-the-counter (OTC) markets. OTC derivatives are usually divided into futures, swaps and options and represent an important way of fund raising, among other important functions.[40] Due to their intrinsic risk, different provisions at different levels regulate these instruments:

- Public law;
- Stock exchange regulations; and
- Master agreements.

Fast development of derivatives market has called for harmonization of some operations related to derivatives transactions and risk control procedures, leading to the creation of uniform agreements (also called "master agreements") by market makers, such as dedicated associations or investment banks. As discussed in the introduction, the choice of law and jurisdiction in these agreements is usually London or New York. The reason to prefer such jurisdictions has been that London and New York Courts are very specialized and able to deal with such intricate matters.[41] On the other hand, exchange traded derivatives follow the dispute settlement method set by individual stock exchanges, and arbitration is used relatively often.[42]

After the financial crisis, banks have reconsidered arbitration as an alternative to litigation for the settlement of financial disputes. There are different reasons on which such an argument is based. First of all, the increasing number of financial transactions, as well as the poor performance of banks has led to an increment in litigation, with the result of costs increment for banks.[43] The second reason is that modern global commerce requires more sophisticated financial instruments. Derivatives, although representing only one class of such financial instruments, have been capable of generating unthinkable sums of money. Though disputes arising out of such transactions needs to be settled fairly and quickly, the non-

[40] *See* M. C. Boeglin, *supra* note 24, at 21.
[41] *See* M. C. Boeglin, *supra* note 24, at 22.
[42] *See* M. C. Boeglin, *supra* note 24, at 22.
[43] *See* A. Helen, *Banking: Litigation could seriously damage banks' health*, EUROMONEY (June 2011).

familiarity with this complex subject by State Courts Judges or arbitrators may delay this process.[44]

The volume and the complexity of Complex Financial Transactions (hereinafter CFTs) represent a proportionate share of the world's major civil disputes.[45] In the absence of an international forum to settle such disputes, they will be settled by local Courts, with the danger of conflicting decisions and concerns on the influence of potential bias. A coherent and uniform interpretation of the instruments used to document CFTs is, in the end, what markets look for, as it makes certain kind of transactions predictable, where their pathologic implications are concerned. Common interpretation of international instruments is at the base of legal uniformity, fair perception of justice, confidence in markets and financial instruments,[46] and last but not the least, an invitation for developing markets, as it sets a more stable environment.[47] However, the absence (or the weakness) of such an international venue to settle CFTs disputes still creates uncertainties, amplifying all the concerns that have been raised as a consequence of the financial crisis.[48]

Different legal solutions to the same legal problem are justifiable when geographical distribution of social values is concerned, as in the case of rules protecting the values of a particular community.[49] However, since CFTs do not pertain to such a category, there exists no scope for different interpretation of their underlying documents. Of course, issues of public policy, that vary from country to country may affect the validity of some clauses in a transaction, but it might be claimed that this does not contrast with the latter assumptions: first, that the invalidity is the result of those laws that protect the values of a particular country (for instance, a more or less accentuated consumers protection or insolvency and bankruptcy laws) and it regards only the validity of a clause, that may not imply invalidity of the whole contract or instrument; second, that as a matter of policy, there may be efforts in the direction of seeking uniformity through the harmonization of legislations,[50] which may reduce, to a certain

---

[44] *See* D. Baragwanath, *How should we resolve disputes in complex international financing transactions?,*7 CAPITAL MARKETS LAW JOURNAL, No. 3, at 205 [hereinafter Baragwanath].
[45] *See* Baragwanath, *supra* note 44, at 206.
[46] *See* Baragwanath, *supra* note 44, at 207.
[47] *See* generally, Baragwanath, *supra* note 44, at 211, pointing out that the role of P.R.I.M.E. Finance should be to "secure markets confidence and support" also "engaging with practitioners, academics and the media in developed and developing markets".
[48] *See* Baragwanath, *supra* note 44, at 207.
[49] *See* Baragwanath, *supra* note 44, at 207.
[50] An important role is also played at an international level by trade usages and practices.

extent, public policy implications. The ISDA Master Agreements are examples of such international transactions, representing the standardization and internationalization of contractual terms.[51] The ISDA Master Agreements, in both their 1992 and 2002 versions, are master service agreements in which the parties agree to most of the terms that will govern future transactions or agreements. In such cases, an international forum would be desirable in order to provide certainty that has positive effects on markets and at the end represents a full implementation of the Rule of Law, meant as a system with rules that are clear and stable to guide actions and behaviours.[52] The implementation of the Rule of Law, however cannot shield from a physiological problem inborn in the administration of justice, namely that there can be more than one rational answer to a legal problem. On a larger scale, division of opinions is present also at an international level, when different Courts decide issues involving international transactions differently. Quoting D. Baragwanath:

> *"The truth is that courts of each state jurisdiction can be of very high quality, and yet be affected by social, cultural and historical factors, among them rules of precedent, which can tend to affect the answer to any problem. These factors as well as differing standards of perceived competence give rise to problems of forum shopping. International adjudication requires a judge to focus on more than his or her own narrowly domestic focus.".*[53]

A rational answer to this lack of legal certainty would be a truly international approach to the settlement of CFTs disputes.

III. P.R.I.M.E. Finance: Scope, Proceedings And Cases.

It has been argued that arbitration of CFTs would have an advantage over Court litigation. Although many institutions administering arbitration may fulfil the needs related to the prompt settlement of CFTs disputes, the lack of a centralized dispute resolution system related to such transactions may disperse the attempt of creating an international forum with its own body of law, rules, and experts.

The call for such a venue has found a response in 2012 with the establishment of P.R.I.M.E. Finance.[54]

---

[51] International Swaps and Derivatives Association, http://www2.isda.org.

[52] *See* D. Baragwanath, *supra* note 44, at 207, quoting John Finnis, Natural Law and Natural Rights (OUP 1980) 270.

[53] *See* D. Baragwanath, *supra* note 44, at 208.

[54]http://www.primefinancedisputes.org.

It is an independent non-profit institute based in The Hague, Netherlands, that includes a panel of renowned legal and financial experts, providing for an international forum for resolving complex financial disputes, supporting judges in sophisticated financial transactions and compiling a database of relevant law including international precedents and source materials. Its mission is to foster a more stable global economy and financial marketplace by reducing legal uncertainty and systemic risk, and promoting the rule of law especially in emerging markets. A guiding principle of the organization is independence, which will distinguish it from industry associations and other financial market participants. The goal of P.R.I.M.E. is ambitious, as it would be the ideal point of reference for the solution of CFTs disputes.

There are basically some aspects of the P.R.I.M.E. Finance projects that should be underlined in order to understand how it is a distinct entity from other institutions that administer arbitration in a broader context, inclusive of CTFs. Preliminarily, the scope of P.R.I.M.E. is narrow, including only complex financial transactions. A narrow scope is synonymous with dedicated service. In particular, attention is drawn on the fact that P.R.I.M.E. Finance has implemented some amendments in the 1992 and 2002 ISDA Master Agreements in order to make them coherent with the use of arbitration in disputes arising out of CTFs. Is it reasonable then to imply that disputes on derivatives and swaps are the main object of attention from the P.R.I.M.E. Finance perspective? The answer seems to be affirmative. An interpreter may infer that there is an ideal link between P.R.I.M.E. Finance and the work of ISDA.

The interest of the ISDA for the settlement of financial disputes by arbitration took form in 2011 with a document titled "The use of arbitration under an ISDA Master Agreement".[55] This document, meant to be a memorandum for the ISDA Members, describes some features of arbitration, the market trends, the reasons for the use of arbitration and the problematic issues. Not surprisingly, particular attention is drawn to the phenomenon of globalization and the participation of emerging Countries (markets) in international finance, which may be reluctant to accept the jurisdiction of English or New York State Courts, as well as the difficulty of enforcing foreign judgments in such emerging jurisdictions. Even though a prospective solution is to litigate such disputes in the country where the defendant has its assets, so as to avoid the pitfalls of the enforcement of foreign judgments, some considerations may be made for reconsidering arbitration to settle such disputes:-

[55] The use of arbitration under an ISDA Master Agreement, ISDA, http://www2.isda.org/search?headerSearch=1&keyword=arbitration [hereinafter The use of arbitration under an ISDA Master Agreement].

- judicial authority perceived as biased or corrupted;
- potential delay;
- lack of experience by counsels or judges dealing with derivatives contracts;
- failure to respect the foreign law chosen to regulate the contract and lack of familiarity of such law;
- inconsistent decision making process;
- use of different language in the litigation, which may give rise to the need of translations.[56]

If these considerations lead to considering arbitration as a better option than court litigation, some issues need to be considered. Attention should be drawn to drafting a valid arbitration agreement,[57] as well as choosing to insert an optional arbitration clause (whose validity may be questioned in some jurisdictions). The importance of drafting a valid and enforceable arbitration agreement should not be undervalued: although the concept is abundantly reiterated by scholars and practitioners, inadequately drafted clauses are found with some frequency.

Particular emphasis is also put on the arbitrators' experience,[58] as well as on the value of precedents.[59] In particular, the absence of the "*stare decisis*" rule is of concern because awards interpreting an ISDA agreement would be useful in setting a rationale to be applied in further cases. The problem, however, does not lie in the value of precedent of an arbitral award, but rather the fact that an award is made public, hence its rationale made clear and virtually being object of debates by scholars or practitioners.[60] It may be noted how some arbitral institutions are now making their awards available to the public, which may weaken the concerns related to the value of an arbitral award as a guidance to the market.

After the first memorandum, ISDA issued a second one, titled "The use of arbitration under an ISDA Master Agreement: feedback to members and policy options",[61] in which members were asked to provide feedback on the following issues, in order to optimize ISDA's initiative:

---

[56] *Id.*, at 3.

[57] To this extent, it is suggested an amendment of the ISDA agreements (1992 and 2002) to the extent of deleting Section 13(b) in its entirety and replaced with the arbitration clause, while Sections 13(c) and (d) should be amended in the sense of taking into account of the change of dispute resolution process to arbitration

[58] *See* "The use of arbitration under an ISDA Master Agreement", *supra* note 61, at 6.

[59] *Id.*, at 6.

[60] *Id.*, at 7.

[61] The use of arbitration under an ISDA Master Agreement: feedback to members and policy options, ISDA, http://www2.isda.org/search?headerSearch=1&keyword=arbitration[hereinafter The

- Drafting of a proper arbitration clause;[62]
- Availability of qualified arbitrators with experience in derivatives;[63]
- Developing jurisprudence on ISDA documentation.[64]

With regard to the first point, it is made clear that an arbitration clause must specify the relevant arbitral rules. The proposal of ISDA was to publish at least one model clause suitable for arbitration under the rules of arbitration of the following institutions:

- The United Nations Commission on International Trade Law (UNCITRAL);
- The International Chamber of Commerce (ICC) Commission on Arbitration;
- The London Court of International Arbitration (the LCIA);
- P.R.I.M.E. Finance (Panel of Recognized Market Experts in Finance).

The inclusion of the first three institutions was based on the consideration that they have been the most chosen for the settlement of financial disputes. The mention of P.R.I.M.E. Finance is due to the fact that, although recently established, it is a dedicated institution for the purpose of giving valuable assistance in the resolution of financial disputes. After these two efforts, ISDA recently issued an arbitration guide,[65] reflecting all comments made after issuing the first two memoranda. This arbitration guide reflects an interest in using arbitration for disputes arising in connection with derivatives transactions documented under the Master Agreements, as well as the need of the publication of model arbitration clauses, inclusive of key issues like seats and rules of arbitration.

The Guide is organized in a manner similar to the first memorandum, and divided in three sections. The first and the second section contain an overview of arbitration and an explanation of its key features, while the third provides for an introduction to the model clauses set out in the Appendices. Among the model clauses provided for in this Guide, some are dedicated to P.R.I.M.E. Finance arbitration with the seat of the Arbitral tribunal in England, New York or The Hague.

---

use of arbitration under an ISDA Master Agreement: feedback to members and policy options].

[62] *Id.*, at 2.

[63] *Id.*, at 4.

[64] *Id.*, at 4.

[65] ISDA Arbitration Guide 2013, http://www2.isda.org/search?headerSearch=1&keyword=arbitration.

Summing up the current status, it is a perception and a concern that there is a black hole of legal uncertainty where CFTs are concerned. Such uncertainty is caused by a lack of top-quality case law, as well as increasing doubts that State Courts may not be able to address the issue in a manner that may bring stability to markets. Financial instruments are also becoming more complex as a result of innovation in the field, which gives rise to more complex disputes.[66] To this fact, one may add the perception of local bias (if any) and the danger of geographically contrasting decision on similar issues. Last but not least, disputes arising out of the ideal canonical venues, namely London or New York, should not be ignored, since markets may be affected by the outcome of such cases.[67] It is hence necessary to implement reliable dispute settlement facilities, since another problem is the lack of experience on CFTs by Judges, not to mention the difficulties in enforcing foreign judgments. Although such transactions are documented through a system of standardized agreements, one of the most used being the ISDA Master Agreement (but not the only one);[68] there is no standardized dispute settlement system. On the contrary, banks, especially those operating in emerging markets, find ad hoc arbitration a reliable method to settle financial disputes.[69] However, this system is not yet well established and settled, due to some shortcomings like the dearth of arbitrators with enough experience on CFTs.

Would P.R.I.M.E. Finance add more to this state of affairs? Quoting J. Ross:

> "*P.R.I.M.E. Finance seeks to fill the international void*[…] *by providing market participants with a panel of neutral experts with market knowledge to resolve and arbitrate their CFTs disputes.*[…]*Care also needs to be taken at this juncture not to make extravagant claims about what P.R.I.M.E. Finance is or should be able to do.*[…]*Put briefly, while state and national courts will always have an important place, P.R.I.M.E. Finance is nevertheless established to fill an international void, alongside those courts.*[…]*P.R.I.M.E. Finance will be a permanently available, centralized, multi-linguistic and multi-cultural 'college of expertise'. P.R.I.M.E. Finance has brought together a group of nearly a hundred 'experts' from a range of disciplines, backgrounds and cultures, comprising judges, arbitrators and mediators, specialized lawyers and academics, and market participants. P.R.I.M.E. Finance has drawn up two lists of experts, a list of finance experts and a list of dispute resolution experts.*

[66] Disputes are multi-jurisdictional and involve both civil law and common law countries.*See* J. Ross, *The case for P.R.I.M.E. Finance*, 7 CAPITAL MARKETS LAW JOURNAL, No. 3, at 222 [hereinafter Ross].
[67] *See*Ross,*supra* note 66, at 223.
[68] *See*Ross,*supra* note 66, at 222.
[69] *See* Ross, *supra* note 66, at 225.

The 'college of expertise' will arbitrate and mediate CFTs disputes. It will also provide expert valuation advice and services in relation to CFTs; guidance where necessary to state and national courts hearing a CFTs dispute; advisory opinions in relation to CFTs issues and disputes; and judicial training in relation to CFTs".[70]

P.R.I.M.E. Finance Arbitration, the core of CFTs dispute settlement

The P.R.I.M.E. Finance arbitration is modelled on the UNCITRAL Arbitration Rules, with some differences to fit the needs of the administration of CFTs arbitration. The first difference with the UNCITRAL Arbitration Rules, commonly used for ad hoc arbitrations is that P.R.I.M.E. Finance arbitration rules are provided for an administering institution, P.R.I.M.E. Finance.[71] The Rules cover all the aspects of the arbitration, with the exception of conflicts with provisions of the law applicable to the arbitration (*lex arbitri*),[72] and apply when the parties agree that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration by P.R.I.M.E. Finance or under the P.R.I.M.E. Finance Arbitration Rules.[73]

The arbitration begins with the filing of a notice of arbitration with P.R.I.M.E.[74] Finance. Subsequently, the claimant is notified of the receipt of the notice of arbitration, and a copy of it is transmitted to the counter-party (the "respondent"), along with an invitation to submit a response to the notice of arbitration. The Arbitral proceedings are considered to have commenced on the

[70] *See* Ross, *supra* note 66, at 227-8.

[71] While one may recall the UNCITRAL arbitration Rules are mostly used for ad hoc arbitrations.

[72] *See* art. 1(2) P.R.I.M.E. Finance Arbitration Rules.

[73] *See* art. 1(1) P.R.I.M.E. Finance Arbitration Rules.

[74] *See* art. 3 P.R.I.M.E. Finance Arbitration Rules. As set in the UNCITRAL Arbitration Rules, the notice of arbitration must contain some essential elements, as well as it may contain some eventual ones. Essential elements are considered: (a) a demand that the dispute be referred to arbitration; (b) the names and contact details of the parties; (c) identification of the arbitration agreement that is invoked; (d) the identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument ,a brief description of the relevant relationship; (e) a brief description of the claim and an indication of the amount involved, if any; (f) the relief or remedy sought; (g) a proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon. *See* art. 3(2) P.R.I.M.E. Finance Arbitration Rules.
Eventual elements are considered: (a) a proposal for the appointing authority referred to in article 6, paragraph 1; (b) a proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1; (c) notification of the appointment of an arbitrator referred to in article 9 or 10. *See* art. 3(3) P.R.I.M.E. Finance Arbitration Rules.

date of receipt of the notice of arbitration by P.R.I.M.E. Finance. The response must be filed with P.R.I.M.E. Finance, within 30 days from the date of the invitation.[75] After the notice of arbitration is filed, the claimant has to pay the registration[76] fee and the administrative costs.[77]

As delay is unpleasant in dispute settlement, P.R.I.M.E. Finance Arbitration Rules provide for a default appointing authority (being in charge of appointing of an independent and impartial arbitrator),[78] the Secretary-General of the PCA, when the parties have not agreed otherwise by the time of commencement of the arbitration.[79]

Three arbitrators usually compose a P.R.I.M.E. Finance arbitral tribunal, unless the parties have not agreed on a sole arbitrator or specified the number of arbitrators.[80] Arbitrators are appointed by the parties, or by the appointing authority, from a list of P.R.I.M.E. Finance approved arbitrators.[81] A procedure similar to the one set for the appointment of an arbitrator is provided for the replacement of arbitrators,[82] with the consequence that the proceedings will resume at the stage where the arbitrator who was replaced ceased to perform his or her functions.[83] A person that is likely to be appointed as arbitrator has a duty to disclose any circumstances that could give rise to justifiable doubts as to his or her impartiality, independence or availability. This duty remains from the time of

---

[75]Similarly to what happens to the notice of arbitration, the Arbitration Rules distinguish between essential information andthose that may be eventually provided for. The first group encompasses the following: (a) The name and contact details of each respondent; (b) the response to the information set forth in the notice of arbitration, pursuant to article3, paragraphs 3(c) to (g) of the P.R.I.M.E. Finance Arbitration Rules. *See* art. 4(1) P.R.I.M.E. Finance Arbitration Rules.
To the second group belong the following: (a) a plea that an arbitral tribunal to be constituted lacks jurisdiction; (b) a proposal for the designation of an appointing authority; (c) a proposal for the appointment of a sole arbitrator; (d) a notification of the appointment of an arbitrator; (e) a brief description of counterclaims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought; (f) a notice of arbitration in accordance with article 3 in case the respondent formulates a claim against a party to the arbitration agreement other than the claimant. *See* art. 4(2) P.R.I.M.E. Finance Arbitration Rules.

[76] *See* art. 3(6) P.R.I.M.E. Finance Arbitration Rules.

[77] *See* art. 3(7) P.R.I.M.E. Finance Arbitration Rules.

[78] *See* art. 6(4) of P.R.I.M.E. Finance Arbitration Rules.

[79] *See* art. 6(1) of P.R.I.M.E. Finance Arbitration Rules.

[80] *See* art. 7(1) of P.R.I.M.E. Finance Arbitration Rules.

[81] *See* art. 8 and 9 of P.R.I.M.E. Finance Arbitration Rules.

[82] *See* art. 14 of P.R.I.M.E. Finance Arbitration Rules.

[83] *See* art. 15 P.R.I.M.E. Finance Arbitration Rules.

the appointment throughout the arbitral proceedings.[84] A doubt about impartiality or independence may give rise to a challenge of the arbitrator.[85] The appointing authority is competent of making a decision on the challenge.[86]

The arbitral tribunal has ample liberty in conducting the arbitration in the manner it deems appropriate, provided that the parties are treated with equality and given a reasonable opportunity of presenting the case.[87] It is always opportune to set a timetable of the arbitration.[88] The arbitral tribunal also has the power to allow third person party to the original arbitration agreement to be joined in the arbitration, unless it is opportune to act differently.[89] This is a key provision, since many CFTs are complex and multiparty.

The arbitral tribunal will determine the place of arbitration in case the parties have not determined it.[90] The arbitral tribunal may meet at any location it considers appropriate for deliberations and, unless otherwise agreed by the parties, at any location it considers appropriate for any other purpose, including hearings.[91] The seat of arbitration is of particular importance, since its efficient planning may represent an advantage in terms of the relevant provision of the *lex arbitri* (for instance, right of appeal) and future enforcement of an arbitral award.[92] A P.R.I.M.E. Finance arbitration seat is intended to be in The Hague, but the parties may choose a place that suits their needs better, without renouncing to the 'college of expertise' that P.R.I.M.E. offers. Moreover, The Hague has a widespread international tradition, hosting International Tribunals, the ICJ and the PCA thus being able to offer facilities like translation services.

The language of arbitration is a detail that parties should pay attention to in order to avoid problems related to translation (potential inaccuracy, costs, delay, etc.). Parties may determine the language of the proceedings. In the absence of such an agreement, the arbitral tribunal will determine the language to be used in the proceedings. Such a decision will apply to all the documents related to the arbitration as well as oral hearings.[93] The arbitral

[84] *See* art. 11 P.R.I.M.E. Finance Arbitration Rules. Annex B to the Rules provides for a model statementof independence pursuant to article 11.
[85] *See* art. 12(1) P.R.I.M.E. Finance Arbitration Rules.
[86] *See* art. 13(4) P.R.I.M.E. Finance Arbitration Rules.
[87] *See* art. 17(1) P.R.I.M.E. Finance Arbitration Rules.
[88] *See* art. 17(2) P.R.I.M.E. Finance Arbitration Rules.
[89] *See* art. 17(5) P.R.I.M.E. Finance Arbitration Rules.
[90] *See* art. 18(1) P.R.I.M.E. Finance Arbitration Rules.
[91] *See* art. 18(2) P.R.I.M.E. Finance Arbitration Rules.
[92] *See*UNCITRAL Notes on OrganizingArbitralProceedings, 28 May - 14 June,1996 (New York), at 10.
[93] *See* art. 19(1) P.R.I.M.E. Finance Arbitration Rules.

tribunal may order that any document submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.[94]

As stated earlier, the arbitration starts with a notice of arbitration, with the claimed relief contained in the statement of claim, accompanied by all documents and other evidence relied upon by the claimant. The reply to the statement of claim is contained in the statement of defence.[95] Both claim and defence may be amended during the course of the arbitral proceedings unless the arbitral tribunal considers it inappropriate, having regard to the delay in proceedings or prejudice to other parties as well as any other circumstances. Such amendments however cannot be made in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal.[96] To the same extent, the arbitral tribunal will decide which further written statements shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.[97]

The arbitral tribunal has the power to rule on its own jurisdiction, including any objection to the existence of the arbitration agreement. The arbitral agreement, according to the severability doctrine, is treated as something separated from the main agreement, and hence a decision on the invalidity of the contract will not automatically reflect on the invalidity of the agreement.[98] The arbitral tribunal may rule on a plea related to its jurisdiction, either as a preliminary question or in an award on the merits. Moreover, it may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.[99]

Another important feature of the P.R.I.M.E. Finance Arbitration Rules is that at the request of the party, the arbitral tribunal may grant interim measures, provided that it has *prima facie* jurisdiction to decide the case,[100] and that the party asking for the measure satisfies the tribunal that the harm resulting if the measure is not issued would be irreparable by an award on damages, and that there is a possibility that the requesting party may succeed on the merits of the claim.[101] Interim measures may be directed to maintain or restore the status quo

[94] *See* art. 19(2) P.R.I.M.E. Finance Arbitration Rules.
[95] *See* art. 21 P.R.I.M.E. Finance Arbitration Rules.
[96] *See* art. 22 P.R.I.M.E. Finance Arbitration Rules.
[97] *See* art. 24 P.R.I.M.E. Finance Arbitration Rules.
[98] *See* art. 23(1) P.R.I.M.E. Finance Arbitration Rules.
[99] *See* art. 23(3) P.R.I.M.E. Finance Arbitration Rules.
[100] *See* art. 26(1) P.R.I.M.E. Finance Arbitration Rules.
[101] *See* art. 26(3) P.R.I.M.E. Finance Arbitration Rules.

pending determination of the dispute; to prevent or refrain from taking action that would cause current or imminent harm or prejudice to the arbitral process itself; to provide means of preserving assets out of which a subsequent award may be satisfied; to preserve evidence that may be relevant and material to the resolution of the dispute.[102] The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure[103]. Interim measures can be modified, suspended or terminated by the arbitral tribunal[104], both upon party application or upon its own initiative (in exceptional circumstances and upon prior notice to the parties).

Two expedite proceedings are provided for under P.R.I.M.E. Finance rules in case urgent provisional measures are needed: emergency arbitral proceedings,[105] and Referee arbitral proceedings (if the seat of Arbitration is in Netherlands, as it is regulated by article 1051 paragraph 1 of the Dutch Code of Civil Procedure).[106]

Regarding the taking of the evidence, each party bears the burden of proving the facts relied on to support its claim or defence. There is indeed some flexibility, since it may be heard as a witness any individual, notwithstanding that he or she is a party to the arbitration or in any way related to a party.[107] The arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal. The expert shall submit to the arbitral tribunal and to the parties, a description of his or her qualifications and a statement of his or her impartiality and independence.[108]

---

[102] *See* art. 26(2) P.R.I.M.E. Finance Arbitration Rules.
[103] *See* art. 26(6) P.R.I.M.E. Finance Arbitration Rules.
[104] *See* art. 26(5) P.R.I.M.E. Finance Arbitration Rules.
[105] *See* art. 26a P.R.I.M.E. Finance Arbitration Rules. Emergency Arbitral Proceedings allows the parties to apply for "urgent provisional measure(s) that cannot await the constitution of the arbitral tribunal." Accroding to the relevant applicable rules, P.R.I.M.E. Finance can order the appointment of an "Emergency Arbitrator" from the approved list of experts within seventy-two hours of receipt of an application by one of the parties. The order issued by the "Emergency Arbitrator" cannot prejudice the final decision of the arbitral tribunal and is not binding on the arbitral tribunal finally established.
[106] *See* art. 26b P.R.I.M.E. Finance Arbitration Rules. Referee Arbitral Proceedings have some similarities with the Emergency Arbitral Proceedings, providing for speedy proceedings culminating in an enforceable award within thirty to sixty days. The award may not prejudice the final decision of an arbitral tribunal on the merits of the case. Referee Proceedings are conducted by a specially appointed tribunal, composed of a sole arbitrator appointed by P.R.I.M.E. Finance from an approved list of experts.
[107] *See* art. 27 P.R.I.M.E. Finance Arbitration Rules.
[108] *See* art. 29 P.R.I.M.E. Finance Arbitration Rules.

The law applicable to the dispute is a crucial point in arbitration. Unlike what happens in transnational civil litigation, where the applicable law is the outcome of a process where rules of Private International Law are applied, arbitration represents a departure from this rule and gives the parties freedom to determine the law applicable to their dispute. In P.R.I.M.E. Finance arbitration, the arbitral tribunal will apply the rules of law designated by the parties as applicable to the substance of the dispute or the law which it determines to be appropriate in case the parties fail to designate the applicable law.[109].

In the decision making process, the arbitral tribunal will take into account the terms of the contract as well as any usage of trade applicable to the transaction.[110] Decisions *ex bono* are possible only if expressly authorized by the parties.[111]

Awards, as well as other decisions of the arbitral tribunal, are made by a majority of the arbitrators (unless there is a sole arbitrator).After the award is issued, and within 30 days after its receipt, a party can request the arbitral tribunal for an interpretation of the award,[112] as well as to correct any error in computation, clerical or typographical error, or any error or omission of a similar nature.[113] When an interpretation of the award, or its correction, is required, the tribunal shall provide within 45 days after the receipt of the request.[114] The tribunal may also make corrections on its own initiative, within 30 days after the communication of the award.[115] Litigation in Courts is usually seen as more transparent, since judgments are published and constitute a body of precedents, while arbitral awards are published only if parties so consent. P.R.I.M.E. Finance, to the contrary, is a sub-version of the order of things, since article 34(5) of its Arbitration Rules explicitly allows the publication of excerpts of an award without the consent of the parties. Awards can be published if P.R.I.M.E. Finance has a legal duty to act in this sense and, last but not the least, P.R.I.M.E. Finance has the right to publish an award or an order in its entirety, in anonymous form, provided that one of the parties does not "object to such publication within one month after receipt of the award". This provision fills an important gap and gives more stability and predictability for market players.

The final part of the rules is dedicated to the fees and expenses of the arbitrators. Such fees and expenses must be reasonable in amount, taking into

[109] *See* art. 34(1) P.R.I.M.E. Finance Arbitration Rules.
[110] *See* art. 34(3) P.R.I.M.E. Finance Arbitration Rules.
[111] *See* art. 34(2) P.R.I.M.E. Finance Arbitration Rules.
[112] *See* art. 37(1) P.R.I.M.E. Finance Arbitration Rules.
[113] *See* art. 38(1) P.R.I.M.E. Finance Arbitration Rules.
[114] *See* art. 37(2) and 38(1) P.R.I.M.E. Finance Arbitration Rules.
[115] *See* art. 38(2) P.R.I.M.E. Finance Arbitration Rules.

account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.[116] After the constitution of the arbitral tribunal, the parties are informed as to how the tribunal proposes to determine its fees and expenses. This determination may be subject to review by the appointing authority, if so asked by a party.[117] Costs of arbitration shall, in principle, be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.[118]

No mention is made in the Arbitration Rules to the right of appeal of the award, which thing is reasonable, being arbitration meant to settle disputes on a first instance basis and in a reasonable amount of time. The practitioner may know very well that arbitral awards are subject to annulment according to the law of the seat. Similarly, the law of the seat may provide for the right of appeal. There is, however, a difference between jurisdictions as far as the right of appeal and setting aside an arbitral award are concerned. We may focus our attention on the relevant jurisdictions that may be the seat for P.R.I.M.E. Finance arbitration.

England

According to the English Arbitration Act 1996, it is possible to challenge, on jurisdictional grounds or on the ground of serious irregularities affecting the tribunal, the proceedings or the award.[119] A party may also appeal an award on a point of English law. However, this right of appeal may be excluded by agreement, and the rules of a number of arbitral institutions provide for such exclusion.[120]

New York

Arbitral awards made in New York may face limited grounds for judicial review under 9 U.S.C. § 10, such as, where the award was procured by corruption or fraud, where there was evident partiality or corruption in the arbitrators, where the arbitrators were guilty of misconduct, or where the arbitrators exceeded their powers.[121] In all these cases no appeal is provided for.

France

[116] *See* art. 41 P.R.I.M.E. Finance Arbitration Rules.
[117] *See* art. 41(3) P.R.I.M.E. Finance Arbitration Rules.
[118] *See* art. 42(1) P.R.I.M.E. Finance Arbitration Rules.
[119] *See* The Arbitration Act, 1996 (c. 23) § 67 and 68 (U.K.) [hereinafter Arbitration Act].
[120] *See* Arbitration Act, *supra* note 128 at § 69.
[121] *See* 9 U.S.C. § 10. *See* also N.Y. CVP. LAW § 7511.

In France, international arbitral awards may be set aside in circumstances where the arbitral tribunal has wrongly upheld or declined jurisdiction, where there was lack of due process or where recognizing or enforcing the award would violate international public policy.[122] By way of specific agreement, parties can waive the right to bring an action to set aside the award.[123] International awards are not subject to appeal, while domestic awards are, if parties so agree.[124]

Hong Kong

In Hong Kong, grounds to set aside international arbitral awards are limited to circumstances such as invalidity of the arbitration clause or that the dispute did not fall within the terms of the arbitration clause, or where the constitution of the tribunal or the arbitral procedure was not in accordance with the parties' agreement or the law.[125]

Singapore

In Singapore, where the legislation is based on the UNCITRAL Model Law on International Commercial Arbitration, arbitral awards may only be set aside in limited circumstances such as where the arbitration clause is not valid or the dispute did not fall within the terms of the arbitration clause, or where the making of the award was affected by fraud or corruption or there was a breach of natural justice in connection with the rendering of the award.[126]

Switzerland

In Switzerland, an international arbitral award may be set aside in circumstances where the arbitration clause is not valid, the dispute did not fall within the scope of the arbitration clause, the making of the award was affected by serious procedural irregularity or the award itself violates international public policy. If neither party has its domicile, habitual residence or place of business in Switzerland, the parties may, by way of a specific agreement, expressly waive their right to apply for setting aside of arbitral awards.[127]

---

[122] *See* French Code of Civil Procedure, 1806, Art. 1518 & 1520.
[123] *See* French Code of Civil Procedure, 1806, Art. 1522.
[124] *See* French Code of Civil Procedure, 1806, Art. 1489.
[125] *See* Arbitration Ordinance, Cap. 609, §81 (H.K.).
[126] *See* UNCITRAL Model Law on International Commercial Arbitration, Art. 34, Sales No.E.08.V.4 (1985); The International Arbitration Act (Chapter 143A), § 24 (Sing.).
[127] *See* The Swiss Federal Statute on Private International Law, (c. 12) Art. 190, 192.

The Netherlands

In the Netherlands, international arbitral awards may be set aside in circumstances such as where the arbitration clause is not valid, the arbitral tribunal was constituted in violation of the applicable rules or the award violates public policy.[128] Appeal to a second arbitral tribunal is possible if parties have agreed thereto.[129]

Where the *lex arbitri* leaves to the parties to decide whether to provide for appeal or not, arbitration rules may contain some default provision in the sense of excluding such a right. However, it is always care of the party to check carefully both the arbitration rules and the applicable law and to decide accordingly.

P.R.I.M.E. Finance cases

As P.R.I.M.E. Finance was created with the attempt of bringing certainty and clarity on CFTs, we may have a look at the potential cases this facility will deal with, albeit exhaustively. One may divide such cases in three areas:

- Jurisdiction cases;
- Interpretation cases; and
- Mis-selling cases.

Not surprisingly, international transactions, as well as CFTs that present some multi-jurisdictional elements (foreign parties, foreign laws, foreign assets, parallel proceedings), often rise questions of which court is competent to hear the dispute.[130] CFTs are regulated by market standard agreements (for instance ISDA) that often contain understood and "familiar" clauses, such as choice of law and submission to exclusive or not exclusive, jurisdiction and related waivers; it may happen that neither party has been incorporated, or is legally domiciled, in the chosen jurisdiction.[131]Dissatisfaction with the deal may lead a party to raise forum-shopping-type arguments, so to bring the dispute in its own national Courts.

Among this field of jurisdictional disputes, of particular interest is the *ultra vires* context, occurring when a statutory or municipal entity has entered into a financial transaction, later claiming invalidity of the transaction because of the absence of the powers to enter into it. One may recall that in the 90s there was a

[128] *See* The Dutch Code of Civil Procedure, Art. 1065.
[129] *See* The Dutch Code of Civil Procedure, Art. 1050.
[130] *See* Ross, *supra* note 67, at 231.
[131] *See* Ross, *supra* note 66, at 232, pointing out that such clauses are widely regarded as boilerplates.

legislative and regulative wave to the effect that statutory or municipal entities had the power to enter into financial transactions, such capacity being subject to various restrictions[132]. The scheme may be summarized following the *Berliner Verkehrsbetriebe Anstalt Des Öffentlichen Rechts* v. *JP Morgan Chase Bank N.A. and JP Securities Ltd.*[133] In this case, BVG, asked to pay US$112 million, alleged that an English-law governed credit default swap, to which and JP Morgan and BVG were counterparties, was ultra vires, *id est* beyond powers. Arguments of BVG were based on articles 22 and 25 of EU Reg. 44/2001, and that the ultra vires was to be determined according to German Law, and the law of incorporation.[134] Eventually, after a complex judicial *iter*, the question arrived before the European Court of Justice, where it was held that:

> "*in a dispute of a contractual nature, questions relating to the contract's validity, interpretation or enforceability are at the heart of the dispute and form its subject-matter. Any question concerning the validity of the decision to conclude the contract, taken previously by the organs of one of the companies party to it, must be considered ancillary. While it may form part of the analysis required to be carried out in that regard, it nevertheless does not constitute the sole, or even the principal, subject of the analysis*".[135]

The core of ultra vires cases is to distinguish a genuine claim of lack of powers to enter into a transaction from a mere surreptitious attempt of delaying a payment under a contract.

Ultra vires cases are just an aspect of jurisdiction cases. *Non ultra vires* jurisdiction cases also form an important share of litigation. As J. Ross wrote:

> "*in the CFTs world, the ultra vires line of cases is but the tip of a jurisdiction iceberg. That there should be such an iceberg is hardly surprising. We do not need a global financial crisis to tell us that parties to cross-border transactions, or to transactions governed by a law different from their own*

---

[132] *See* Ross, *supra* note 66, at 233.

[133] [2010] EWCA Civ 390 (CA) [U.K.]. This case is quoted by J. Ross, *supra* note 66, at 233.

[134] Article 22(2) provides that, if proceedings before a court have as their object the validity of decisions of the 'organs' of a company, then, notwithstanding a contractually agreed exclusive jurisdiction clause, the courts of the Member State where the company has its seat have exclusive jurisdiction.
Article 25 provides that, where a court (here, the English court) is seized of a claim that is 'principally concerned with' a matter over which the courts of another Member State (here, Germany) have exclusive jurisdiction, then that court must declare that it has no jurisdiction.

[135] [2011] EUECJ C-144/10, 12 May (E.C.J.).

domicile, are disposed to raise the question of jurisdiction.

Many pairs of contractual parties enter into several contracts, including ISDA Master Agreements and other ISDA agreements, with different governing law and jurisdiction clauses. Some of the jurisdiction clauses are exclusive, some non-exclusive. Many transactions, particularly structured finance transactions, involve multiple agreements and multiple parties domiciled in different jurisdictions. A number of the transaction agreements are often governed by different laws. In those circumstances, a single transaction often involves agreements that contain submissions to the exclusive or non-exclusive jurisdiction of different courts. Some aspects of the parties' relationship are naturally governed by one law rather than another. This does not preclude them choosing exclusive jurisdiction clauses. Further, a bank may operate in different markets through one or more branches in those markets. As a result, a global customer of the bank, despite best intentions or documentation policies otherwise, can reasonably be expected to enter into different agreements, or even the same agreement, with different branches in different jurisdictions that contain different choice of law and jurisdiction clauses. A dispute between the two parties may, and often does, arise under more than one of these agreements.

Needless to say, therefore, multiple and parallel proceedings are not only possible, they are also likely. The risk of inconsistent decisions is writ large".[136]

An example that may be quoted is *Deutsche Bank AG* v. *Sebastian Holdings Inc.*,[137] where the English Court of Appeal stressed the necessity of construing jurisdiction clauses broadly, as parties to multiple agreements do not expect their disputes to be settled by different tribunals. The interpretation of multiple (related) agreements should be made so as to determine the parties' intention, hence being relevant whether such agreements were, or were not, part of an overall transaction. This judgment did not apply the 'commercial centre' approach that instead would be a valid alternative when the agreements have been concluded over a short period of time.

In another case, *Deutsche Bank AG* v. *Tongkah Harbour Public Co Ltd.*,[138] the issue was whether in a series of agreements providing for optional arbitration and for litigation, Deutsche Bank, as a party to the agreements, could choose to litigate under one agreement and arbitrate under the other. The argument of Deutsche

[136] *See* Ross, *supra* note 66, at 236.
[137] [2010] EWCA Civ 998 (U.K.).
[138] [2011] EWHC 2251 (QB) (U.K.).

Bank that different divisions involved in the transactions allowed for different dispute settlement options was unsuccessful, since the Court looked at Deutsche Bank as a sole contracting entity.

These cases show a tendency of parties to CFTs to bring the dispute to their own home jurisdiction. This fact should not be undervalued, due to the increasing cross-border impact of such transactions.

Would P.R.I.M.E. Finance constitute a solution for these cases? From the perspective of the application of the EU Reg. 44/2001, it would not be possible to rely on issues of exclusive jurisdiction, since the afore mentioned regulation does not apply to arbitration.[139] Moreover, parties may psychologically benefit from having their dispute settled in a neutral venue, with the possibility of appointing highly specialized experts. Last but not the least, a final submission to an arbitral tribunal of the disputes that may rise out of a contractual relationship is sufficient to exclude Court jurisdiction, since a Court would stay the proceedings if one of the parties claims the existence of an arbitral clause.

CFTs disputes raise issues of interpretation related to their documentation or related to the relevant statutes and regulations. However, why interpretation should give rise to disputes if standardized agreements and boilerplate clauses are the basis of documenting transactions? The answer depends on different factors, of which we may recall the most important:

- When there is no dispute about the principles to be used in the interpretation of contracts, what is controversial is the act of interpretation itself;
- Market consensus and understanding about what a particular agreement or provision means can be frustrated when faced with a judicial decision that does not take into account that consensus or understanding, as well as in the case of conflicting judicial decisions about the meaning or intent of a particular provision;
- Such agreements are a compromise between brevity and completeness, since they have to fit the need of working in a multi-jurisdictional environment. Ambiguities cannot be avoided easily. Such compromise may hence give rise to interpretation issues.[140]

These points deserve clarification. CFTs are documented by agreements that have been developed over a long period of time and with substantial uniformity. Such uniformity is to the benefit of an efficient and time saving conclusion of transactions. When judges, particularly in England, are faced with such

[139] *See* EU Reg. 44/2001, *supra* note 11 at art. 1, 2(d).
[140] *See* Ross, *supra* note 66, at 239.

agreements, interpretation is a question that may arise, as said, not in relation to the principles to be applied, but to the act of interpreting itself. An example may clarify the issue. In the case *Chart Brook Limited & another* v. *Persimmon Homes Limited & another*,[141] at para 14 Lord Hoffman said:

> **"***There is no dispute that the principles on which a contract (or any other instrument or utterance)should be interpreted are those summarised by the House of Lords in Investors Compensation Scheme Ltd.* v. *West Bromwich Building Society*, *[1998] 1 WLR 896, 912–913. They are well-known and need not be repeated. It is agreed that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean [sic]. The House emphasised that 'we do not easily accept that people have made linguistic mistakes, particularly in formal documents' . . . but said that in some cases the context and background drove a court to the conclusion that 'something must have gone wrong with the language'. In such a case, the law did not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had*".

Again, in the *In Rainy Sky* v. *Kookmin Bank*,[142] Lord Clarke said the following:

> "*For the most part, the correct approach to construction of the Bonds, as in the case of any contract, was not in dispute. The principles have been discussed in many cases, notably of course,*[…] *by Lord Hoffmann in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, passim, in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912F–913G and in Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101, paras 21–26.* […]. *Those cases show that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the Investors Compensation Scheme case at page 912H, the relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract* […].
>
> *The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court*

[141] [2009] 1 A.C. 1101 (U.K.).
[142] [2011] UKSC 50 (U.K.).

> *must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other*".

Such decisions are a good example of the uncertainties related to the act of interpretation. This trend in modern decisions has raised the issue of textual or literal interpretation as opposed to contextual interpretation.[143] Where CFTs are concerned, this tension is even more palpable when one comes to the interpretation of section 2 (a) (iii) of the ISDA master agreement.[144] This tension between the two proposed interpretations is also accentuated by the discussion of whether or not the intention and purposes of the original drafters of a particular provision should be taken into account, along with the intention of the parties, namely giving importance to the interpretation of such provisions given by market sponsors as ISDA. Such point of view was taken by the English Court of Appeal,[145] accepting the submissions made by ISDA, as intervener, regarding the meaning of Section 2(a)(iii), as well as other provisions. The English Court of Appeal also brought some clarity on conflicting decisions issued by the High State Court in relation to the ISDA art. 2(a)(iii).[146]

Some observations can be made on this purpose. The fact that a better level of decision (at least from the market point of view) was reached only on appeal might have affected markets' needs of certainty and predictability. If the same matter were brought before a specialized arbitral tribunal, the same issue would

---

[143] *See* Ross, *supra* note 66, at 243.

[144] The issues covered by cases on such provision are discussed by Ross, *supra* note 66, at 248. Section 2 reads as follows:

(a) General Conditions

(i) Each party will make each payment or delivery specified in each Confirmation to be made by it, subject to the other provisions of this Agreement.

(ii) Payments under this Agreement will be made on the due date for value on that date in the place of the account specified in the relevant Confirmation or otherwise pursuant to this Agreement[…]

(iii) Each obligation of each party under Section 2(a)(i) is subject to (1) the condition precedent that no Event of Default or Potential Event of Default with respect to the other party has occurred and is continuing, (2) the condition precedent that no Early Termination Date in respect of the relevant transaction has occurred or been effectively designated and (3) each other applicable condition precedent specified in this Agreement.

[145] [2012] EWCA Civ 419 (U.K.).

[146] *See* Ross, *supra* note 67, at 249.

have been certainly decided getting to the same conclusion of the Court of Appeal but in less time. This shows how specialized experts are needed in the process of adjudicating complex financial transactions.

Mis-selling cases are another class to be considered. Claims of mis-selling of financial products in order to recover losses, made by sophisticated clients, have been very common after the financial crisis. Such claims have different basis. Usually the claimant alleges:

- The existence of an advisory relationship, hence implying a breach of an advisory and fiduciary duty;
- Negligent or fraudulent misstatement, deceit;
- Breach of an implied term, misrepresentation, making of an implied representation;
- Lack of sophistication;
- Misunderstanding in relation to the nature of the investment;
- Contractual terms, signed but neither read nor understood, unsuitability of the products sold, breach of regulatory or statutory duties; and
- Lack of capacity and authority.[147]

Defences are based on:

- The absence of an advisory relationship;
- On the mere sale of products, thus not acting as advisor; and
- On the grounds of estoppel because of applicable disclaimers and non-reliance clauses excluding advisory duties.

English courts have taken a pro-bank and pro-financial institution approach, looking at the realities of such transactions, the parties' conditions and considering factors like the exclusion of Bank responsibility for misrepresentation. When such duty has been excluded, in order to assess whether it was possible for the claimant to rely on misrepresentation, Courts had to investigate in detail the nature of the statements and by whom they were made. Mis-selling cases are hence fact-specific and many of them are based on evidence.[148]

From a P.R.I.M.E. Finance perspective, the fact that Courts, particularly in England, did not take a view favourable to bank customers and clients may push these subjects to skip the litigation in such venues towards a more neutral dispute settlement mechanism. However, this is a matter of strategy influenced

[147] *See* Ross, *supra* note 67, at 266.
[148] *See* Ross, *supra* note 67, at 268.

by a subjective perception of the Courts dealing with such cases. Moreover, this consideration may be affected by the fact that clients may be more or less favourable, on a cost benefits basis, to submit their disputes to arbitration or mediation.

IV. Conclusion

The Arbitral Institution we briefly described in this paper is relatively recent in its establishment. Some features of P.R.I.M.E. are noteworthy, namely the creation of an integrated dispute settlement body where specialists of dispute resolution and financial markets work side by side. This aspect will certainly have a positive impact on settling disputes in a reasonable amount of time and reaching substantially fair and uniform decisions. Moreover, the advisory function makes P.R.I.M.E. Finance a unique institution, maximizing the efficacy of its mandate. Good advisory opinions may have a palpable outcome in lowering the amount of disputes in relation to financial products, hence giving markets that stability they need. Last but not least, P.R.I.M.E. Finance pool of experts may help to bring certainty and clarity in Court Litigation, if the expert witness option is used. A weak point that can be underlined is that, in the geographical composition of the panel of 100 experts, there is a predominance of the Anglo-American pole. This fact may be perceived by emerging market players as an attempt of piloting, though the transformation from litigation to arbitration, the case law of those countries being more represented on P.R.I.M.E., thus making it wide spread. If it is true that these two legal systems have a bigger expertise on financial transactions, this issue may be heavily criticised, especially under the light of the recent financial crisis. It could also put under risk the main purpose of P.R.I.M.E., namely being an independent forum for financial dispute resolution. However, one may note that P.R.I.M.E. is still taking its first steps and that nothing prevents us from thinking that in the future its structure and the geographical composition of its panel will be different, both in collocation and numbers.

AMALGAMATING THE CONCILIATORY AND THE ADJUDICATIVE: HYBRID PROCESSES AND ASIAN ARBITRAL INSTITUTIONS

Deekshitha Srikant[*] *& Arka Saha*[•]

ABSTRACT

In the recent past, Asia has grown into one of the world's foremost business destinations, as a result of which ADR mechanisms and institutions that offer them have been on the rise in the region. This article seeks to show how swifter, more economical and pioneering mechanisms such as hybrid processes could do wonders in a world where traditional dispute resolution is becoming increasingly painstaking, and the incorporation of these processes by leading Asian arbitral institutions could potentially change the way dispute resolution works in Asia and worldwide. The authors seek to explain how such processes work, identify and analyse potential flaws and fissures in the law in Asia concerning them, and ultimately provide a framework for their implementation in Asian arbitral institutions.

"I cannot tell you the number of times I have been frustrated at the waste of resources in resolving disputes through standard litigation practices. It sometimes reminds me of what an American army captain said in Vietnam: 'To secure the village it was necessary to destroy it.'"
- David Shaughnessy[1]

In the backdrop of a bustling Asian business hub, two parties are cementing a business relationship that has lasted decades on paper. The transaction is to sell A's multimillion dollar insurance business to B, ensuring A's continued presence in the functioning of the business. The parties are apprehensive about the possibility of ruined business relations over any dispute that might arise over the contract, and do not even fathom the idea of going to court. The idea of arbitration is also shrouded with many of the same concerns, but the prospect of mediating or negotiating a possible conflict brings doubts about whether the latter processes can be enforced as efficiently as the former. The parties, as

[*] II Year, B.A. LL.B (Hons.), NALSAR University of Law, Hyderabad.

[•] II Year, B.A. LL.B (Hons.), National law Univeristy, Odisha

[1] David Shaughnessy is a British theatre and television director, actor and producer. He is the recipient of the daytime Emmy award for his television show, *The Young and the Restless*.

rational persons,[2] seek a quick and efficient solution while keeping costs minimal. The parties pin their hopes on one of the many premier alternative dispute resolution institutions that have emerged in Asia - but how do they reconcile these apprehensions?

The answer, perhaps, lies in coalescing the confrontational and the non-confrontational, with the assurance that the dispute shall be resolved, come hell or high water. The emergence of hybrid arbitral processes in Asia could put these fears to rest. Coupled with the reputation and efficiency of a premier arbitral institution, a 'hybrid' process, which is a combination of two or more traditional ADR processes likes arbitration and mediation, could offer the best deal to the complex business relations that throng Asia today. This paper will analyse two of the most widely utilised processes, Med-Arb (the combination of mediation first and then arbitration) and Arb-Med (which involves arbitration first, followed by mediation) from an Asian perspective, and seeks to highlight why the incorporation of these models in Asian arbitral institutions will immensely benefit international arbitration.

Part-I of this paper will examine what these processes entail and how they work, while Part-II scrutinizes the existing framework for hybrid processes in the rules of Asian arbitral institutions. Part-III will point out flaws and potential issues in these processes and lacunae in the law concerning them, which Part-IV will then attempt to resolve and provide a framework for the incorporation of these hybrid processes in Asian arbitral institutions.

I. Med-Arb and Arb-Med: What they Entail

A. Med-Arb

Med-Arb, at the risk of over-simplifying, can be defined as an amalgamation of the processes of mediation and arbitration in a temporal sequence. The former process is carried out, having confidence in the existing safety net of subsequent arbitration resulting in the decree of a final binding award in case of failure of mediation. In Med-Arb, the parties to a dispute first undergo the mediation process, wherein they try to reach an agreement in the presence of a neutral mediator, failing which, the mediator assumes the position of an arbitrator, and the dispute enters the arbitration phase. If the parties arrive at an agreement in

[2] Cooter & Ulen, *Law and Economics* 50 (Addison Wesley 2012) (hereinafter 'Cooter and Ulen')

the mediation phase, they usually sign a binding settlement agreement and sometimes, the mediator assumes his role as an arbitrator to convert the crux of the intended agreement in to a binding arbitral award.[3]

The certainty of a defined outcome, comparatively greater efficiency in terms of economics of time and money and greater party autonomy and control of the timeline of the process of dispute resolution are the central advantages of the process.[4]Further, Med-Arb follows a low to high cost consumption process which is in consonance with many scholars' beliefs[5] that the cost incurred during the dispute resolution phase should move likewise as the dispute progresses. It provides the greater decision control characteristic of mediation and allows disputants to retain a fair say in how the dispute is settled for a more prolonged period.[6]Apart from these advantages, this process accommodates greater efficiency than separate mediation and arbitration by cutting costs and saving time involved in hiring an unfamiliar neutral arbitrator for the second stage of the process. Further, issues in dispute are narrowed down in the mediation phase, which results in a process that is less time consuming and allows for more free-flowing arbitration.[7]

---

[3] Alan L. Limbury, *Hybrid Dispute Resolution Processes – Getting the Best while Avoiding the Worst of Both Worlds?*(Jan. 23, 2014) http://www.cedr.com/about_us/arbitration_commission/Hybrids.pdf (hereinafter referred to as 'Limbury')

[4] Brewer, Thomas J., and Lawrence R. Mills.,*Combining Mediation and Arbitration*, 54:4 DISP. RESOL. J. 32-39 (1999)

[5] WILLIAN URY, JEANNE BRETT & STEPHEN GOLDBERG, GETTING DISPUTES RESOLVED201 (Jossey-Bass Publishers, 1988);[In the book the authors sketch three separate choices for resolving disputes in a workplace, moving from a low to high cost consumption pattern. The favoured choice, which is also the most economical, is reconciliation by negotiation or mediation followed by the second and relatively less favoured and more expensive option which is a rights based process in which an authority adjudicates.]; *See also,* Michele Gelfand& Jeanne Brett eds.,*The Handbook of Negotiation and Culture* (Stanford Bus. Books 2004); William H. Ross and Donald E. Conlon, *Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration*, 25:2 ACAD. MANAGE. REV 416-427 (2000) (hereinafter referred to as 'Ross and Conlon')

[6] Ross and Conlon, *supra* note 5, pp. 416-427

[7] Blankenship, John T., *Developing your ADR Attitude: Med-Arb, a Template for Adaptive ADR*, TENNESSEE BAR JOURNAL 28-41 (2006)

Med-Arb is specifically advantageous in situations where the disputants hold their overall commercial relationship more valuable than 'irritant' disputes. It provides for a process that disputants in these situations consider fair, more even handed and an expedient form of dispute resolution.[8]

However, there exist certain dangers plaguing the process, the most noted being the reduction in the efficiency of the mediation part of Med-Arb due to the concern among disputants that confidential information revealed to the Med-Arbiter,[9] might subsequently be used by her in granting the final arbitral award, and subsequent issues of bias[10]. Part-III of this article will discuss these shortcomings in detail.

This particular shortcoming however, is often overcome by having different individuals don the role of mediator and arbitrator. Doing so would raise costs, but it also allows the mediator to have available 'the full range of mediation techniques conducive to settlement'[11], and ameliorates concerns around violations of principles of natural justice, especially the principle of *audi alterem partem*.[12]Part IV of this article will discuss the idea of two different individuals carrying out the mediation and arbitration stages respectively, as well as other possible solutions with respect to issues like bias and revealing confidential information that Med-Arb entails.

B. Arb-Med

In 2011, the arbitration community in Asia witnessed a case that sparked off heated debates. This was *Gao Hai Yan & Another v Keeneye Holdings Ltd & Others,* popularly known as the wining and dining case, which primarily scrutinized whether the hybrid ADR process of Arb-Med, (a conglomeration of the processes of arbitration and then mediation, in precisely that lexical order) was

[8] *Ibid.*
[9] The person who is first appointed mediator and then assumes the role of an arbitrator, if the mediation fails.
[10] Fuller, L. 1962, *Collective bargaining and the arbitrator proceedings*, Fifteenth Annual Meeting, National Academy of Arbitrators: 8-54. Washington, DC: Bureau of National Affairs
[11] Limbury, *supra* note 3
[12] A latin maxim which means each party should have the opportunity to present their side.

congruous with the principle of procedural fairness in arbitration.[13] In its initial stages, the Hong Kong Court of First Instance decided that the fact that this process involved an individual who would first operate as an arbitrator and then switch roles to a mediator created a reasonable doubt of bias in the eyes of a fair-minded observer, which is a concern shared by both Med-Arb and Arb-Med. Before delving into the pros and cons (the latter of which constituted most of the discourse that emerged as a result of this decision), the question of what this hybrid process is needs to be answered.

Arb-Med essentially involves two stages – first, the arbitrator passes an award, which remains sealed and unrevealed to the parties until the process of arbitration reaches an end. The arbitrator then switches to the more informal role of a mediator and attempts to convince the parties to negotiate and reach consensus. In the event that the mediation fails, however, the award is unsealed and becomes binding upon the parties.[14]There is also a possibility of the arbitration stage resuming in the event of failure of mediation. One of the redeeming features of this course of action is that the parties are more likely to reach a final settlement and continue with business relationships (something that is crucial in business villages such as Hong Kong). Arb-Med also ensures that the dispute is resolved even if the mediation phase were to fail.[15] The mechanism would also result in lower expectations of a favourable outcome in each party,[16] which subsequently results in the possibility of greater cooperation and thereby a higher chance of reaching a settlement.[17] It has also been argued that more disputes can potentially be settled in the mediation stage in the Arb-Med

[13] Gao Hai Yan & Another v Keeneye Holdings Ltd & Others, 2011 WL 5506418 (CA), [2012] 1 HKLRD 627, [2011] HKEC 1626[2011] HKEC 1626 (hereinafter referred to as 'Keeneye')

[14] Limbury, *supra* note 11.

[15] Claire Wilson, *The Arb-Med hybrid in Hong Kong – Much ado about nothing?*KLUWER ARBITRATION BLOG (Jan 24, 2014) http://kluwermediationblog.com/2012/02/01/the-arb-med-hybrid-in-hong-kong-much-ado-about-nothing/

[16] This is because the arbitral award has already been passed, so parties could enter the mediation phase with the idea that any new information at this juncture is not going to change the final decision if the mediation were to fail.

[17] The idea of greater cooperation when a party is uncertain about whether the other party would make a co-operative choice or not flows from the classic economic conception of the prisoner's dilemma. *See* TVERSKY&SHAFIR, THE DISJUNCTIVE EFFECT IN CHOICE UNDER UNCERTAINTY 305-309 (Psychological Science 1992)

mechanism, because parties are more willing to reveal confidential information as the stakes and desire to emerge victorious post the arbitral process has faded, since they realise that any information they divulge during mediation cannot affect the final award.[18]

However, Arb-Med does have its fair share of pitfalls as well, some of which were elucidated upon in the *Keeneye* case. Some of the concerns expressed include the threat of possible bias, [19]and wastage of time and money spent on the initial arbitration phase if the mediation is successful - but this needs to be juxtaposed against the desire for consensus between the parties on their own. Parties could also be influenced into settlement if the behaviour of the mediator during the process is read into for hints of what the arbitral award could contain.[20]This article will discuss possible repercussions in detail in Part-III. However, it is important to recognize that the *Keeneye* case is an exception, as there were qualms about the procedure right from the beginning of the process, and the fundamental premise of arguments against it have all been bias, as opposed to wider issues of due process and public policy.[21]

In fact, the Appeals court in the case later took the stance that the parties had waived their rights to object on the grounds of possible bias when they consented to the process, in consonance with views worldwide on the merits of the Arb-Med process.[22]

---

[18] Ross and Conlon, *supra* note 5 at pp. 423-426

[19] On the flipside, this seems to be a more serious concern for the Med-Arb mechanism, as the mere holding of private sessions creates a reasonable apprehension of bias in an arbitrator. *See*, The Duke Group Ltd (In Liq.) v. Alamain Investments Ltd &Ors, SASC 272, 2003 WL 22000368, 15 Aug 2003, SASC [2003]; Glencot Development & Design Ltd v Ben Barrett & Son (Contractors) Ltd[2001] B.L.R. 207; (2001) 3 T.C.L.R. 11; 80 Con. L.R. 14; (2001) 17 Const. L.J. 336; Official Transcript; QBD (TCC); 2001-02-13 [2001]

[20] Limbury, *supra* note 14.

[21] Mark Goodrich, *Arb-med: Ideal solution or dangerous heresy?*WHITE & CASE 2012 (Jan 24, 2014) http://www.whitecase.com/files/Publication/fb366225-8b08-421b-9777-a914587c9c0a/Presentation/PublicationAttachment/36c4bfd1-db71-4990-bfd7-b27b3ce759ae/articles-IALR-2012-Arb-med-solution-or-dangerous-heresay.pdf

[22] Article 12 of the UNCITRAL Model Law and Section 18A of the domestic arbitration act in Australia also follow this view, for example. Article 12 stipulates if parties are informed of circumstances that could cast doubts upon an arbitrator's impartiality by the arbitrator, they cannot object to it later. Similarly,

II. Hybrid Processes and Asian Arbitral Institutions

A. Med-Arb and Asian Arbitral Institutions

Given the cultural premise in place in Asia, which imposes an amiable code of conduct aimed at co-operation and preservation of cultural ties,[23] it is expected that a process such as Med-Arb that allows disputants to mediate in the first phase should flourish. This is bolstered by the fact that historically, it has been found that mediation/ conciliation is the preferred mode of dispute resolution in most Asian jurisdictions.[24]A logical extrapolation would be the acceptance of hybrid ADR processes that combine the certainty of a final arbitral award with the greater outcome control of mediation. This particular hypothesis is backed by the fact that Med-Arb is provided for in the laws of many Asian countries[25] like China, Hong Kong, Japan, Taiwan and Singapore, as opposed to their western counterparts who consider the two processes to be "two different routes to be kept separate from each other."[26]

Med-Arb in Hong Kong is governed by the Arbitration Ordinance[27] which assumed the force of law in 2011. Section 32 of the Ordinance allows for Med-Arb by dealing with the appointment of mediators in sub-section 3, by allowing the mediator appointed under an arbitration agreement to act as an arbitrator if no settlement is arrived at during the mediation phase. This position is in line with the ends foreseen during the Civil Justice Reforms[28]which, in the form of

---

Section 18A of the Australian Arbitration Act also lays down that once an arbitrator discloses circumstances that can cast doubts upon his impartiality, the parties cannot later challenge the arbitrator.

[23] A.F.M Maniruzzaman, *International Commercial Arbitration in the Asia Pacific - Asian Values, Culture and Context* 30 INT'L BUS. LAW. 510 (2002)

[24] ANDREW HUXLEY (ED), THAI LAW, BUDDHIST LAW - ESSAYS ON THE LEGAL HISTORY OF THAILAND LAOS AND BURMA15 (White Orchid Press, Bangkok, 1996)

[25] Takao Tateishi, *The Role of the two-tier 'Med/Arb' Scheme in Japanese Dispute Resolution* ASIAN DISPUTE RESOLUTION 24 (2000)

[26] *See* the reflection of the Western tradition in Article 19 of the United Nations Commission on International Trade Law (UNCITRAL) Rules of Conciliation (1981) 20 ILM501. *See generally*, CHRISTIAN BFIHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONALBUSINESS (GRAHAM &TROTMAN/MARTINUSNIJHOFF, 1996).

[27] Hong Kong Arbitration Ordinance Cap. 609 (2011)

[28] The Civil Justice Reform in Hong Kong was implemented in April 2009. The objectives of the reforms were to transmogrify the general approach to court-litigation.

court encouragement and facilitation of ADR processes (especially mediation), aimed to provide special impetus to 'consensual ADR',[29] including Med-Arb. In Hong Kong, there exists a distinction in the laws governing mediation proceedings standing alone, and those forming a part of a Med-Arb process. The Mediation Ordinance, [30]which came into force on the January 1st, 2013, leaves mediation processes forming part of Med-Arb to be governed by the Arbitration Ordinance, thus specifically dealing with inherent issues of violations of natural justice, confidentiality and legal status distinct to the Med-Arb process emanating from the dynamic 'shifting' role played by the med-arbiter.[31]

However, the Hong Kong International Arbitration Centre (hereinafter referred to as 'HKIAC'), a premier international centre for commercial arbitration and mediation under the ambit of the Hong Kong Mediation Council (HMC), in its mediation rules [32](in effect from August 1999) abnegates the possibility of Med-Arb services through the institution. Rule 14 expressly prohibits the appointment of the mediator in a mediation proceeding from being appointed as the arbitrator in subsequent arbitration arising out of the mediation, or any other dispute arising out of the same contract.[33]
The Singapore International Arbitration Act, [34]however, allows for Med-Arb proceedings in Singapore, a major commercial hub in Asia, by prohibiting

---

The major underlying objects of the reform were to expedite the resolution of cases, decrease costs, and provide a framework for fair distribution of the resources of the courts. Another notable feature was that ADR, especially mediation, was given major impetus.

[29] As highlighted by the working party in its Interim Report, §625-628, http://www.civiljustice.gov.hk/ir/paperHTML/toc ir.html (last visited 21 Jan 2014).

[30] Hong Kong Mediation Ordinance Cap. 620 (2012)

[31] Nadja Alexander, *How is med-arb regulated in Hong Kong?*KLUWER MEDIATION BLOG (Jan 24, 2014) https://kluwermediationblog.com/2013/03/10/what-legislation-applies-to-med-arb-in-hong-kong/

[32] HKIAC Mediation Rules, http://hkiac.org/index.php/mediation/mediation-rules (last visited 20th February 2014)

[33] Rule 14: Mediator's Role in Subsequent Proceedings - The parties undertake that the mediator shall not be appointed as adjudicator, arbitrator or representative, counsel or expert witness of any party in any subsequent adjudication, arbitration or judicial proceedings whether arising out of the mediation or any other dispute in connection with the same contract. No party shall be entitled to call the mediator as a witness in any subsequent adjudication, arbitration or judicial proceedings arising out of the same contract.

[34] International Arbitration Act, Cap 143A

objection by disputants on arbitration proceedings on the ground that the arbitrator had previously acted as a conciliator in the dispute.[35] The Singapore Mediation Centre (SMC) and the Singapore International Arbitration Centre (SIAC) in tandem, offer the SMC-SIAC Med-Arb procedure, wherein parties to a dispute attempt to arrive at an agreement by mediation under the SMC rules governing the same, before taking the dispute to arbitration in case of failure. Arbitration is then carried on at the SIAC under its rules. If the parties to the process arrive at a resolution in the mediation phase, under Rule 6(2) of the SMC Mediation Procedure, the mediator is appointed as the arbitrator solely to give the settlement the force of an arbitral award.

Rule 10[36] allows the individual previously appointed as the mediator by SMC in the mediation phase to subsequently don the hat of an arbitrator in the arbitration phase, given the consent of the parties and if he/she is of the opinion that the conduct of any of the parties and/or any confidential information revealed to her in the mediation phase shall not affect her decision during arbitration.

The recent economic boom in India and China resulted in an unprecedented increase in the foreign investments, leading these nations to take measures to simplify dispute resolution mechanisms to further establish themselves as secure business locations. Therefore, it would seem logical that arbitral institutions in these two countries would provide for Med-Arb. In China, the China International Economic and Trade Arbitration Commission[37] (hereinafter referred to as 'CIETAC') allows for the amalgamation of conciliation and arbitration under a detailed procedure laid down in Article 45 of the institutional rules.[38] The other major institutions offering these processes include the Beijing

---

[35] *Id* at §17

[36] Rule 10, SMC Mediation Procedure

[37] The CIETAC is the oldest and largest arbitration institution in China.

[38] Article 45 of the CIETAC Rules state that with the consent of both parties to a dispute obtained by the arbitral tribunal it can conciliate the case during the course of the arbitration proceedings. Subsequent to this, if settlement is reached in the conciliation phase, the parties must sign a settlement agreement, which may be later converted to an arbitral award.
Rule 7 puts down that in event of breakdown in conciliation proceedings the arbitral tribunal shall resume arbitration.
Rule 9 deals with confidentiality of information obtained during conciliation

Arbitration Commission[39]and the Indian Institution of Arbitration and Mediation[40] in India.

B. Arb-Med and Asian Arbitral Institutions

The general trend noticed with respect to dispute resolution in Asia is that the Asian approach to dispute resolution is largely non-confrontational. This is why numerous places in Asia (such as Hong Kong and Japan) have enacted domestic legislations that allow for an arbitrator to act as a mediator in addition to allowing a mediator to act as an arbitrator despite the UNCITRAL Model Law being silent on the issue, as discussed in the previous section.

The International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration[41] also allows for an arbitrator to aid the parties in reaching a settlement as long as there has been express consent by the parties to the same, and the arbitrator has not behaved in a manner that would disqualify

---

proceedings and bars reliance on such in subsequent arbitration, and ad verbatim, states the following- "Where conciliation fails, any opinion, view or statement, and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of conciliation, shall not be invoked by either party as grounds for any claim, defence or counterclaim in the subsequent arbitration proceedings, judicial proceedings, or any other proceedings." http://www.cietac.org/index/rules.cms (last accessed 21st March 2014)

[39] The Beijing Arbitration Commission is a not-for-profit arbitral institution to promote effective alternative dispute mechanism processes. Beijing Arbitration Rules 2007, Article 39, http://www.bjac.org.cn/en/Arbitration/index.html (last accessed 21st March 2014)

[40] The Indian Institution of Arbitration and Mediation, similarly, is a not-for-profit arbitral organization in India. In its website, the IIAM provides a recommended Med-Arb clause that provides for mediation to be carried out first under the institution's mediation rules followed by subsequent arbitration according to its rules and the provisions of the Indian law, namely the Arbitration and Conciliation Act, http://www.arbitrationindia.com/htm/mediation.html (last accessed 21st March 2014)

[41] The IBA Guidelines are a set of guiding principles for determining and evaluating the independence of an arbitrator, and lay down when, how and what information can be disclosed by the arbitrator to the parties. Part I of the Guidelines lays down general principles (which are seven in number) about impartiality, independence, etc. Part II lays down 'Application Lists' or situations where disclosure by the arbitrator is not warranted. The IBA Guidelines, however, are not binding by themselves.

him from adjudicating the dispute.[42] The Indian Arbitration and Conciliation act of 1996, the Japanese Arbitration Law of 2003 and the recent Hong Kong Arbitration Ordinance in 2011 all permit an arbitrator to act as a mediator, for example, within the framework of the IBA Guidelines.[43]However, China is the only Asian country to have used Arb-Med processes widely and without many hurdles.[44]

Cases where Arb-Med has been used in arbitral institutions in Asia are close to nought since most Asian institutions do not have express provisions to facilitate such a process. In fact, some of their rules prohibit a mediator to take the role of an arbitrator even if the parties have previously consented to the same. A possible rationale behind these prohibitions could be the fact that mediation and arbitration are engaged in as two different processes in most arbitral institutions, resulting in an inherent apprehension in combining the two. Another possibility could be to circumvent the many issues that a hybrid arbitral process presents to an institution.

This process is essentially what happens with Arb-Med – if the mediation fails, the mediator dons the role of an arbitrator once more. This is the present

---

[42] General Standard 4(d) of the IBA Guidelines says "An arbitrator may assist the parties in reaching a settlement of the dispute at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such process or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to final settlement of the case, the parties remain bound by their waiver. However, consistent with General
Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings."

[43] GREENBERG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION 333-334 (Cambridge University Press 2011) (hereinafter referred to as 'Greenberg')

[44] Kun Fan, *The New Arbitration Ordinance in Hong Kong*, 29:6 J. INT'L ARB 715-722 (2012) (hereinafter referred to as 'Kun Fan'); M Moser, *People's Republic of China* in DISPUTE RESOLUTION IN ASIA 93 (Kluwer Law International 2006); Gabrielle Kauffman-Kohler and Kun Fan, *Integrating Mediation into Arbitration: Why It Works in China* 25:4J. INT'L ARB (2008); Greenberg at 334

scenario with the HKIAC, as discussed earlier, where Mediation Rule 14 expressly prohibits a mediator to act as an arbitrator for the same dispute.[45]

Hong Kong earlier grappled with the question of whether Arb-Med processes should be implemented at all in the *Keeneye* case, but apprehension that surrounded the process was allayed by the Court of Appeal ruling that Arb-Med can be implemented. Further, Section 33 of the Hong Kong Arbitration Ordinance establishes a procedural framework within which Arb-Med proceedings are to operate, contingent on whether there has been express consent by the parties. The Ordinance also mandates that in the event that mediation fails, the arbitrator must disclose to both parties any confidential information gathered during the mediation that might be material to the arbitral proceedings, something that has been subject to much criticism and scepticism as it may discourage candid discussions during mediation.[46]

While the SIAC allows for Med-Arb processes and has a separate set of procedural rules that apply to such processes (SMC-SIAC Med-Arb Procedure) [47]their rules do not expressly provide for Arb-Med, although provisions of the Singapore Arbitration Act are nearly identical to the Hong Kong Ordinance, which allow the same.[48] Unlike the HKIAC, however, the SIAC does not have express rules that prohibit an arbitrator from facilitating mediation, and vice versa.

The only leading Asian institution to have express provisions in their rules allowing for Arb-Med is the CIETAC. Article 40 of the CIETAC rules allows an arbitral tribunal to mediate the dispute between the parties, subject to the parties' consent, in any manner the tribunal deems appropriate. It also states that mediation can be terminated upon the request of a party, and arbitration resorted to once more.[49] The CIETAC rules were revised in 2012. Now Article 45.8 of

[45] Luke Nottage, *Arb-Med and New International Commercial Mediation Rules in Japan*, (Jan 25, 2014)http://blogs.usyd.edu.au/japaneselaw/2009/07/arbmed_and_new_international_c_1.html

[46] Kun Fan, *supra* note 45 at pp. 715-722

[47] SMC-SIAC Med-Arb Procedure, (Jan 25, 2014) http://www.mediation.com.sg/images/stories/downloads/Med_Arb_Service/medarb%20procedure%20ss.pdf

[48] Goodrich, *supra* note 21

[49] Greenberg, *supra* note 44 at 335-336

the 2012 Rules allows for Arb-Med. [50]China is not only the sole Asian country to have routinely engaged in Arb-Med – it is also the only country where an arbitral institution has provisions for the same. Many account this to the fact that Chinese culture encourages harmony to the point that the very existence of a conflict is often ignored. This also means the influence of Chinese culture has allowed for processes that begin as non-confrontational and proceed to become confrontational only if the former fails. This is also evident from the emphasis placed on mediation and conciliation by the Chinese law on civil procedure.[51]

III. Issues with Hybrid Processes and Lacunae in the Law Concerning Them

A. Bias in Med-Arb and Arb-Med

The most controversial problem with both Med-Arb and Arb-Med, and the law surrounding it, which has been in forefront of academic discourse, is whether or not both process is antithetical to the principles of natural justice. This arises due to the fact that Med-Arb, and Arb-Med, if the mediation fails and the process relapses back to arbitration, involves the mediator assuming the role of an arbitrator. The ethical conundrum here is twofold – *one*, does the mere fact that the arbitrator shifts to the position of a mediator create the possibility of a real risk of bias in the eyes of a fair-minded observer; and *two*, how much of the information received during a failed mediation session can potentially affect the arbitral award?

The first issue primarily revolves around the mediation phase, a process that could involve private caucuses, wherein the mediator discusses matters with one party without the other. Clearly, mediation involves a fair amount of confidential information in the hands of the mediator.[52]

---

[50] Justin D'Agostino, *Key changes to the CIETAC Arbitration Rules*KLUWER ARBITRATION BLOG (25 Jan, 2014) http://kluwerarbitrationblog.com/blog/2012/04/11/key-changes-to-the-cietac-arbitration-rules/

[51] WON KIDANE (ED), CHINA-AFRICA DISPUTE SETTLEMENT: THE LAW, ECONOMICS AND CULTURE OF ARBITRATION, 343-393 (International Arbitration Law Library, Volume 23, Kluwer Law International 2011)

[52] Michael Leathes, *Stop Shoveling Smoke! Give Users a Classic Definition of Mediation* (Jan 27, 2014) http://www.mediate.com/articles/LeathesM3.cfm?nl=333

In a court of law, information is regulated and presented under oath. In Med-Arb and Arb-Med, there is no such regulation on the information presented to the Med-Arbiter in the mediation phase during private caucuses.[53] During these private sessions, parties are free to pass personal comments, subjective criticisms and other information, which could inevitably colour the Med-Arbiter's opinion without her knowledge. Also, such opinions and comments conveyed to the Med-Arbiter *ex parte* during private caucuses are not subject to rebuttal as the other party has no knowledge of it. Such information is treated as 'extra confidential' and hence, is not allowed to be put before the other disputant without the first party's consent.[54] Such information, which may or may not be acceptable during the subsequent arbitration phase, might still have a role to play in the Med-Arbiter's mind during the latter process and influence her award,[55] giving rise to questions of residual bias. Such questions of bias might be subtle, and if one of the parties can show that the award rendered was influenced by such confidential and inadmissible information, the award may be set aside on the basis that the award was fashioned by relying on information obtained outside the arbitration phase.[56] The courts, in deciding whether the award is to be set aside on such grounds looks at whether the parties by agreement have waived any or all of the mediation communications and allowed for its use in the subsequent arbitration.[57]

In *Bowden v Weickert*, [58]the award issued by a Med-Arbiter in a contract dispute concerning the sale of an insurance business, was subsequently vacated as the court held that the Med-Arbiter had a duty to remain impartial and to protect all confidential information elicited during the mediation phase.[59]The Court also held that the Med-Arbiter could only rely on the evidence gathered and presented at the arbitration phase without exceeding her powers.[60] It was also held that in the absence of a waiver by the disputants, if it was proved that

[53] These are situations in which the med-arbiter meets the parties to a dispute separately.
[54] Gerald F Phillips, *Same-Neutral Med-Arb,* 60J. DISP. RESOL. (2005)
[55] *Id.*
[56] Blankley, Kristen M., *Keeping a Secret from Yourself - Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 BAYLOR L. REV. 317 (2011) (hereinafter referred to as 'Blankley')
[57] *Id.* at 346.
[58] 188 Ohio App.3d 730, 936 N.E.2d 984, 2010 -Ohio- 2581, Ohio App. 6 Dist., June 04, 2010 (NO. S-09-022)
[59] *Id.*
[60] *Id* at 6-7

mediation communications were utilized in shaping the final award, it may be declared invalid.[61] Another leading case dealing with similar issues is *Town of Clinton v. Geological Services Corp*, [62]in a Massachusetts superior court. The ratio of the case reiterates that of Bowden, and further states that waiver of mediation privilege must be explicitly made and consenting to a Med-Arb procedure does not automatically and implicitly result in a waiver of mediation confidentiality.[63] Therefore, the ultimate choice must rest with the parties to a dispute to agree or disagree to the use of confidential information in the arbitration phase by the Med-Arbiter, negating the possibility of challenging the final award.

The judicial trend, emanating from the cases discussed above, and other noted cases in the United States of America[64]and in Hong Kong, like the *Keeneye* case,[65] is to rely on statutes, court rules and public policy while dealing with mediation confidentiality in the absence of agreement between the parties to the dispute in Med-Arb processes.[66]

In addition to subjective opinions and personal comments discussed, private caucuses could also involve the divulging of more serious confidential information, which may lead to the mediator *consciously* forming an opinion that invariably affects the subsequent arbitration. This becomes even more probable in light of the fact that the mediator has to decide what information is 'material' and what isn't. Hence, the question of the creation of a risk of bias in the event of the mediation failing and lapsing back into arbitration is not an unfounded one. In Arb-Med, if the mediation were to fail and the case switches back to arbitration, does the revealing of confidential information and private caucuses create the risk of bias?

---

[61] *Id* at 7.

[62] *Town of Clinton v. Geological Servs.Corp.*, No. 04-0462A, 2006 WL 3246464, at §1(Mass. Super. Nov. 8, 2006) (Unreported Memo).

[63] Blankley, *supra* note 61.

[64] *In re Cartwright,* 104 S.W.3d (Tex. App.—Houston [1st Dist.] 2003) at 706, 708; *Twp. of Aberdeen v. Patrolmen's Benevolent Ass'n*, Local 163, 669 A.2d 291 (N.J. Super. Ct. App. Div. 1996)

[65] Keeneye, *supra* n.13

[66] Blankley, Kristen M., *Keeping a Secret from Yourself - Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 Baylor L. Rev. 317 (2011)

In the *Keeneye* case, for example, a private caucus between the arbitrators turned mediators Zhou Jian and Pan Junxin and one Mr. Zeng Wei (somebody who was associated with the respondents) was what brought up the whole issue of bias in the first place. The judge, Reyes J, contemplated as to whether this could even constitute a private caucus, but stated that it did create a risk of bias.[67]What further added to the concern is that the mediators never conducted caucuses with the parties themselves.

At this juncture, it might be relevant to note that until recently, the test of bias that is followed in Hong Kong (and most of Asia) follows the 'real danger of apparent bias' test laid down by the House of Lords in *Regina v Gough*.[68]This test departs from the test of 'apparent bias' as the former involves a heavier burden, the proof of an actual possibility or real risk of bias as opposed to a reasonable apprehension of bias in the eyes of an informed observer. While England follows the test in *Porter v Magill*[69] of a real possibility of bias (along the lines of the apparent bias, while raising the standard of proof), the courts of Hong Kong[70] as well as the rules of the HKIAC have, in the past, followed the *Gough* test. However, the Hong Kong Court of Appeals in *Suen Wah Ling v China Harbour Engineering Co.* [71]departed from previous jurisprudence and approved of the *Porter v Magill* formulation of the *Gough* test, which sets a lesser standard of proof of real possibility. Recent decisions of Singaporean courts, as well, have deviated from their previous usage of the 'real danger' test to adopt the 'reasonable suspicion' or apparent bias test.[72]The authors believe that this support of the apparent bias test will facilitate more opportunities for the parties to object to bias that is not glaringly obvious, thereby further cementing the case for usage of hybrid processes in Asia as it allows for more control of the process from the perspective of the parties as well as helps in allaying the fears of bias that have plagued discourse on the Arb-Med process in particular.

---

[67] Goodrich, *supra* note 21

[68] [1993] UKHL 1, [1993] A.C. 646, H.L. (UK)

[69] [2002] 2 AC 357

[70] *See, Logy Enterprises Ltd v Haikou City Bonded Area Wansen Products Trading Co* 1997 WL 33125257 (CA), [1997] HKLY 186

[71] 2008 WL 809864 (CFA), [2008] HKEC 620

[72] *See*, *Re Shankar Alan S/O Anant Kulkarni* [2006] SGHC 194 at 76; *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd &Anr* (No.2) [1988] SGHC 28 at 503

Although the *Keeneye* case did not involve private caucuses with the parties, the mediation phase of most Arb-Med processes would involve the same, raising both issues of bias as well as how much of the confidential information the mediator is mandated to disclose. The English case *Glencot Development &Design v. Ben Barret*[73] reflects the European view on caucusing, which acknowledges the possibility of an inherent bias in arbitrators turned mediators due to private caucusing. Asian countries like Hong Kong and Singapore, however, have allowed private caucusing in the law concerning Arb-Med, with the requirement that if the mediation is unsuccessful, the arbitrator is obliged to disclose as much of the confidential information that he considers material to the proceedings.[74]

This brings us to the second issue outlined earlier - mandated disclosure of confidential information considered material to the proceedings.[75] The first and most obvious problem with this requirement is the subjectivity of what could be considered 'material' – would a party confessing to be insolvent (thereby expressing his possible inability to adhere to the award) qualify? What about a party who shows the mediator a document he has not shown the other party about an issue pertinent to the case? The second concern would be that if parties knew that what they discuss with the mediator might be disclosed, the entire mediation process might become more inhibited than it would be in normal settings.

B. Med-Arb: Offshoot Issues

Challenges to the validity of the process of Med-Arb arise due to the inherent differences between mediation, a largely conciliatory process, and arbitration, which are adjudicatory. These differences are what limit an effective combination of the two.[76] One such issue hindering the process is the possibility of a coercive element that a Med-Arbiter may induce in the mediation phase by virtue of her being authorized to subsequently issue a binding arbitral award. Though this

---

[73] [2001] B.L.R. 207

[74] Michael Hwang, *The Role of Arbitrators as Settlement Facilitators - Commentary* in ALBERT JAN VAN DEN BERG (ED), NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 571-581 (ICCA Congress Series, 2004 Bejing Volume 12 Kluwer Law International 2005)

[75] Hong Kong Arbitration Ordinance, §33

[76] Bartel, Barry C., *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential* 27 WILLAMETTE L. REV. 661 (1991) (hereinafter referred to as 'Bartel')

'muscle' possessed by the med-arbiter mediating prior to arbitration contributes positively to the success of this process, [77]it leaves a wide scope for misuse. There exists the perceived risk of the Med-Arbiter coercing a settlement by hinting at negative results in the arbitration phase. This has prompted many scholars in expressing that the agreements reached during the mediation phase of Med-Arb processes are actually not voluntary, but products of strong-arm tactics.[78]

In a study conducted by collecting field data, this particular trend of Med-Arbiters forcing upon the parties premature and forceful concessions was analysed.[79] The authors concluded that though these risks did manifest, Med-Arbiters in general did not direct and dictate the mediation phase to a great extent. Further, it was put forth that such pressure tactics were more often than not used late in the process of mediation to rescue it. This issue of abuse of power by the Med-Arbiter in the mediation phase can be overcome by making the arbitration phase contingent to the agreement of the parties post the mediation phase.[80] If either of the parties to the dispute nurtures doubts regarding abuse of power, they should be allowed to terminate the process.

C. Arb-Med: Offshoot Issues

Perhaps the most immediate and practical problem one would have with Arb-Med is the fact that if mediation is successful, the resources and time spent on the arbitration phase of the process go to waste.[81] If two different persons are appointed to be arbitrator and mediator respectively, the cost issue is deepened with the resources and time utilized to familiarize another person with the facts of the case.[82]

---

[77] Kagel, *Combining Mediation and Arbitration*, 96 MONLTHLY LAB. REV. 62 (1973)
[78] Lon Fuller, *Collective Bargaining and the Arbitrator*, 1962 NAT'L ACAD. ARB. 8, 255, reprinted in Dispute Resolution 12 (1985)
[79] PRUITT, MCGILLICUDDY, WELTON, & FRY, PROCESS OFMEDIATION IN DISPUTE SETTLEMENT CENTERS, MEDIATION RESEARCH 368 (K. Kressel, D. Pruitt & Assoc., eds. 1989)
[80] Bartel, *supra* note 77
[81] Limbury, *supr*a note 3
[82] Houzhi Tang, *Combination of Arbitration with Conciliation - Arb-Med* in ALBERT JAN VAN DEN BERG (ED), NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 547-555 (ICCA Congress Series, 2004 Beijing Vol 12 2005)

However, this must be contrasted with Arb-Med's merits – the fact that by lowering expectations of a favourable outcome for both parties (since neither can be certain the award will be in their favour) encourages co-operation in the mediation stage and ensures that ensuing business relations are not hampered as a result of the dispute. The fact remains, however, that the uncertainty that Arb-Med creates might also mean that parties could choose other processes where they exercise more control, such as Med-Arb or mediation.[83]

If the 'sealed envelope' model of Arb-Med is utilised to circumvent the confidentiality issues, several other reasons for apprehension arise other than the fact that if the mediation is successful, the award is not disclosed;[84] and if the mediation runs its full course, the costs incurred on arbitration would be for nothing.

Ethical issues aside, there are other dilemmas that plague this process. The question of enforceability of either an award post failed mediation that could potentially be tainted with bias or, in case of a successful mediation, with the agreement itself. With respect to the first, an award set aside for being against public policy in Hong Kong has to contravene the fundamental conceptions of morality and justice of the country. Singapore, however, has always tried to ensure minimal curial intervention beyond typical grounds such as fraud, corruption, breaches of natural justice and so on in arbitration.[85] In both countries, however, the award being tainted by bias as well as the question of whether Arb-Med violates the principle of due process would be an extremely pertinent cause for concern.

If the mediation is successful, how does one enforce the settlement agreement? How does it override the earlier award that was delivered, but never unsealed? What happens to that award? Is the award in the nature of a decree, and if so, can it be disregarded by the parties consenting to the waiver? These are

[83] Ross and Conlon, *supra* note 5 at p. 423-426

[84] Article 34 (5) of the UNCITRAL Rules states that "An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority."

[85] Rodyk and Davidson LLP, *Arbitration and Public Policy – Is the Unruly Horse being Tamed?* (Jan 28, 2014) http://www.rodyk.com/usermedia/documents/RodykReporter_Jun12.pdf

extremely valid concerns regarding the process which an institution incorporating it will have to consider and successfully reconcile. As Part IV will elaborate, the answer to these questions lies in the finality of the sealed award.

IV. Incorporating Hybrid Processes in Asian Arbitral Institutions: A Workable Framework

A. Circumventing Bias

Bias, both actual and apparent, is what has fuelled the discourse against Med-Arb and Arb-Med time and again. Rules of natural justice mandate that no person should go unheard. That is, every party to a dispute must be given reasonable opportunity to answer the case against it. However, one fundamental aspect of mediation is that of private caucuses (which will be examined in greater detail with respect to Arb-Med). In pure mediation, the rule of natural justice mentioned above does not operate as the mediator has no authority to decide the rights and duties of the parties. However, the dynamic shifts in the process of Med-Arb. The Med-Arbiter here subsequently issues a binding award on the parties and thus, must work in harmony with the principles of natural justice. At this juncture, the model proposed in the Keeneye case could be considered to overcome the issues private caucuses entail. The Court of Appeal in the *Keeneye* case attempted to provide a solution in ruling that the parties had waived their right to challenge the arbitrators for bias merely because they also mediated the dispute. The Court relied on *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd*[86] to say that a party not objecting to apparent bias in a timely manner amounted to a waiver.[87] If parties enter into an Arb-Med agreement with full knowledge of this fact, the apprehensions surrounding the process (which have significantly reduced since the Appeal decision) might subside. The problem however, runs deeper than a mere waiver.[88] The issue lies with the concept of private caucusing, as is evident from the facts of *Keeneye*.

One way to overcome this challenge to procedural fairness is to eliminate private caucuses altogether. However, this decreases the efficiency of the mediation

---

[86] *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.*, (1999) 2 HKCFAR 111, [1999] 1 HKLRD 665, [1999] 2 HKC 205

[87] Article 45 of the CIETAC Arbitration Rules is also along these lines.

[88] FrivenYeoh and Desmond Ang, *Reflections on GaoHaiyan – Of 'Arb-Med', 'Waivers', and Cultural Contextualisation of Public Policy Arguments* 29:3 J. INT'L ARB pp. 285 – 297 (2012)

phase to a great extent, enervating the very process of Med-Arb. Instead, provisions that make it mandatory to disclose all information material to the arbitral proceeding obtained by the Med-Arbiter from the parties to a dispute during the mediation phase to the other party, are Section 33(4) of the Hong Kong Arbitration Ordinance[89] and Section 17(3) of the Singapore International Arbitration Act, can be considered.[90]However, these provisions, aimed at mitigating natural justice concerns however, suffer from practical infirmities, such as deciding what 'material' information is, and the possibility of conscious or unconscious bias colouring that decision, as Part III discussed. As Lord Goff said in *R v Gough*,[91] "bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias." In light of risks of both real and inherent bias, the authors are of the opinion that one solution could be the inclusion of an express provision in the law renouncing the use of all information gathered in private caucuses in the arbitration phase, which seems to be the only way to address issues relating to the violation of natural justice and subsequent real bias. This, though not watertight, takes the onus of separating material information from the rest gathered at private caucuses from the Med-Arbiter, concomitantly negating behavioural risks of disputants such as non-disclosure of certain information which the disclosing party wants to be kept away from the knowledge of the opposing party to the dispute. This, however, does not resolve the issue of residual inherent bias, which owing to its psychological and subconscious nature of existence is not something a procedural rule can negate. However, as discussed previously, the judicial trend towards the test of apparent as opposed to real bias, as well as inclusion of a mechanism in the form of the second consent principle for the parties to object to the bias might, if not fully circumvent the issue of residual bias, provide the parties with an effective means of objecting to residual bias.

In light of the latter suggestion for a mechanism, the authors are of the opinion that a provision akin to Section 27D (4) of The Commercial Arbitration Act 2010 (NSW) needs to be incorporated into the existing framework in the Hong Kong and Singapore law which requires for the said second consent from the parties post the mediation phase for the med-arbiter to proceed to the arbitration

[89] Hong Kong Arbitration Ordinance, §33(4)
[90] International Arbitration Act, §17(3)
[91] *Supra* note 69

phase. If such consent is not granted by both the parties, a substitute arbitrator should be appointed vide a provision akin to Section 27D (6) of the Commercial Arbitration Act. In effect, this will allow the disputants who fear the risk of bias seeping into the arbitration phase to prohibit all information obtained during private caucuses from being used in the issuance of the final award with an option to change to a new arbitrator. These provisions, if incorporated into the existing framework shall mitigate the risk of bias and violations of principles of natural justice to a large extent. Alternatively, if material information gathered during private caucuses *is* allowed to play a role in the arbitration phase, a second consent provision should still be incorporated and such material information should be disclosed to the parties prior to seeking their consent to allow the same neutral med-arbiter to proceed to arbitration. This will allow the parties to check for the danger of bias and act accordingly to protect their interests.

What hybrid processes essentially seek to do, in light of the Normative Coase theorem,[92] is to reduce both the transaction costs of the process for the parties (which include search costs, bargaining costs, and enforcement costs) as well as reduce information costs[93]for the adjudicating body. This is done by allowing the same person to both mediate and arbitrate, thereby reducing the costs of discerning the values attached to the rights and liabilities in question by both parties to efficiently allocate them in the arbitration phase, as they have already been determined to some extent in the mediation phase. In light of this efficiency argument, it is contended that the residual opinion from the mediation phase in certain cases reduces the cost of determining several facts and issues already determined in the mediation phase. The risk of bias here is offset by the incorporation of the second consent mechanism.

B. Med-Arb: Resolving Offshoot Issues

The concerns with Med-Arb that have been illustrated here revolve around the notion of lack of procedural fairness, bias (either actual or apparent) that Part IV-A discussed, and the coercive element that a Med-Arbiter might bring to the table resulting in the parties making unwanted and premature concessions.

---

[92] The Normative Coase theorem states that if transaction costs are high, the law must be structured to reduce them. *See*, Cooter and Ulen, *supra* note 2 at 93

[93] Courts are usually faced with a trade-off between transaction costs and information costs. If the cost of determining which party values certain rights more than the other is higher than the transaction costs of the dispute between the parties, the efficient solution for the court is to follow precedent. The corollary is efficient when information costs are low. *See*, Cooter and Ulen, *supra* note 2 at 93

Further, certain behavioural issues of disputants can inhibit the effective functioning of the process and keep it from performing with utmost efficiency. For example, if the parties are fearful that confidential information, like concessions that the parties are willing to make if revealed to the Med-Arbiter in the mediation phase might influence the shaping of the arbitral award issued subsequently, they might choose to withhold it. However, such withholding of information might ultimately hurt him in arbitration.[94]

C. Arb-Med: Resolving Offshoot Issues

Other than bias, the issues with Arb-Med can broadly be catalogued into two major areas – costs and enforceability. It cannot be denied that Arb-Med is a relatively expensive process and does involve potential wastage of resources, but this is slightly nullified by the appointment of a single person to undertake both the arbitration and mediation phases. Also, considering the market and clientele that has usually engaged in Arb-Med, it can be asserted that the incurring of greater costs is for the long-term benefit of both parties, as it can be compensated for by their continued business association. For parties with long standing business relations, it can be argued that the costs of a more expensive process like Arb-Med pales in comparison to the business they stand to lose if the relationship between the two parties ends on a bad note due to a process like arbitration, where one party always loses. For business hubs like Hong Kong and Singapore, this would certainly make the process seem more attractive than traditional dispute resolution mechanisms. Other redeeming features of Arb-Med, such as the fact that it allows for quicker and more consensual methods of dispute resolution, makes it even more attractive. Dispute resolution is guaranteed, either by arbitration or mediation.[95]

As for enforceability of mediated agreements, the UNCITRAL Model Law provides for a framework wherein a settlement agreement can be enforced as a consensual arbitral award.[96]All that is required is that the countries in question

---

[94] Bartel, *supra* note 77

[95] Claire Wilson, *The Arb-Med hybrid in Hong Kong – Much ado about nothing?*KLUWER MEDIATION BLOG (Jan 28, 2014) http://kluwermediationblog.com/2012/02/01/the-arb-med-hybrid-in-hong-kong-much-ado-about-nothing/

[96] Article 14, United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006 (Vienna: United Nations, 2008);*See* Arnaud Ingen-Housz, *Enforcement of Mediated*

should operate under the Model Law framework and the institutions should have rules that allow the agreement to be so enforced.[97]In countries that do not follow the Model Law, it is possible to enforce the agreement as a contract between the two parties.[98]

As discussed previously, the concerns that surround the 'sealed envelope' model of Arb-Med about the effect and enforceability of the sealed award can be effectively addressed by examining the finality of arbitral awards with the finality of judicial decisions. It is contended that *first*, the role of an arbitrator is quasi-judicial and cannot be equated to that of a judge.[99] Since the sealed award is never enforced, the issue of considering it a binding decree does not arise. *Second*, arguments for the finality of an arbitral award are fundamentally premised on the fact that the parties have commonly consented to be bound by the award, and allowing an appeal undermines this consent. In an Arb-Med process, however, the parties have consented to disregard the award in case the mediation is successful, so the finality argument is inapplicable.

V. Conclusion

Asia has always been more receptive to hybrid processes than the west, as evident from the number of countries that have successfully incorporated such processes into their law. If premier Asian arbitral institutions such as the HKIAC and the SIAC (which offers Med-Arb services, but is yet to incorporate Arb-Med) follow the CIETAC's example and incorporate the model into their rules, they are not only offering more alternatives to their present clientele – they are also inviting clients from around the world who could be interested in the process, for all the benefits listed previously. The fact that these processes have express provisions facilitating it in the respective laws of both Singapore and

---

Settlement Agreements and Combined Procedure Awards (Jan 28, 2014) http://www.brp-forum.ch/enforcement-of-mediated-settlement-agreements-and-combined-procedure-awards

[97] The SIAC, for example, allows for this. *See* http://www.mediation.com.sg/index.php?option=com_content&view=article&id=50&Itemid=226 (last accessed 28th January 2014)

[98] Tore Wiwen-Nilsson, *Conciliation: Enforcement of settlement agreement* (Modern Law for Global Commerce, Congress to celebrate the fortieth annual session of UNCITRAL, Vienna, 9-12 July 2007)

[99] Pierre Lalive, *Absolute Finality of Arbitral Awards?*RevistaInternacional de Arbitragem e Conciliação 9 (2008)

Hong Kong and can be effectively enforced further strengthens this proposition. In a world where everybody is looking for a quicker, cheaper and more efficient process, arbitration seems to be losing its appeal as it becomes increasingly like litigation, a processes such as Med-Arb and Arb-Med being undertaken by institutions such as the SIAC and HKIAC could do wonders to international commercial arbitration.

With respect to the situation introduced earlier in this article, A and B have agreed to submit disputes arising out of the transaction to institutional Med-Arb and Arb-Med. These hybrid forms of alternative dispute resolution, they realize, are a panacea to their concerns over the trade-off between efficiency and finality on one hand, and the need to foster and preserve their amiable business relations on the other. They also realize that unlike court litigation, and characteristic of both mediation and arbitration, these hybrid processes can keep their dispute in the shadows while substantially cutting costs that are incurred in submitting their dispute to separate mediation and arbitration.

Amalgamating the conciliatory nature of mediation with the adjudicatory nature of arbitration makes available the best attributes of mediation and arbitration resulting in efficiency, expediency, flexibility and privacy among other things.[100]

[100] Sherry Landry,*Med-Arb: Mediation with a Bite and an Effective ADR Model*, 63 DEF. COUNSEL J. 263 (1996)

USE OF COSTS ON INDEMNITY BASIS TO COMBAT DILATORY TACTICS IN ARBITRATION- ADVOCATING THE HONG KONG APPROACH

Gourav Mohanty[*] *& Shruti Raina*[•]

ABSTRACT

Arbitral terrorism has become a subject of international concern. Dilatory tactics are the most common methods employed in derailment of arbitral process. Hong Kong's revolutionary stand in using costs on indemnity basis as a deterrent tool has broken ground in arbitration wherein notwithstanding the merit in the application, unsuccessful attempts and appeals at setting aside an award are being sanctioned by courts with indemnity costs. Even ICSID and ICC have penalized parties, winners and losers alike, for disorderly conduct in delaying arbitral proceedings. In the backdrop of the Hong Kong approach, echoed in the recent decision of Pacific China Holdings v. Grand Pacific Holdings, the article explicates the utility of the pre-award approach followed by arbitral institutions and national courts, and the conservative post-award approach followed by Australia, Malaysia, Singapore, England, and United States in discouraging dilatory tactics in arbitration. The conservative approach imposes indemnity costs as an exception unlike the Hong Kong approach where indemnity costs are imposed as a general rule. The conservative approach varies within the countries that follow it. Australia vociferously follows the conservative approach where it has explicitly rejected the Hong Kong approach. While America's stand is closer to Hong Kong's in spirit, United Kingdom, Malaysia and Singapore have not employed any conspicuous tangible practice of using indemnity costs in proceedings arising out of arbitration. The article analyses the jurisprudence available to extrapolate the effectiveness of the Hong Kong approach in combating dilatory maneuvers in arbitration.

I. Introduction

Guerrilla tactics of delaying and dilating enforcement of an arbitral award by resorting to appeals and injunctions have plagued the arbitration mechanism across countries and institutions and this become an international phenomenon.[1]

[*] III Year, B.A. LL.B (Hons.), Symbiosis Law School, Pune

[•] IV Year, B.A. LL.B (Hons.), Symbiosis Law School, Pune

[1] *See* Michael Hwang, *Why is there Still Resistance to Arbitration in Asia*, *in* Global Reflections On International Law, Commerce And Dispute Resolution: Liber Amicororum In Honour Of Robert Briner 401-405 (2005); Stephan Wilske*, Crisis? What Crisis?: The*

Indemnity costs and sanctions are emerging as effective tools to thwart unjustified protracted attempts at capsizing arbitral process or vacating arbitral awards.

> *When a party who loses an arbitration award, assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief it will prevail, the promise of arbitration is broken.*
>
> -10th Circuit Court in *Lewis* v. *Circuit City Stores, Inc.*[2]

The Hong Kong Court of Appeal gave a separate decision on costs in *Pacific China Holdings Ltd* v. *Grand Pacific Holdings*[3] which was upheld by the Final Court of Appeal in 2013, that confirmed the revolutionary position taken by the country in using indemnity costs as a tool to bolster its support for the finality of arbitral process by using it to sanction appeals against arbitral awards.

This paper focuses on the use of costs on an indemnity basis by Hong Kong as a measure of deterrence against undermining of the arbitral awards by disgruntled claimants. After a thorough exposition on the principles that govern indemnity costs in Australia, United Kingdom and United States, this paper will elucidate on the practicability of such a measure and make an assessment on the distinction between the Hong Kong approach of 'indemnity costs as a rule' and the Conservative approach of 'indemnity costs as an exception'. By evaluating the cross jurisdictional matrix of jurisprudence available, this write-up will advocate the use of indemnity costs as an effective measure to curb dilatory manoeuvres in the form of court intervention.

II. The Problem of Dilatory Tactics

Arbitration, marketed as an effective and expeditious form of alternate dispute resolution mechanism, has devolved into becoming merely the first step to litigation. There are various reasons that have contributed to this downfall

---

Development of International Arbitration in Tougher Times, 2.2 Contemp. Asia Arb. J. 187-216 (2009).

[2] Lewis v. Circuit City Stores, Inc., 500 F.3d 1140, 1153 (10th Cir.2007) [Hereinafter 'Circuit City case'].

[3] Pacific China Holdings Ltd v. Grand Pacific Holdings Ltd., [2012] H.K.C. 971 (C.A.) [hereinafter 'Grand Pacific'].

ranging from zealous judicial intervention to lapses in arbitral integrity. One of the most common tools for undermining arbitration has been the use of dilatory tactics by attorneys and counsels, wherein parties involve courts in the arbitral proceedings leading to a delay in conclusion of the dispute.

Dilatory manoeuvres are just one of the methods employed in *Guerilla tactics* or *arbitral terrorism*. The article, credited with coining the term 'arbitration guerrillas or terrorists', by Michael Hwang, used the term to describe respondents who have a bad case and yet decide to plead for court intervention.[4] They range from completely illegal and inappropriate acts, such as witness tampering and intimidation of arbitrators, to unwarranted applications for court intervention in the form of injunctions.[5] Belated jurisdictional objections, challenges to the impartiality of arbitrator, applications for interim injunctions, institution of parallel proceedings and persistent appeals against awards undermine the finality and integrity of an award.

The diversity of tactics that are used to get a 'second bite at the apple' ranges from challenges to the authority of the Tribunal, requests for the replacement of arbitrators, resignations of party-nominated arbitrators, efforts to break-down communications between members of the arbitral tribunal and resort to national courts.[6] The problem of obstructive moves aimed at frustrating the arbitral procedure is no longer in its nascent stage as is evident by a move to reinforce the arsenal of arms against guerrilla tactics. This can be seen in the 2012 Rules of Arbitration of the International Chamber of Commerce which encourage an

[4] *See* Michael Hwang, *Supra note* 1, (defining arbitration terrorists or guerrillas as 'Respondents who are not interested in playing the game by the Rules, usually because they have a bad case. They will try and exploit the procedural rules for their own advantage, seeking to delay the hearing and (if they get any opportunity) ultimately to derail the arbitration so it becomes abortive or ineffective)'. Stephan Wilske credits Michael Hwang for the first use of the term 'arbitration guerrillas'; Stephan Wilske, *Arbitration Guerillas at the Gate: Preserving the Civility of Arbitral Proceedings when the Going Gets (Extremely) Tough*, AUSTRIAN Y.B. ON INT'L ARB. 315, 323–324 (Klausegger et al. eds., 2011).

[5] Gunther Horvath, *Subtle Ways to Address Guerilla Tactics*, Speaking Notes of presentation given at the CILS Conference, Vienna, Austria (May 24. – 27, 2012) *available at* http://www.arbitration-austria.at/dokumente/Horvath.pdf.

[6] S. Greenberg, *Tackling Guerrilla Challenges Against Arbitrators: Institutional Perspective*, Transnat'l Disp. Mgmt. 7 (2010).

active approach of case management to combat undue delays and excessive costs by obliging parties and arbitrators to conduct arbitrations efficiently.[7]

However, approaching a court against the continuance of an arbitral process or enforcement of the award passed by the tribunal falls in a twilight zone when viewed through the kaleidoscope of guerrilla tactics. Conduct of appeals in domestic courts on account of dissatisfaction with an arbitral award, identified by some attorneys as guerrilla tactics, would be defended by others as a legitimate strategy, or even as part of an attorney's obligation to diligently represent the client's interest. To their European counterparts, the American's approach in the form of interjecting excessive objections, bullying witnesses on cross-examination, concocting creative interpretations of legal rules and strategically jockeying for procedural advantages in arbitration is disruptive and counterproductive. While it is no surprise that American attorneys have been characterized as 'ungentlemanly',[8] the moot question is when does such conduct transform into a guerrilla tactic? Further, every move aimed at pleading for court intervention cannot be regarded as an escapade of a crestfallen party to the arbitration agreement as some might involve grave grievances which need to be redressed.[9] Thus, constructing an unassailable arbitration structure absolutely free from the scope of judicial encroachment is not possible.

Despite the recent pro-arbitration approach taken by the judiciaries of many countries, dilatory tactics have not been curbed as they are masked with the veil of grievance catapulted from the rock of justice, equity and good conscience. It therefore becomes an inescapable duty of the Court to take cognizance of such prayers and this effectively derails the arbitral process. The problem is further aggravated as the international arbitration system does not possess its own

---

[7] Victoria Orlowski, *Chapter 2, §2.02: The Perspective of Arbitral Institutions: Upping the Arsenal – Using the ICC Rules to Counteract Guerilla Tactics, in* Guerrilla Tactics In International Arbitration (Günther J. Horvath & Stephan Wilske eds. 2013).

[8] Santiago A.Cueto, *Guerilla Tactics in International Arbitration. The New Normal in 2014?*, INT'L ARB. PRINCIPLES (Dec. 29, 2013), *available at* http://internationalarbitrators.com/guerilla-tactics-in-international-arbitration-the-new-normal-in-2014/ (last visited Jan. 30, 2014).

[9] *See* Rama Chandran v. The Industrial Court of Malaysia & Anr., [1997] 1 M.L.J. 145 (Malay.); M/s Mohan Construction Co. v. DDA, 73 (1998) D.L.T. 12 (India); Burlage v. Superior Court, 178 Cal. App.4th 524 (CA 2009) [awards vacated due to misconduct on part of arbitrator].

transparent Code of Ethics. The current absence of ethical regulations to curb such dilatory tactics poses a potential crisis which has been pointed out by leading arbitrators as a considerable threat to the future integrity and legitimacy of international arbitration.[10]

III. Costs

Costs include all those expenses of litigation which one party is directed by the Court to pay to the other at the conclusion of a suit or dispute between them.[11] They must be distinguished from 'fees' which have to be paid by a litigant to the officers of the court.[12] Costs exist to ensure that not all victories are pyrrhic and won at excessive cost, and to deter litigants who are guilty of some misconduct or unwelcome demeanour.[13]

The monetary burden of a long-drawn out litigation battle placed on the contesting parties is rather sizeable in measure. Arbitration, like litigation, also requires the resolution of the question on costs as 'the costs of international commercial arbitrations are regularly substantial, not only in absolute terms but also compared to the amount in dispute'.[14] There exists no general discernible

---

[10] *See* Charles N. Brower & Stephan W. Schill, *Regulating Counsel Conduct before International Arbitral Tribunals, in* Making Transnational Law Work In The Global Economy: Essays In Honour Of Detlev Vagts 491-492 (Peter H. F. Bekker et al. eds. 2010) ('At issue may ultimately be the legitimacy of the international arbitral system as a whole, in particular inasmuch as … [uniform legal ethics for counsel] operate not only retrospectively…, but also prospectively as a mechanism of global governance.'); Doak Bishop, Address at the ICCA Congress (26 May 2010) ('Although there have been no catastrophes to this point, the International Arbitration system is at least subject to reasonable criticism without its own transparent Code of Ethics, and we need to ensure the future integrity and legitimacy of the system.'); *See also* Carolyn B. Lammet et al., *Has the Time Come for an ICSID Code of Ethics for Counsel?, in* 2009-2010 Y.B. On Int'l Investment L. & Pol'y (Karl Sauvant ed., 2010) (answering the titular question in the positive); Cyrus Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration,* 3 DISP. RESOL. INT'L 83, 78-94 (2009) (answering the titular question in the negative).

[11] Arthur L. Goodhart, *Costs*, 38 THE YALE L. J. 849-878 (1929).

[12] *See* Bouvier's Law Dictionary 239 (1926).

[13] McCullough Estate v. Ayer, (1998) A.B.C.A. 38 (Can. C.A.).

[14] W. Lawrence Craig, William W. Park & Jan Paulsson, INTERNATIONAL COMMERCIAL ARBITRATION 395 (2000), 'awards in excess of $ 1 million are unremarkable in the biggest cases'.

practice as to the treatment of costs in international commercial arbitrations.[15] One of the primary reasons behind this is the fact that the issue of costs is left to the widest discretion of the arbitrators,[16] and thus, a concrete guideline cannot be carved out from existing case laws.

The two common forms of costs employed by courts across jurisdictions can be classified as costs on party-party basis,[17] and costs on indemnity basis.[18] Costs on party-party basis refers to the practice of the court to only allow costs which are proportionate to the matters in issue and resolve any doubt which it may have as to whether or not costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.[19] This means that the party seeking to recover its costs has to prove the reasonableness and proportionality of the amount claimed. When awarding costs on an indemnity basis, all costs shall be allowed except those of unreasonable amount or which have been unreasonably incurred. Any doubts which the taxing master may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party.[20] There is no requirement for the costs to be proportionate.[21] This has the effect of putting the onus on the paying party to show that the costs claimed are unreasonable which usually turn out to be an order for a higher percentage of their costs on assessment than would be the case if costs were assessed on the party to party basis for the receiving party.

---

[15] Alan Redfurn & Martin Hunter, Law And Practice Of International Commercial Arbitration 406 (3rd edn. 1999).

[16] Report of the Working Group on International Contract Practices, at 99, UN Doc. A/CN.9/216 (Feb. 16-26, 1982) (Even the drafters of the UNCITRAL Model law concluded that 'the question regarding costs of arbitration is not an appropriate matter to be dealt with in the model law').

[17] Also known as Standard basis in some jurisdictions.

[18] Gordon Woodman & Diethelm Klippel, Risk and the Law 149 (2008).

[19] *See* High Court Rules, 2011, Cap. 4 O. 62, R. 28(2) (H.K.). Also *see* Civil Procedure Rules, 1998, R. 44.3(2) (Eng.), *Uniform Civil Procedure Rules, 1999* (Qld.) § 703, (Austl.).

[20] *Supra* note 19.

[21] For understanding of the term proportionate, please see Civil Procedure Rules, R. 1.1, The Overriding Objective, *available at* http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01#1.1 [Requires courts to deal with cases in ways that are proportionate to the amount of money involved; to the importance of the case; to the complexity of the issues; and to the financial position of each party]

IV. Pre-Award Stage: Use of Indemnity Costs

Arbitral Tribunals:

A reflection of the trend to levy penalty for delaying strategies is visible in the practice of various arbitral institutions. While determining costs, tribunals look at the results of the case as well as the conduct of the parties during the proceedings.[22] For instance, in international commercial arbitration, ICSID (International Centre for Settlement of Investment Disputes) tribunals are guided by three criteria while allocating costs:

i. The principle of 'costs should follow the event' which essentially translates into the fact that the successful party is entitled to seek an order directing the unsuccessful party to pay its costs.[23]
ii. The principle that the rationale behind costs should be to discourage misconduct by the parties. The application of this principle can be found in cases where costs are attributed to 'bad behaviour' of the parties.[24]
iii. The other notion is where costs should be shared equally by the parties (50:50 principle).[25]

ICSID tribunals tend to follow any one of the three aforementioned criteria.[26] Recoverable party costs should be considered akin to the damages suffered awarded on account of contractual breach or tortuous behaviour of the other party.[27] Using of costs on an indemnity basis can be considered as an incarnation of this view. As per the 2010 IBA Rules on Evidence, if the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of

[22] José Rosell, *Arbitration Costs as Relief and/or Damages*, 28.2 J. Int'l Arb. 115 (2011) [hereinafter 'José Rosell'].
[23] A similar rule can be found in Civil Procedure Rules, 1998, R. 36.10, (U.K.)
[24] In 21% of the cases where the 'costs follow the event' approach was followed, the outcome was attributed to 'bad behaviour'. Please *see* M. Hodgson, *Costs in Investment Treaty Arbitration: The Case for Reform* 11 Transnat'l Disp. Mgmt. (2014).
[25] José Rosell, *supra* note 22, at 118.
[26] Christoph Schreuer et al., The ICSID Convention: A Commentary, art. 61, ¶.17 (2009). Also *see supra* note 22, at 118.
[27] W. Laurence Craig et al., International Chamber of Commerce Arbitration 394 (2000).

the arbitration, including costs arising out of or in connection with the taking of evidence.[28]

ICSID and International Chamber of Commerce (ICC) maybe considered harbingers of this form of shifting of costs. A study undertaken by the ICC of the final awards rendered within 1989-1991 showed that out of 48 cases where the claimant clearly prevailed, the tribunal ordered the respondent to bear all the costs in 39 cases.[29] The robust stand taken by the tribunals against dilatory tactics is noteworthy in cases where even the winners have been denied costs as a sanction against their conduct. In these cases, the tribunal though more inclined towards awarding costs, has refused, partially or entirely, to award costs to the winning party against the losing party as a sanction against dilatory, obstructive or otherwise improper procedural conduct on the part of the former.[30] Hence, parties to an international arbitration are expected to abstain from delaying tactics.

Even when ICSID tribunals allocate costs on a 'loser pays' basis, they are sometimes reluctant to order the unsuccessful party to pay the party's legal costs and expenses unless circumstances exist that would contribute to the same. These circumstances unequivocally include dilatory tactics. In *ADC* v. *Republic of Hungary* the Tribunal noted that Hungary's conduct, which contributed to the length and cost of the proceedings, was relevant to its decision to award ADC the full amount of its legal and other expenses.[31] Further, the Tribunal ordered the respondent in this case to reimburse the successful claimant and laid down six factors for determining the same. The following factors out of the six are indicative of this approach: (i)Some of the points taken were unarguable but were nevertheless added to extend the time and cost of this arbitration (ii) Not only did the respondent change counsel mid-arbitration thereby causing some extra expense, but also changed experts at the very last minute (iii) On change of

---

[28] *Rules on the Taking of Evidence in International Arbitration*, Adopted by a resolution of the IBA Council,INTERNATIONAL BAR ASSOCIATION, art. 9(7) (May 29, 2010).

[29] Cited in Eric A. Schwartz, *The ICC Arbitral Process, Part IV: The Cost of ICC Arbitration*, 4 I.C.C .CT. BULL. (1993), Micha Buchler*, Awarding costs in International Commercial Arbitration: An overview*, 22 A.S.A. Bull, 261 (2004).

[30] *See e.g.*, Case No. 8486 of 1996, 24 Y.B. Comm. Arb. 172 (ICC Int'l Ct. Arb.); Case No. 7453 of 1994, 22 Y. B. Comm. Arb.163 (ICC Int'l Ct. Arb.)

[31] ADC Affiliate Ltd. & ADC & ADMC Management Ltd. v. Republic of Hungary, ICSID Case no. ARB/03/16, (Oct. 2, 2006).

counsel, the Respondent sought an adjournment of the long fixed hearing dates, opposed by the Claimants, which was rejected by the Tribunal.[32] In *Ecuador* v. *Petroecuador* it was found appropriate that Petroecuador should bear all costs incurred by the Centre in connection with this proceedings, including the fees and expenses of the members of a Centre as regards the circumstances of the case, which in their view, included the fact that exceptional delay had resulted from Petroecuador's tardiness in making the first advance payment requested by the Centre and its continued refusal to pay the subsequent advances requested in relation to the annulment proceedings.[33]

International tribunals have a strong infrastructure to discourage unwelcome strategies that disrupt the arbitral proceedings. With a surge in arbitral institutions around the world, these entrants should take a cue from ICSID and ICC to create an ethical matrix of regulations to use costs as a disincentive against employing distasteful conduct.

National Courts:

Proactive vigilance on the part of the Courts can go a long way in combating dilatory tactics in arbitration during the pre-award stage. When parties resort to means such as initiation of parallel proceedings in courts of law to prolong the process of settlement, indemnity costs have been used to curb such abuse of process.[34] This is because the damages which flow from the breach of that agreement are normally all the costs reasonably incurred by the party entitled to a stay of the proceedings.[35] The practice though, has been scarcely used. The English Court has admitted that if the receiving party's costs have been increased on account of unreasonable behaviour on part of the opponent, it is fair that it should recover an enhanced amount of its costs.[36] The Court while awarding indemnity costs for violating the arbitration agreement had deprecated the practice of resorting to parallel proceedings, for instance, in *A* v. *AJ*[37]*:*

---

[32] *Supra* note 31, at 103.
[33] Repsol YPF Ecuador S.A. & Empresa Estatal Petróleos del Ecuador v. Republic of Ecuador, ICSID Case No. ARB/01/10, Decision on Annulment (Jan. 8, 2007).
[34] Kyrgyz Mobil Tel Ltd v. Fellowes International Holdings Ltd., [2005] EWHC (Comm) 1314 (Eng.).
[35] *Id.*
[36] ABCI v. Banque Franco-Tunisienne, [2003] 2 Lloyd's Rep. 146 (Eng.).
[37] A v. AJ, [2007] EWHC (Comm) 54 (Eng.).

> *The conduct of a party who deliberately ignores an arbitration or a jurisdiction clause so as to derive from its own breach of contract an unjustifiable procedural advantage is in substance acting in a manner which not only constitutes a breach of contract but which misuses the judicial facilities offered by the English courts or a foreign court.*[38]

In situations where the successful applicant is able to establish that the breach has caused the innocent party to reasonably incur legal costs, the Court has deemed indemnity costs to be "appropriate".[39] In cases of breach of an exclusive 'English arbitration clause', the English court will ordinarily exercise its discretion, by way of an anti-suit injunction.[40] However, the methodology for compensation to be ordered where there has been a breach of an agreement to arbitrate has also been well recognized.[41] In the case of *Paramedics Electromedicina Commercial* v. *GE Medical Systems Information Technologies*, the court ordered damages instead of injunctive relief against breach of an arbitration agreement by way of institution of parallel proceedings,[42] but such an order on costs is yet to be encountered in the American front.

In *Kyrgyz Mobil Tel Ltd* v. *Fellowes International*, Cooke J. was concerned with the costs of complex litigation located in the English, British Virgin Islands and Kyrgyzstan courts wherein Fellowes International had caused Kyrgyz to ignore the arbitration agreement and start proceedings in the Kyrgyzstan court. In awarding costs against Fellowes in proceedings for an anti-suit injunction, Cooke J. construed the correct approach to be that of imposition of indemnity costs where there has been a breach of a jurisdiction clause by a party whereby it initiated proceedings in a non-chosen jurisdiction. As per Cooke J., the

---

[38] *Supra* note 37, ¶ 15.
[39] *Supra* note 37, ¶ 15.
[40] Donohue v Armco Inc. and Ors., [2001] UKHL 64, [2002] 1 Lloyd's Rep. 425 (appeal taken from Eng.); Oceanconnect UK Ltd & Anr. v. Angara Maritime Ltd., [2010] EWCA (Civ) 1050 (Eng.).
[41] Mantovani v. Carapelli SpA, [1978] 2 Lloyd's Rep. 63, [1980] 1 Lloyd's Rep. 375 (Eng.); National Westminster Bank PlC v. Rabobank Nederland, [2007] EWHC (Comm) 1742.
[42] Paramedics Electromedicina Commercial, Ltd. v. GE Medical Systems Information Technologies Inc. 369 F.3d 645 (Ct. App. 2nd Cir. 2004).

Commercial Court in particular and all the courts in general, in England should adopt such an approach.[43]

V. The Hong Kong Position on Indemnity Costs

Under the Hong Kong approach, the courts, in proceedings arising out of or in connection with arbitral proceedings, in the absence of special circumstances, will normally consider it appropriate to order costs on an indemnity basis.[44] The arbitration mechanism has been envisaged to be such that, having regard to the underlying objectives in the Civil Justice Reforms ("CJR"), any unsuccessful application to challenge an arbitrator's award will normally attract indemnity costs against the applicant.

Background: Hong Kong has been known to be a favourable arbitration venue.[45] The Hong Kong judiciary has had a long reputation for its fairness and was recently rated as the best judicial system in Asia by a North Carolina think tank.[46] To make the judicial system more effective, the Honourable Chief Justice appointed the Working Party on Civil Justice Reform (Working Party) in February 2000 to review the rules and procedures of the High Court in civil proceedings and to recommend changes thereto, with a view to ensuring and improving access to justice at reasonable cost and speed. The Working Party

---

[43] *Supra* note 34, at 42.

[44] Please see decisions of Hong Kong Judiciary taken after the Civil Justice Reforms were implemented in 2009. *Supra* note 2, Gao Haiyan & Anor v. Keeneye Holdings Ltd & Anr. (No 2), [2012] 1 H.K.C. 49 (C.F.I.) [hereinafter Gao Haiyan case]; A v. R, [2009] H.K.C.F.I. 342 (C.F.I.) [hereinafter A v. R case].

[45]Secretary for Justice, *HK the place for international arbitration* (Oct. 2, 2003), *available at* http://www.doj.gov.hk/eng/archive/pdf/pr021003e.pdf.
See also John Bussey, *In Hong Kong, Business Watches Snowden Test the Law,* Wall St. J. (July 5, 2013), http://online.wsj.com/news/articles/SB10001424127887324260204578585860124962072.

[46] Political and Economic Risk Consultancy (PERC) survey: Hong Kong's judicial system scored 1.45 on the scale (zero representing the best performance and 10 the worst), Singapore with a grade of 1.92, followed by Japan (3.50), South Korea (4.62), Taiwan (4.93), the Philippines (6.10), Malaysia (6.47), India (6.50), Thailand (7.00), China (7.25), Vietnam's (8.10) and Indonesia (8.26). *See* Agence France-Presse, *Hong Kong has best judicial system in Asia: business survey,* ABS-CBN NEWS, (Sept. 15, 2008), http://www.abs-cbnnews.com/world/09/15/08/hong-kong-has-best-judicial-system-asia-business-survey.

completed the review and published its Final Report on 3 March 2004, making a total of 150 recommendations.[47]

The CJR was finally implemented in April 2009 in Hong Kong. A new regime called 'sanctioned offer' and 'sanctioned payment' was introduced to encourage prompt settlement in litigation.[48] Now any party, defendant or plaintiff, could make an offer to settle the claim. There would be consequences in terms of costs and interest where the party concerned failed to do better than the sanctioned offer or payment.[49] Thus, if a plaintiff made a sanctioned offer which is declined by the defendant, and the plaintiff obtains a judgment better than the offer, the defendant is likely to be ordered to pay the plaintiff's costs on an indemnity basis, enhanced interest (up to 10% above judgment rate) on those costs and enhanced interest (up to 10% above judgment rate) on any sum awarded to the plaintiff and the same rule applies to the plaintiff in case of a sanctioned offer made by the defendant.[50]

To illustrate, let's say it can be reasonably assessed that the plaintiff, if successful at trial, is likely to be awarded HK$1 million. An early sanctioned offer by the plaintiff to accept from the defendant a sum of HK$990K would yield obvious advantages to the plaintiff. If the defendant, for fear of a severe sanction, accepts the offer, the plaintiff will be able to quickly recoup more or less all his likely entitlement deficient of only a small discount. However if the defendant

---

[47] Final Report, Chief Justice's Working Party Om Civil Justice Reform, available at http://www.legco.gov.hk/yr06-07/english/bc/bc57/papers/bc570611cb1960-e.pdf.

[48] Rules of High Court, (2011) Cap. 4A, O. 22 (H.K.), *Available at* http://www.legislation.gov.hk/blis_ind.nsf/CURALLENGDOC/E07CB071EA75BF174825758A000ACC34?OpenDocument. *See also* Rules of the District Court, (2000) Cap. 336H (H.K.), *Available at* http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/A65E02C849A77A12482575EE006D84F2?OpenDocument&bt=0.

[49] Civil Justice Reform, *An Overview by the Judiciary,* http://www.rcul.judiciary.gov.hk/rc/download.jsp?FN=documents/eng/CJR_An_Overview_eng.pdf.

[50] For further details of the principles and mechanism of Sanctioned Offer/Payment, please refer to the Judiciary's publication: *How to Shorten Legal Proceedings: Sanctioned offers and Sanctioned Payments,* CIVIL JUSTICE REFORM, http://www.civiljustice.gov.hk/cjr/download.jsp?FN=eng/documents/Leaflet_08_Eng.pdf.

does not accept the offer and the plaintiff eventually succeeds at trial with an award of HK$1 million, then the defendant is likely to be ordered to pay the plaintiff's costs on an indemnity basis with enhanced interest.

Thus, Hong Kong approaches the principle of imposing indemnity costs as a general rule unless special circumstances demand otherwise. This sends a radical message, in support of prompt settlement of cases, to prospective litigants against adopting dilatory tactics to prolong a court case.

A. A v. *R*

The Hong Kong approach ushered in the Civil Justice Reforms in 2009 with the landmark decision of Justice Reyes in *A* v. *R*[51] which reverberated with gusto the growing discontent with dilatory tactics, of lawyers, which have destroyed the purpose of arbitration and created judicial congestion. Justice Reyes endeared parties to comply with arbitration awards and deemed enforcement of the same as "a matter of course"[52] and appeals to set aside an award or order refusing enforcements as "exceptional events"[53]. He also underlined the objectives of the CJR wherein a party seeking to un-meritoriously challenge an award would not be complying with its obligation to the Court under Order 1A Rule 3 to further the underlying objectives of CJR, in particular, the duty to assist the Court in the just, cost-effective and efficient resolution of a dispute.[54] Thus, the Court ought to award costs against a losing party on an indemnity basis when an award is unsuccessfully challenged. Accordingly, in the absence of special circumstances, indemnity costs were awarded.

B. Gao Haiyan v. *Keeneye Holdings Ltd*

The Bench in both *Gao Haiyan* case,[55] and *Grand Pacific* case,[56] were inspired by Justice Reyes' landmark decision. Six months before *Grand Pacific,* the Court of Appeal ('CA') in the High Court of the Hong Kong Special Administrative Region had expressed in *Gao Haiyan* v. *Keeneye Holdings* that it would be

---

[51] A v. R case, *supra* note 44.
[52] *Supra* note 51*,* at 67.
[53] *Supra* note 51, at 68.
[54] *Supra* note 51, at 69.
[55] Gao Haiyan case, *supra* note 44.
[56] Grand Pacific, *supra* note 3. It would be interesting to note that Hon Tang VP and Fok JA were present in the three member Bench in both *Gao Haiyan* and *Grand Pacific.*

paradoxical if a defendant who is faced with a claim against which he has a complete defence should only obtain costs on a party and party basis.[57] It confirmed that courts should be more ready to award indemnity costs to support the underlying objective of the Civil Justice Reforms.[58] The merits of the appeal were not considered as 'special reasons' for not awarding indemnity costs in this case as well. There were many judgments relied on for arguing that merit in arguments suffices as a reasonable cause to not award costs on indemnity basis and that this was not a case where the court process had been abused with a view to delay enforcement of the award.[59] But the cases relied upon preceded the Civil Justice Reform and were thus not taken into consideration.[60] On the other hand, the Court opined that had the case been "hopeless", it would have provided additional reasons for indemnity costs.[61]

C. Pacific China Holdings Ltd v. *Grand Pacific Holdings Ltd*

The Court of Appeal, in *Grand Pacific,* lived up to the reputation of the Hong Kong judiciary in ensuring fairness by going beyond the strict letter of law and removed any doubts that would confound a reasonable litigant. The *Grand Pacific* judgment was just another chapter in the arbitration friendly Hong Kong jurisprudence. In *Pacific China Holdings Ltd* v. *Grand Pacific Holdings Ltd,*[62] an ICC award was set aside in favour of Grand Pacific by the Court of First Instance on the basis of breach of Articles 34(2)(a)(ii) and 34(2)(a)(iv) of the UNCITRAL Model Law on International Commercial Arbitration ('UNICTRAL Model Law'). In May 2012, the CA unanimously overturned the decision and reinstated the award. As per the Court "only a sufficiently serious error" undermining due process could be regarded as a violation of Article 34(2)(a)(ii) of UNCITRAL

---

[57] *Supra* note 44, at 8.
[58] *Id.* at 9.
[59] Cases relied were Wing Hong Construction Ltd. v. Tin Wo Engineering Co. Ltd., [2010] H.K.E.C. 919 (H.K.) [hereinafter Wing Hong Construction]; Town Planning Board v. Society for Protection of the Harbour Ltd. (No. 2), [2004] 7 H.K.C.F.A.R. 114 (C.F.A); Karaha Bodas Co Llc v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara 2011 A.B.C.A. 291 (Can.).
[60] Wing Hong Construction *supra* note 59, though decided after CJR, did not support the contention [11... The nature of arbitration is such that, having regard to the underlying objectives in the RHC, an unsuccessful application to challenge an arbitrators award will normally attract indemnity costs against the applicant.]
[61] Wing Hong Construction *supra* note 59, at 14.
[62] Grand Pacific, *supra* note 3.

Model Law. It had to be proven that the tribunal's conduct was of a "serious" or even "egregious" nature to establish breach of the said Article.[63] The decision was confirmed by the Hong Court of Final Appeal; ('CFA') wherein on 19 February 2013, the CFA refused leave to appeal against the judgment of the CA.[64]

However, it was the separate decision on costs in which the CA ordered Pacific China to pay Grand Pacific's costs from the court below and the CA proceedings on an indemnity basis that reconfirmed the judiciary's attitude towards arbitration and its disposition against dilatory manoeuvres.[65] The CA held it fair that if a party was unsuccessful in setting aside or resisting enforcement of the arbitral award, in the absence of special circumstances, it should pay costs on an indemnity basis.[66] The fact that the challenge was reasonably arguable was not held to be a special circumstance that would warrant an exclusion of indemnity costs.[67]

> *But parties opt for arbitration because they would not accept the uncertainty of litigation, so the fact that an appeal was necessary to put matters right does not detract from the reason for ordering indemnity costs in the first place.*[68]

Thus, the CFA did consider the fact that setting aside of the award in favour of Grand Pacific by the Hong Kong Court of First Instance, before the decision was overturned by the higher court lends some credit to the assumption that Grand Pacific's stand had some merit. In other words, the CFA held the institution of a mere appeal against the arbitral award, irrespective of the merits therein, as conduct justifying indemnity costs. It sends out a very strong signal in

---

[63] Grand Pacific, *supra* note 3, ¶ 94.
[64] Justin D'agostino, Martin Wallace & Yu-Shin Teoh, *Hong Kong Court Of Final Appeal Refuses Leave To Appeal In The Grand Pacific V. Pacific China Case,* KLUWER ARB. BLOG (Feb. 20, 2013), *available at* http://kluwerarbitrationblog.com/blog/2013/02/20/hong-kong-court-of-final-appeal-refuses-leave-to-appeal-in-the-grand-pacific-v-pacific-china-case/ [hereinafter '*D'agostino*'].
[65] Grand Pacific, *supra* note 3.
[66] Grand Pacific, *supra* note 3, ¶ 15.
[67] Grand Pacific, *supra* note 3, ¶ 17.
[68] Grand Pacific, *supra* note 3, ¶ 21.

favour of the arbitration process and preservation of contractual sanctity that contains the arbitration clause.

Another thing worthy of note here is that none of the parties had made a sanctioned offer or payment which was required for a mechanical imposition of indemnity costs as per Order 22 of the Rules of High Court which deals with indemnity costs apropos sanctioned offers.[69] The Court interpreted the law and took it a step further by relying on its earlier decision in *Gao Haiyan* v. *Keeneye Holdings*[70] and extended indemnity costs to every case unless special circumstances demanded otherwise. The court deemed it reasonable that any confident party would not venture to make any sanctioned offer if it was sure of its success and this should not deprive it of costs on an indemnity basis.[71]

As evident from the aforementioned judicial pronouncements, Hong Kong has adopted a fierce arsenal in the form of indemnity costs against dilatory unmeritorious challenges arising out of or in connection with arbitral proceedings. It is not even necessary for a party successfully resisting an application seeking to challenge the award, to establish the application itself as an abuse of process to justify indemnity costs. This is because a party in whose favour the arbitral award is rendered should not have had to contend with any types of challenges to the award after the arbitral proceedings are over. To quote Justice Reyes:

> *If the losing party is only made to pay costs on a conventional party-and-party basis, the winning party would in effect be subsidising the losing party's abortive attempt to frustrate enforcement of a valid award.*[72]

It might appear to be harsh that the Hong Kong approach may bring even arguable cases within the purview of the general rule of indemnity costs[73] but the provision of 'special circumstances' can be construed in the future by the courts to provide it with sufficient discretion to depart from the rule in cases of genuine

---

[69] *Supra* note 48.
[70] Gao Haiyan case, *supra* note 44.
[71] Grand Pacific, *supra note* 3, ¶ 12.
[72] A v. R, *supra* note 44, ¶ 70.
[73] As noted above, the decision by the Court of First Instance in *Grand Pacific v. Pacific China* was given in favor of Grand Pacific. And it was overturned by the higher court of appeal which awarded indemnity costs against Grand Pacific. The lower court's decision and the apparent merits in the stand of Grand Pacific were disregarded.

grievances as distinguished from mere dissatisfaction with the award on technical or insignificant grounds. Thus in the absence of special circumstances, the court will normally consider it appropriate to order costs on an indemnity basis. This will indeed deter parties who lose out in arbitration proceedings to prolong the legal battle in Courts.

VI. The Conservative Approach

The Conservative approach, when juxtaposed with the Hong Kong approach, follows an orthodox ideology in imposition of indemnity costs wherein indemnity costs are awarded only in special circumstances with standard costs being the routine norm.[74] The threshold for these special circumstances is high and thus imposition of indemnity costs is rare.

A. Australia

Costs are ordinarily awarded against the unsuccessful party on a "party-and-party" basis. An award of costs on an indemnity basis may be made only in a special case, where the circumstances justify departure from the ordinary principle.[75] The general principle of costs is expressed in Section 681(1) of the *Uniform Civil Procedure Rules.*[76] Standard costs i.e. costs on party to party basis only take into consideration costs that were necessary or proper for the attainment of justice or for enforcement or defence of rights.[77] Indemnity costs

---

[74] The authors have used the term 'Conservative Approach' to describe the trend in Australia, United Kingdom United States, Malaysia and Singapore. These countries impose indemnity costs only in exceptional cases.

[75] *See Degman Pty Ltd. (in liq) v Wright, (No. 2)* [1983] 2 NSWLR 354 (Austl.); *Qantas Airways Limited v Dillingham Corporation* (Unreported, Sup. Ct. NSW, May 14, 1987) (Austl.); *Singleton v Macquarie Broadcasting Holdings Limited* 24 NSWLR 103, (Rogers CJ Comm D) (Austl.); *Blackburn v NSW* (Unreported, Sup. Ct. NSW, David Hunt J, Aug. 9, 1991) (Austl.); *Melouhowee Pty Ltd. v Steenbohm* (Unreported, Sup. Ct. NSW, Waddell CJ, Feb. 6, 1992); *Sky Channel Pty Ltd. v Minister for Transport and Communications* (Unreported, Federal Court of Australia, Einfeld J, Feb. 19, 1993); *Woodger v Federal Capital Press of Australia Pty Ltd.* 107 ACTR 1, 40 (Miles CJ); *AWA Ltd. v Daniels* (Unreported, Sup. Ct. NSW, Rogers CJ, Apr. 27, 1993) (Austl.).

[76] *Uniform Civil Procedure Rules 1999* s 681, (Austl.) [General rule about costs: (1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise].

[77] In several jurisdictions the rules of court specify that, without limiting the court's discretion, the usual

are viewed as harsher category of costs awarded only in circumstances involving misconduct.[78]

Examples of cases where indemnity costs have been awarded are when allegations of fraud were made which were known to be false by the party making them,[79] where there was wilful disregard for known facts or clearly established law,[80] and when proceedings were instigated with ulterior motive.[81]

Australia has used indemnity costs as a punitive measure against dilatory tactics in civil litigation in contrast to arbitration cases wherein courts have awarded costs on indemnity basis against claims which were made with no basis and should never have been made in the first place,[82] against misconduct aimed at prolonging court proceedings,[83] and where a party maintained a cause of action with no real prospect of success.[84] Though Australia does not have a mechanism which is similar to the system of sanctioned payment that exists in Hong Kong,

---

order will be that costs which follow the event: *Uniform Civil Procedure Rules 2005* (Qld) reg 42(1) (Austl.); *Uniform Civil Procedure Rules 1999* (Qld) r 689; *Supreme Court Rules 1987* (SA) r 101.02, *Supreme Court Civil Rules 2006* (SA) r 263(1); Rules of the Supreme Court 1971 (WA) O 66 r 1. *See also Colgate-Palmolive Company v Cussons Pty Ltd.* [1993] 46 FCR 225, 232 (Austl.) [hereinafter *Colgate Palmolive case*].

[78] *Grouped Proceedings in the Federal Court (ALRC Report 46),* LAW REFORM COMMISSION OF AUSTL. (Dec. 1988): "The principle of the 'heads I win, tails you lose' approach to costs is unacceptable." See also P.J. Mause, *Winner Takes All: A Re-examination of the Indemnity System*, 55 IOWA L. REV. 26 (1960); G.D. Watson & P. Lantz, *Bringing Fairness to the Costs System - An Indemnity Scheme for the Costs of Successful Appeals and Other Proceedings*, 19OSGOODE HALL L.J. 447 (1981).

[79] Thors v. Weekes (1989) 92 ALR 131, 152 (Austl).

[80] *J-Corp Pty Ltd v Australia Builders Labourers Federation Union of Workers,(No 2)* (1993) 46 IR 301 (Austl.).

[81] *Justice Woodward in Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd.,* (1988) 81 ALR 397 (Austl.).

[82] *Ragata Developments Pty Ltd v Westpac Banking Corporation*, [1993] FCA 115 (Davies J.) (Austl.)

[83] *Colgate Palmolive case, supra* note 77.

[84] *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd*, (1988) 81 ALR 397. (Austl.).

it still awarded indemnity costs where a settlement was offered and there was evidence of lack of willingness to compromise or negotiate.[85]

These were however exceptional circumstances and Australia does not punish every discontented appellant. Further, these cases were in the realm of civil litigation not pertaining to arbitration. The country was recently offered an opportunity to deal with the question of whether unsuccessful applications against setting aside of an award rendered in arbitration proceedings amounted to special circumstances warranting imposition of indemnity costs.

J. Croft tried to adopt the Hong Kong approach when enforcing an award from Mongolia in the Victorian Supreme Court,[86] but in *IMC Aviation Solutions Pty. Ltd.* v. *Altain Khuder LLC*, the CA, in refusing enforcement, held that this did not reflect current Australian law.[87] The Court ruled that unsuccessfully resisting enforcement of a foreign arbitral award is not an established category of special circumstances in Australia.[88] The Court below had taken into account the decision rendered by Reyes J,[89] and found that such considerations applied with equal force in Victoria, 'both from an arbitration perspective and also from the perspective of legislation such as that contained in the Civil Procedure Act and in the Hong Kong Civil Justice Reforms.' Although the CA did not venture to provide a view on whether the approach of Reyes J should be followed in Victoria, it deemed the reliance placed on the Hong Kong decision as erroneous and decided not to award indemnity costs for want of 'special circumstances'. The Court also did not comment on the finding of J. Croft where he had found an analogy to the Hong Kong CJR in the overarching purpose of the Civil Procedure Act 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute' [90] and the overarching obligation of a party directed to achieving that purpose.

[85] *Maitland Hospital v Fisher, (No 2)* (1992) 27 NSWLR 721 at 724 (Austl.).
[86] Luke Nottage, *International Commercial Arbitration in Australia: What's New and What's Next?*, 10.5 J. Of Int'l Arb. 476 (2013).
[87] *IMC Aviation Solutions Pty Ltd v Altain Khuder L.L.C.* [2011] VSCA 248 (Austl.),
[88] *Supra* note 82, at 55.
[89] A v. R case*, supra* note 44.
[90] *Hodgson v Amcor Ltd.* [2011] VSC 63 (Austl.).

B. England

Since the use of indemnity costs proceedings arising out of arbitration has not quite taken root yet,[91] a final analysis on the same cannot not be based on an impressive amount of jurisprudence. The courts, in civil suits, have found that a question of whether or not to award indemnity costs will always be relevant to whether there is something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way that justifies an order for indemnity costs.[92] In this fashion, England follows Australia's lead insofar as awarding indemnity costs only in special circumstances is considered.[93] The guiding principles on costs on an indemnity basis in England were summarized by the English High Court in *Fiona Trust & Holding Corporate* v. *Yuri Privalov.*[94] The case dealt with contracts which had been induced by bribery and had been rescinded on discovery of the bribery clause. In that case Andrew Smith J., who was required to determine issues about relief and costs, following his judgment on liability, identified the case scenarios that would warrant an imposition of costs on indemnity basis. It included *inter alia*:

(i) reasonableness of allegations and the manner in which it was pursued,
(ii) pursuit of an unjustified case,
(iii) pursuit of allegations despite the lack of any foundation in the documentary evidence for those allegations,
(iv) pursuit of claim which is speculative, weak, opportunistic, thin or farfetched,
(v) where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant,
(vi) where during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the

[91] Courts have awarded indemnity costs in application against arbital awards only once in Exfin Shipping *(*India*)* Ltd. *v.* Tolani Shipping Co Ltd [2006] EWHC (Comm) 1090, 13(Eng.) [hereinafter 'Tolani Shipping case'].
[92] Excelsior Commercial & Indus'l Holdings Ltd. v. Salisbury Ham Johnson, [2002] EWCA (Civ) 879 (Eng.) [hereinafter 'Excelsior Commercial case'].
[93] *See* Fiona Trust & Holding Corp. v. Yuri Privalov, [2011] EWHC (Comm.) 664 (Eng.).
[94] *Id.*

> allegations which it has made, only then to suffer a resounding defeat.[95]

A continued emphasis seems to be on the unreasonableness of the litigation.[96] The only judgment in which the English Courts have been bold enough to order costs on an indemnity basis against an unsuccessful application for setting aside an arbitral award is that of *Exfin Shipping* (*India*) *Ltd.* v. *Tolani Shipping Co Ltd.*[97] Calling the application 'wholly unmeritorious', the Court gave its decision on costs based on the fact that the party 'had acted in its own perceived commercial interest and without merit and should pay the commercial price of doing so'.[98] The judgment only speaks of the arguments made which include an argument suggesting unreasonableness and 'objective of delaying payment' on the part of the unsuccessful party. The judgment makes no attempt to clarify any stance on whether such a situation of an 'unreasonable application' would result in indemnity costs being awarded in all cases. Further, another factor that contributed to the decision on costs was the fact that the party had been previously warned about its disregard for time.[99] This transforms the imposition of indemnity costs in this case into a 'qualified' penalty insomuch as it was built on the premise of a previous warning.

The conservative approach in England is a much softer and nebulous version of the Australian approach that requires more judicial deliberation. The jurisprudence on awarding indemnity costs is still in its nascent stage and is yet to touch the contours of arbitration. The guidelines set out in *Fiona Trust* case,[100] are however comprehensive and if implemented firmly against appeals against arbitration awards, can aid the arbitral process in being the final stop rather than the first stop in the path to resolving a dispute.

---

[95] *Supra* note 92 at ¶ 61.
[96] Reid Minty (a firm) v. Gordon Taylor [2002] 2 All E.R. 150, Kiam v. MGN Ltd (No. 2) [2002] 2 All E.R. 242(Eng.).
[97] Tolani Shipping case, *supra* note 91.
[98] *Id.* at ¶ 13.
[99] *Id.*
[100] *Supra* note 92.

C. United States of America:

The trend of awarding costs to deter dilatory tactics in United States is an oft-used tool and is closer to the Hong Kong approach.[101] The American disposition was recently displayed in *Johnson Controls, Inc.* v. *Edman Controls, Inc.*[102], wherein the court noted that challenges to commercial arbitral awards bear a high risk of sanctions as they "undermine the integrity of the arbitral process".[103] Appeals against the arbitral award deprived the holder of the award, part of the value of the arbitration to which both parties agreed.[104]

This judicial sentiment is an echo of the stance taken in *Grand Pacific* as the court did not consider merit in the arguments to be a significant factor in imposing sanctions. The court's emphasis on the value of the arbitration and use of sanctions as a threat against attempts at eroding this value marks a step forward from the decisions in *B.L. Harbert International LLC* v. *Hercules Steel Co.*,[105] and *Lewis* v. *Circuit City Stores.*[106] In *B.L. Harbert* [107] the plaintiff's argument in his appeal was nothing more than a disagreement with the arbitrator's decision, which was held not to be a basis for vacating an arbitral award. The Court was "exasperated by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards."[108] In 2007, the Tenth Circuit in *Lewis* reiterated in the same tone that the bringing

---

[101] Manning v. Smith Barney, Harris Upham & Co., 822 F. Supp. 1081, 1083-84 (S.D.N.Y. 1993); See also Matter of U.S Offshore, Inc. (Seabulk Offshore, Ltd.), 753 F. Supp. 86, 92 (S.D.N.Y. 1990) (granting attorneys' fees under Rule 11 where party's arguments "appear[ed] to have been motivated by a desire to forestall complying with the award ... and ... in the main [were] not warranted by existing law or a good faith argument to extend, modify or reverse existing law"). Also B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905, 913-14 (11th Cir. 2006) (suggesting that "[w]hen a party who loses an arbitration award assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief it will prevail, the promise of arbitration is broken" and that in such a case sanctions may be appropriate).

[102] Johnson Controls v. Edman Controls Inc., 712 F.3d 1021 (7th Cir. 2013) [hereinafter Johnson Controls case].

[103] *Id.* at part V

[104] *Id.*

[105] B.L. Harbert International LLC v. Hercules Steel Co., 441 F.3d 905 (11th Cir. 2006).

[106] Circuit City case, *supra* note 2, at 1140, 1153.

[107] Johnson Controls case, *supra* note 105.

[108] *Id.* at 914.

of an appeal itself may constitute "sanctionable multiplication of proceedings" justifying an award of costs and fees under § 1927[109]. The Court highlighted the `narrow standard of review' presented by arbitration and justified the imposition of Section 1927 sanctions if the arguments presented are `completely meritless'.

In 2010, a New York Court issued sanctions against a law firm that "succeeded in undermining the purpose of arbitration and protracting this dispute into three year, multi-million dollar litigation".[110] Another decision of the New York Court in the case of *Digitelcom, Ltd.* v. *Tele2 Sverige AB,*[111] has been described to have "echoed" the Hong Kong court approach.[112] The court after disposing off the challenger's multi-pronged attack on the arbitration award, warned that litigants must be discouraged from defeating the purpose of arbitration by bringing petitions based on "nothing more than dissatisfaction with the tribunal's conclusions"[113] and held sanctions to be peculiarly appropriate in the context of a challenge to an arbitration award which appears to be a largely dilatory effort.

These decisions have underscored the point that unscrupulous attempts to vacate arbitration awards destroy the "promise of arbitration". US Courts have been very reluctant to tolerate such antics.[114] Thus they have unequivocally adopted the strategy of imposing sanctions in cases of dilatory tactics in arbitration by virtue of which they can give breath to their "national policy favouring arbitration."[115] From a brief perusal of the decisions in *Digitelcom*[116],

[109] Circuit City case, *supra* note 2.
[110] Prospect Capital Corp. v. Emnon, Case. No. 08 Civ. 3721 (LBS) (S.D.N.Y. Mar. 9, 2010) [hereinafter Prospect Capital case].
[111] Digitelcom, Ltd. v. Tele2 Sverige AB, 12 Civ. 3082 (S.D.N.Y. July 25, 2012) [hereinafter Digitelcom case].
[112] *D'agostino*, *supra* note 64.
[113] Prospect Capital case, *supra* note 110 (in part D: Attorney Fees).
[114] See DMA International, Inc. v. Qwest Communications International Inc., 585 F.3d 1341 (10th Cir. 2009) [hereinafter DMA International case] ["We do not take our decision to impose sanctions lightly. To the contrary, we recently took the opportunity to warn those spurned by an arbitration award that we will impose sanctions in appropriate cases" and the Tenth Circuit directed counsel to personally pay the attorney's fees of the arbitration winner]. Also see Lewis v. Circuit City Stores, Inc., 500 F.3d 1140, 1153 (10th Cir.2007).
[115] Hall Street Associates v. Mattel, Inc., 552 U.S. 576 (2008).
[116] Digitelcom case, *supra* note 111.

DMA International[117], *Johnson Controls*[118] and *Lewis,*[119] it appears that the US Courts place importance on some ostensible form of circumstances that warrant sanctions rather than a mechanical imposition of sanctions merely on account of an appeal preferred against an arbitral award as is the case in Hong Kong. However, the manner and frequency in which sanctions have been awarded in matters related to arbitration reveal that the United States' approach is a simulation of its Australian counterpart in form but inclines towards the Hong Kong attitude in substance and spirit.

D. Malaysia:

Though Malaysia allows imposition of indemnity costs to chastise dilatory strategies,[120] no conspicuous use of the same has been made in the sphere of arbitration in the country. It could be said that if the Courts were to impose indemnity costs against unscrupulous appeals from arbitral awards, the premise of such an order would be based on Order 59 Rule 10 of Rules of Court ('RC') which penalises a party who fails to establish any claim or issue which he has raised and this has "unnecessarily or unreasonably protracted" the trial or "added to the costs or complexity of those proceedings".[121] The Federal Court in *Takako Sakao* v. *Ng Pek Yuen & Another*[122] set out some guidelines for an award of indemnity costs and emphasised that the discretion to award such costs is

---

[117] DMA International case, *supra* note 114; Circuit City case, *supra* note 2.

[118] Johnson Controls case, *supra* note 102.

[119] Circuit City case, *supra* note 2.

[120] *See* Rules of Court 2012. under Courts Of Judicature Act, 1964 and Subordinate Courts Rules Act, 1955.
Order 59 Rule 5(2): Costs arising from misconduct or neglect [5....(2)...the Court shall, for the purpose of that paragraph, have regard in particular to the following matters:
(a) the omission to do anything the doing of which would have been calculated to save costs;
(b) the doing of anything calculated to occasion, or in a manner or at a time calculated to occasion unnecessary costs; and (c) any unnecessary delay in the proceedings.
The Court may order that:
(i) the costs of that party shall not be allowed in whole or in part
(ii) costs occasioned by the failure of that claim or issue be paid to the other party regardless of the outcome.]

[121] *Supra* 120, at Order 59 Rule 10: Costs due to unnecessary claims or issues.

[122] Takako Sakao (f) v. Ng Pek Yuen (f) & Anr. (No 2), [2010] 2 M.L.J. 181 (Malay.).

unfettered. In another case, the court opined that costs on an indemnity basis is normally granted because a party had conducted its case improperly or in bad faith but as there was no evidence to indicate mala fides in the case, indemnity costs were not granted.[123]

With the RC already providing for indemnity costs against dilatory tactics in its legal framework,[124] it could be reasonably assumed that Malaysia would toe the line between the Hong Kong approach and the conservative approach when it comes to treating the act of challenging an arbitral award as an exceptional event. Order 59 Rule 8 of the RC further provides some guidance in this light on the special matters to be taken into account in the exercise of the Court's discretion in the award of costs, one of which is to consider the "*conduct of all parties, including before and during the proceedings*."[125] In recent times, the country has been gearing up to emerge as an arbitration-friendly jurisdiction in Asia.[126] It has already reinforced its pro-arbitration sentiment.[127] Kuala Lumpur should consider using

---

[123] Commission of the City of Kuching North v. Chonglin Plaza Sdn Bhd , [2010] 6 CLJ 438 at 20.

[124] *See* Order 59 Rule 16(4), Rules of Court 2012 under Courts Of Judicature Act, 1964 and Subordinate Courts Rules Act, 1955: [On a determination of costs on the indemnity basis, all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred and any doubts....shall be resolved in favour of the receiving party..]

[125] *Supra* note 120 at Order 59 Rule 8. The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account—
(a) any offer of contribution or offer of settlement under Order 22B;
(b) the conduct of all the parties, including conduct before and during the proceedings;
(c) the conduct of the parties in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution; and
(d) in particular, the extent to which the parties have followed any relevant pre-action protocol or practice direction for the time being issued by the Registrar.

[126] See *KL Arbitration Centre Goes Global, Taps India*, NEW STRAITS TIMES, (Jan. 29, 2012) http://www.nst.com.my/latest/kl-arbitration-centre-goes-global-taps-india-1.38801.

[127] Please *see* Federal Court decision of Intelek Timur Sdn Bhd v. Future Heritage [2004] 1 M.L.J. 401 and the Court of Appeal in AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd [2013] 2 C.L.J. 395.

the Hong Kong approach in pursuance of this object by imploring the courts to discourage frivolous challenges to arbitral awards by imposing indemnity costs.

E. Singapore:

In Asia, Hong Kong and Singapore have famously rivalled each other to receive the larger share of the region's 'arbitration pie'.[128] It would appear that this would be incentive enough for Singapore to adopt the Hong Kong approach of treatment of an arbitral award as inviolable. Singapore's law on indemnity costs[129] runs parallel to its codified Malaysian counterpart.[130] But Singapore has chartered further territory to safeguard the sanctity of arbitral proceedings. The judgment of *Tjong Very Sumito and others* v. *Antig Investments Pte Ltd.*,[131] provided the scope that already existed in English law by categorically relying on the English Courts judgment of *A* v. *B*,[132] where the court held that initiating proceedings of the court in violation of an arbitration clause could 'normally be characterised as so serious a departure from 'the norm' so as to require judicial discouragement' and awarded indemnity costs for the same. Thus the courts of Singapore have recognised, at least on one count, improper invocation of the jurisdiction of a court in form of 'unmeritorious appeals' as a valid ground for imposing indemnity costs.[133] However, this was an isolated decision and there does not exist a discernible policy that would set the stepping stone for the allocation of these costs in this precise form. But keeping in mind Singapore's staunch pro-arbitration history and the doors that the *Tjong Very sumito* judgment has opened, the practice of imposing indemnity costs against frivolous challenges to an arbitral award seems inevitable.

---

[128] Michael McIlwrath, *Can Arbitration Keep Up? Singapore Ratchets Up Forum Competition*, KLUWER ARB. BLOG, (Aug. 31, 2013), *available at* http://kluwerarbitrationblog.com/blog/2013/10/31/can-arbitration-keep-up-singapore-forum-competition/.

[129] Singapore Supreme Court of Judicature Act, Rules of Court, 1996, O 59, r 6A, r 7 and r 6.

[130] Malaysia Supreme Court of Judicature Act, Rules of Court, 2012, O 59, r 8, r 5(2) and r 10.

[131] Tjong Very Sumito v. Antig Investments Pte Ltd., [2009] SGCA 41 (Sing.).

[132] A v. B [2007] 1 Lloyd's Rep. 358 (Eng.).

[133] *Supra* note 129, at 71.

VII. Conclusion

If parties which lose in arbitration are permitted to freely re-litigate their cases in court, arbitration will do nothing to reduce congestion in the judicial system, and dispute resolution will be slower instead of being faster. It will eventually turn arbitration into a far more costly scheme than approaching a court of law. For arbitration to be a meaningful alternative to litigation, the parties must be able to trust that the arbitrator's decision will be the last in all but the most unusual cases.

It is advised that countries initiate a trend of willingness to award indemnity costs in cases of unsuccessful appeals against arbitral awards to scale back this creeping expansion of applications of court review of arbitration awards. Unhindered appeals from awards without any potential deterrent have turned what should have been an exceptional and high-risk strategy into something which is potentially worth-a-go. Adopting the Hong Kong approach against anti arbitration injunctions and parallel proceedings should be deliberated upon.

As discussed above, imposition of costs on indemnity basis has been used as an effective punitive tool to punish misconduct and dilatory tactics across countries. However, the Hong Kong approach has turned a new leaf by turning this tool into an effective deterrent arsenal. This outlook would be welcomed by the arbitration fraternity but it is a norm that needs to be carefully regulated to prevent genuine grievances from being penalized. The question of 'appropriate circumstances' when an indemnity cost should not be awarded is of intense pragmatic character, well suited for gradual development but requiring the most careful analysis. It is one question upon which all common law and civil law jurisdictions can learn much from each other. It is incumbent upon the courts in different jurisdictions to be sensitive to each other's reactions to cases of imposition of indemnity costs against unsuccessful appeals. Hence, a balance must be struck by the courts in judiciously employing discretion between imposing sanctions on disgruntled claimants to deter them from wilfully or recklessly abusing the court process and simultaneously making it possible for grave grievances to be redressed, with an exaggerated emphasis on the former.