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IN THE NAME OF ARBITRATION: REFLECTING BACK AND LOOKING FORWARD

Akhil Raina[*] *& Arundathi Venkataraman*[†]

One can think of several purposes for the editorial section of an academic journal. It could be said to be a place for silent reflection – of past achievements, aims and struggles. To go another way, perhaps one could say that it is a space to think about sincere acknowledgements and motivations. It could also be a combination of the two. Or perhaps neither of these really go to the heart of the real reason. For instance, it could simply serve to lay out the blueprint of the particular issue that it finds itself preceding. A good two and a half years after its first issue, it is perhaps time for IJAL to revisit this question. In the pursuit of the answer to this question, we sought assistance and guidance from the previous issues of our journal.

In the previous editions, we have taken a policy decision to primarily utilize the editorials for drawing attention to the growing phenomenon of India's integration into the field of international arbitration, identifying several thought-provoking reasons for the same.[1]

This time however, we choose to tread a different, more experimental path- in tandem with the spirit of questioning that we have displayed above. We asked ourselves the obvious existential question - *why this journal at all?* The answer seems to lie in India's acceptance of international arbitration as an exceedingly attractive method of dispute resolution. This phenomenon has energized activity in the field and opened up several new questions. These range from questions of practical import to legal questions, arising from the development of rich arbitral jurisprudence. Additionally, there has been a renewed interaction of arbitration with other disciplines like sports law and copyright law. Thus, there exists a subsequent and natural need to, not only provide an avenue for academic writing but also to kindle an interest in the field in the minds of our readers. We find our *raison d'être* in the pursuit of this very goal.

But mere recognition of this goal, in itself, would do no good; simply being cognizant of our responsibilities should not be the extent of our duties. Over the course of the last four years, we have made a sizeable effort towards realizing and discharging these responsibilities.

In our maiden edition, Professor Martin Hunter refers to the practice of international arbitration as the "*only game in town*".[2] His argument is simple. With increased international commerce, he argues that there is great scope for disputes between parties of different nationalities. He emphasizes that choosing a national court or a court of a neutral third country are not always feasible solutions. He thereafter concludes with graceful simplicity, in an almost matter of fact fashion, that international arbitration is indeed the only way for resolution of disputes in a manner that will lead to an enforceable and binding result.

Taking cue from Prof. Hunter's words and understanding the truth in it, the Journal through its journey so far has focused on the explosion of international commerce and the palpable need to find a convenient and cost effective way of dealing with such disputes. The reality of the need

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[1] Martin J. Hunter, *Journey to the 'Only Game in Town'*, 1.1 INDIAN J. OF ARB. L. 1 (Sept., 2012). [hereinafter *Hunter*]; Gary B. Born & Suzanne A. Spears, *International Arbitration in India: "A Truly Excellent Judgement!"* 1.1 INDIAN J. OF ARB. L. 4 (Sept., 2012).
[2] *Hunter, supra* note 1.

for alternate dispute resolution mechanisms is particularly fascinating when viewed through the lenses of developing nations. In this regard, the Journal has recognized the commendable efforts of several developing nations such as India towards warming up to the idea of sourcing out of jurisdiction to arbitral tribunals. Such efforts are of course crucial to prevent unnecessary delays caused due to, at best overburdened, and at worst, corrupt court proceedings.

This leads us to an equally significant aspect of arbitration that the Journal has explored in great detail, that of the relationship between arbitration tribunals and national courts. Here, we have not restricted ourselves only to international arbitration but significant energy has also been devoted to analysing the landscape of domestic arbitration. The Indian legal regime is infamous for the impediments that it is has created for arbitration, sometimes hitting at the very root of party autonomy. The Journal has paid close attention to the ambiguous tendencies of the higher courts which have caused confusion and difficulty in determining the Indian position. At the same time, our Journal has been generous in its applause for forward-looking judgments that have been doled out more frequently in the recent past. Where questions remained unanswered, attention has been drawn to some burning issues that deserve attention, thought and debate.

IJAL has also laid emphasis on covering lesser explored, niche areas, in great detail. Given the proliferation of arbitration as a more palatable dispute resolution mechanism in general, articles have discussed its implementation in specific industries such as e-commerce,[3] intellectual property[4] and sports.[5] Additionally, aspects have not been debated upon only in theory or catered only to the academically-oriented; the perspective of practitioners has also been explained and elaborated upon and any scope for improvement has been highlighted.

Recently, the Centre for Advanced Research and Training in Arbitration Law, which includes members of the Editorial Board of IJAL, has organized several lectures by illustrious members of academia at National Law University, Jodhpur. The primary aim of these lectures has been to introduce younger minds to this field of law. In March 2015 a prominent figurehead in the area of investment law, Mr. Prabhash Ranjan, delivered a lecture on National Contestation of Investment Treaty Arbitration and International Rule of Law.

There have been substantial efforts by various Boards in the past to fulfil the aforesaid mandate of the Journal, give arbitration its due and help perfect it over time. This Board has attempted to do justice to that very mandate with this issue. In line with the same, we have a wide array of debates and deliberations for you to ponder upon.

In *Harmony: The Ship that Sailed*, Mr. Chakrapani Misra, Mr. Sairam Subramanian and Ms. Sanjna Pramod visit the recent decision of the Supreme Court of India in *Harmony Innovation Shipping Limited* v. *Gupta Coal India Limited*. The decision pertains to the important aspect of 'intention', and its role in multi-party agreements. The authors note that the case presented the Court with an opportunity to examine doctrines of contract law that are not used to their optimum. With the different 'eras' created by the Supreme Court in *BALCO*, this issue only becomes more important. While agreeing that the decision is reasoned and rational in its conclusion, the authors note that certain aspects shall remain ambiguous till the Supreme Court provides further clarification.

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[3] Ujjwal Kacker & Taranpreet Saluja, *Online Arbitration for Resolving e-commerce Disputes: Gateway to the Future*, 3.1 INDIAN J. OF ARB. L. 31 (Apr., 2014).
[4] Meghna Agarwal & Nishtha Gupta, *The Scope of Copyright Arbitration in the Indian Film Industry*, 1.1 INDIAN J. OF ARB. L. 46 (Sept., 2012).
[5] Devyani Jain, *Judicial Trend of Intervention in Sports Arbitration and its Future in India*, 1.1 INDIAN J. OF ARB. L. 37 (Sept., 2012).

Mr. Sujoy Chatterjee, in *Judicial Import of the Model Law: How Far is Too Far*, gives a refreshing perspective on how much reliance the Indian judiciary must place on the UNCITRAL Model Law on International Commercial Arbitration. The author identifies the scarcity of jurisprudence on the specific role of the Model Law in interpreting the Arbitration and Conciliation Act. This, in the opinion of the author, opens up a hoard of nuanced issues pertaining to international comity, legislative sovereignty and statutory interpretation. The analysis that follows is strongly focused on three decisions, one of the Delhi High Court in *Union of India* v. *East Coast Boat Builders*, and two of the Supreme Court in *BALCO* and *Bhatia*. The author concludes that the right way forward is to maintain a balance, to respect the sovereign will of the Indian Legislature and have measured enthusiasm in the efforts to make India a hub of international arbitration.

In *Increased Efficiency and Lower Cost in Arbitration: Sole Member Tribunal*, Mr. Michael Dunmore utilizes a cost-benefit analysis to suggest that arbitral tribunals should be composed of a sole-member, appointed by an arbitration institution, rather than three members selected by the parties. He argues, with sound logic, that while parties perceive their appointed arbitrators as increasing their chances of success, the additional cost far outweighs the illusive benefit. This article will be of particular interest to practitioners and users of arbitration.

Finally, Mr. Nikhil J. Variyar in *Tribunal Ordered Interim Measure and Emergency Arbitrators: Recent Developments Across the World and in India*, examines the nature of interim measures in two contexts- arbitral tribunals internationally and the narrower Indian scenario. The author attempts to determine the minimum standard that has to be met in such situations. The author critically analyzes the deficiencies of the Arbitration and Conciliation Act, noting the lack of judicial exposition in this regard, but for the Bombay High Court decision in *HSBC Holdings (Mauritius) Ltd.* v. *Avitel Post Studioz Ltd.* The Note ends with a final discussion on the amendments suggested by the 246th Law Commission Report to Sections 2(d) and 17 of the Act.

In the end, it is necessary to acknowledge the importance of having distinguished members of the arbitration profession to guide and steer the board. We are glad to have on board Mr. Harisankar KS as the Founding Executive Director and Consulting Member of CARTAL. Additionally, we are pleased to announce the joining of Mr. Kartikey Mahajan as a Visiting Fellow of the Centre. We sincerely hope you like what you find in our issue this time.

HARMONY: THE SHIP THAT SAILED[1]

Chakrapani Misra,[*] *Sairam Subramanian*[†] *& Sanjna Pramod*[††]

Abstract

The determination of the intention of the parties to an arbitration agreement has always been a contentious issue. This aspect gets further complicated in case of 'multiple agreements' between the parties. In furtherance of the said observation, the authors discuss the recent judgment of the Hon'ble Supreme Court of India in the case of Harmony Innovation Shipping Limited v. Gupta Coal India Limited ("Harmony"). In light of this judgment, the authors endeavour to highlight the issue of interpretation of contracts and the much-discussed doctrines of 'presumed intention' and 'fair result'. Moreover, the authors elucidate upon the issue related to implied and express inclusion of the jurisdiction of Indian courts in light of Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc. ("BALCO") and Bhatia International v. Bulk Trading S.A. After proper scrutiny of the aforementioned, the authors conclude that the Supreme Court, in the case of Harmony, deviated from the path set out by BALCO and thus, amplified the prevailing uncertainty relating to interpretation of arbitration agreements.

1. Introduction

> *The rules laid down in respect of the construction of deeds are founded in law, reason, and common sense: That they shall operate according to the intention of the parties, if by law they may: And if they cannot operate in one form, they shall operate in that, which by law will effectuate the intention.*[2]
>
> - *Lord Mansfield, C.J.*

> *We can judge of the intent of the parties only by their words.*[3]
>
> - *Powell, J.*

From time immemorial, the intention of parties has played the most crucial role in determining and adjudicating a dispute. This aspect gets complicated when the intention of a party to multiple agreements has to be determined. To understand the intention of parties, when the same are not expressed by either of them, remains the most complex situation in the interpretation of contracts. While doing so, the courts have to weigh factors that go beyond the general reading of the contract. In such cases, the courts are required to weigh the presumed intention of the parties in order to deliver "fair result", thereby incorporating and applying to their optimum, the most crucial and intricate doctrines. This article is concerned with the issue of the interpretation of contracts, the doctrine of 'presumed intention and fair result' and the importance of implied and express exclusion of the jurisdiction of Indian Courts in view of the cases of *Bharat Aluminum Co.* v. *Kaiser Aluminum Technical Services Inc.*[4] ("*BALCO*") and *Bhatia International* v. *Bulk Trading S.A.*[5] ("*Bhatia*"). In light of the decision of the Supreme Court in the case of *Harmony Innovation Shipping Limited* v. *Gupta Coal India Limited*[6] ("*Harmony*"), the article seeks to analyze and

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[1] The article is an extension of a publication in the newsletter of the International Law Office, dated April 9, 2015, titled *"Jurisdiction of Indian courts in international commercial arbitration"*.

[2] Goodtitle v. Bailey, [1777] 2 Cowp. 600 (Lord Mansfield, C.J.) (Gr. Brit.).

[3] Idle v. Cooke, [1704] 2 Raym. 1149 (Gr. Brit.).

[4] Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc., (2012) 9 S.C.C. 552 (India).

[5] Bhatia International v. Bulk Trading SA, (2002) 4 S.C.C 105 (India) [hereinafter *Bhatia*].

[6] Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd., A.I.R. 2015 S.C. 1504 (India).

discuss the settled principles by highlighting the (1) factual matrix, (2) arguments canvassed by the parties, (3) judicial analysis by the Supreme Court, (4) ratio delivered, followed by (5) a constructive analysis of the application of the concepts in the judgment and (6) conclusive remarks.

2. Facts

An agreement was entered into between the parties on 20 October 2010 ("Principal Agreement") in respect of 24 voyages of coal shipment belonging to Harmony Innovations Shipping Limited ("Appellant") from Indonesia to India. M/s Gupta Coal India Limited ("Respondent") undertook only 15 voyages and that resulted in disputes which stood referred to arbitration. Notably, an addendum to the Principal Agreement was executed with regards to the remaining voyages on 3 March 2013, while disputes arose in respect of the Principal Agreement. Arbitration proceedings were initiated with regard to the disputes arising out of the Principal Agreement and eventually an award was passed.

Following the passing of the award, with respect to the Principal Agreement, the Appellant filed an application before the District Court, Ernakulum seeking enforcement of the Award under the provisions of the Arbitration and Conciliation Act, 1996 ("Act"). In the interim, certain disputes arose between the parties in relation to the addendum, and arbitration proceedings were initiated by invoking the arbitration clause therein with regard to the said disputes. Faced with this situation, the Appellant filed an application under the Act seeking attachment of the cargos as an interim relief. The learned 2nd Additional District Judge, Ernakulum allowed a conditional order of attachment as was prayed.

The said interim order was assailed by the Respondent before the High Court of Kerala ("High Court") on the ground that it was passed without jurisdiction and hence was unsustainable in law. This contention was countered by the Appellant on the ground that the agreements were entered into prior to the decision in the case of *BALCO* and was essentially governed by the principles laid down in the case of *Bhatia.*

The High Court, having considered the Principal Agreement, the addendum and the decisions in *Bhatia* and *Venture Global Engineering* v. *Satyam Computer Services Limited*,[7] set aside the order on the foundation that Section 9 of the Act is limited to domestic arbitrations and has no applicability to international arbitrations. The High Court further held that clause 5 of the Principal Agreement, which is the arbitration clause, clearly spells out that the Principal Agreement is to be governed and construed according to English Law.

To elucidate, the said clause read as follows:

"5. *If any dispute or difference should arise under this charter, general average/arbitration in London to apply, one to be appointed by each of the parties hereto, the third by the two so chosen, and their decision or that of any two of them, shall be final and binding, and this agreement may, for enforcing the same, be made a rule of Court. Said three parties to be commercial men who are the members of the London Arbitrators Association. This contract is to be governed and construed according to English Law. For disputes where total amount claim by either party does not exceed USD 50,000 the arbitration should be conducted in accordance with small claims procedure of the London Maritime Arbitration Association*."

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

Thus, while the Principal Agreement does not provide for a law governing the arbitration clause itself, it only stipulates that the agreement or substantive law would be governed and construed according to English Law.

Further, the High Court dismissed the contention that since the addendum was entered into prior to *BALCO*, the principles laid down therein would not be applicable. In the alternate, the High Court viewed the law laid down by the Supreme Court in *BALCO* as declaratory in nature, to be considered the law at all times. It held that such a declaration could not be regarded as having prospective effect. Therefore, the fact that the Principal Agreement was entered into prior to *BALCO* was found to have no bearing and the petition under Section 9 of the Act was held not maintainable. Subsequently, the order of the High Court was challenged before the Supreme Court.

3. Contentions of the Parties before the Supreme Court

(A) Express or implied exclusion of Part I of the Act

The Appellants relied on the Supreme Court's decision in *Citation Infowares Ltd* v. *Equinox Corp,*[8] wherein it was held that unless the provisions of Part I are excluded by agreement between the parties either expressly or by implication, they would apply even where the international commercial agreements are governed by the laws of another country. Referring to the arbitration clause in the instant case, the Appellant urged that there existed no express or implied exclusion of the applicability of Part I. Therefore, it was argued that the courts in India have jurisdiction and the Learned Additional District Judge had not erred in exercising jurisdiction.[9]

To the contrary, the Respondent relied on the decision in *Reliance Industries Limited & Anr.* v. *Union of India,*[10] ("*Reliance Industries Ltd.*") wherein the Supreme Court discussed the principle stated in *Bhatia* and went onto hold that since the juridical seat of arbitration was in London and the laws governing the arbitration would be the laws of England, Part I would necessarily be impliedly excluded.

(B) Presumed intention

To bolster its argument, the Appellant contended that in the present case, the agreement stipulates that the Principal Agreement is to be governed and construed according to English law and that the same would have to be interpreted as a part of "curial law" and not as "proper law" or "substantive law", thereby entailing that the same could not be equated with the seat of arbitration. The Appellant, further added that to apply the principles of implied exclusion, a court has to test the "presumed intention" and it would be the duty of the court to adopt an objective approach and understand what could have been the intention of reasonable parties in the position of the actual parties to the contract.

To ascertain the "presumed intention" of the parties, the Respondent directed the Supreme Court's attention to various phrases such as "*arbitration in London to apply*", arbitrators are to be members of the "*London Arbitration Association"* and the contract "*to be governed and construed according to English Law*" and that if the dispute is for an amount less than US$ 50000, the arbitration is to be conducted in accordance with the small claims procedure of the London Maritime Arbitration Association. Notably, since there was no reference to any other law in the

[8] Citation Infowares Ltd v. Equinox Corp., (2009) 7 S.C.C. 220 (India) [hereinafter *Citation Infowares*].
[9] *Id.* at 12.
[10] Reliance Industries Limited & Anr. v. Union of India, (2014) 7 S.C.C. 603 (India).

arbitration clause, the Respondent emphasised that the "presumed intention" of the parties indicates that the juridical seat of arbitration was London.

(C) The test of "fair result"

The Appellant submitted that the case at hand neither had an express nor implied exclusion of Part I. That being said, to establish implied exclusion of the jurisdiction of courts in India, the "presumed intention" of the parties would have to be tested. The intention of reasonable parties to the contract and the concept of fair result would have to be borne in mind by the court. The application of the concept of "fair result" involves solving disputes according to commercial practice to arrive at a result considered fair in a particular business community. Courts must pay heed to the commercial background, the context of the contract and the circumstances of the parties so as to not lead to an unreasonable or unfair result. Thus, the Appellant insisted that they would be disadvantaged if the Court were to hold Part I as inapplicable to the present case.

The Respondent contended that since the juridical seat was in London and the parties had entered into the addendum after *BALCO* on 3 April 2013, it follows that the intended effect was to have the seat of arbitration in London. Further, a reference to Section 3 of the English Arbitration Act, 1996 ("English Act") was made in this regard. Section 3 of the English Act reads as follows:

"**3. *The seat of the arbitration*.** *—In this Part 'the seat of the arbitration' means the juridical seat of the arbitration designated—*

(a) by the parties to the arbitration agreement, or

(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or

(c) by the Arbitral Tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances."

In this respect, the Respondent submitted that the juridical seat of the arbitration would be London since the parties had agreed upon the arbitrators to be commercial men who are members of the London Arbitration Agreement and that if the claim were for a lesser sum, the small claims procedure of the London Maritime Arbitration Association would be followed.

4. Judicial Analysis by the Supreme Court

The Supreme Court analysed a plethora of decisions to establish the methodology adopted by it in the past, with respect to establishing the law governing the juridical seat in arbitration proceedings. In this regard, the Supreme Court considered two aspects - (i) whether, upon construction of the clause, the ratio held in *Bhatia* would not apply and instead the ruling in *Reliance Industries Ltd.* would apply? and (ii) whether the execution of the addendum would attract the principles laid down in *BALCO* and oust the jurisdiction of courts in India?

With regard to the first proposition, the Supreme Court considered the "presumed intention" of the parties and the "fair result" of the construction of the arbitration clause in the present scenario. According to the Court, from the provisions of the arbitration clause, it was clear that if any dispute or difference would arise under the charter, arbitration in London would apply; that the arbitrators were to be commercial men who were members of the London Arbitration Association; the contract was to be construed and governed by English law; and that the arbitration for a lesser sum was to be conducted in accordance with the small claims procedure of the London Maritime Arbitration Association. Notably, no other provision in the agreement referred to any other law that would govern the arbitration clause. The court also relied on

Section 3 of the English Act, which states that the seat of the arbitration would mean the juridical seat of the arbitration.

With the aforesaid stipulations in mind, the Supreme Court appreciated that the "presumed intention" of the parties was to assign London as the juridical seat of the arbitration. Moreover, the commercial background, the context of the contract, the circumstances of the parties and in the background in which the contract was entered into, lead to the aforesaid conclusion.

With regard to the second proposition, the Supreme Court reasoned that *Bhatia* was rendered on 13 March 2002 and *BALCO* was delivered by the Constitution Bench on 6 September 2012. In the instant case, the arbitration agreement was executed prior to *BALCO* and the addendum came into existence only on 3 April 2013. In this respect, the court held that the pronouncement in *Bhatia* would be applicable to the facts of the case, since there was nothing in the addendum to suggest any arbitration and in fact it was controlled and governed by the conditions postulated in the Principal Agreement.

Further, the Supreme Court construed and thought it fit to interpret the arbitration clause as a proper or substantial clause as opposed to being a curial or a procedural one by which the arbitration proceedings are to be conducted and hence disposed to conclude that the seat of the arbitration will be at London.

5. Judgement of the Supreme Court

The Supreme Court concurred with the High Court on the finding that the courts in India will not have jurisdiction. However, in doing so, the Court based its judgment on the principles laid down by *Bhatia* as opposed to *BALCO*. Therefore, the Supreme Court concurred with the conclusion arrived at by the High Court, but notably for different reasons, and accordingly dismissed the appeal.

6. Striking a different chord to Harmony

(A) Express and implied exclusion

The issue of what amounts to "express" and/or "implied exclusion" of Part I has been the basis of several litigations before Indian courts. Hence, at this stage, it becomes imperative to properly understand the decision in *Bhatia*. In the said case, the agreement entered into between the parties contained an arbitration clause which provided that arbitration was to be as per Rules of Arbitration of the International Chamber of Commerce, 1998 ("ICC Rules"). The parties had agreed that the arbitration was to be held in Paris, France. The respondent approached the Additional District Judge, Indore, Madhya Pradesh, with an interim prayer under Section 9 of the Act. The appellant raised a plea stating that the Indore Court had no jurisdiction and the application was not maintainable. The said contention was dismissed by the Additional District Judge, which found favour with the High Court. Before the Supreme Court, it was urged, on behalf of the appellant, that Part I only applies to arbitration where the place of arbitration is in India and Part II would apply to arbitration with a place outside India. On the other hand, the respondent urged that unless the parties, by their agreement either expressly or impliedly exclude the provisions of the Act, Part I would also apply to all international commercial arbitrations including those that take place in India. In light of the contentions raised, the Supreme Court held that provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India, the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India, provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its

provisions. In that case, the laws or rules chosen by the parties would prevail. The Supreme Court examined and held that Article 23 of the ICC Rules permitted parties to apply to a competent judicial authority for interim and conservatory measures. Therefore, in such cases an application could be made under Section 9 of the Act.[11]

Interestingly, where the parties have designated a foreign proper law but not a seat of arbitration, the Supreme Court has, on two occasions, held that such a condition would not amount to an "implied exclusion" of Part I. In both *Indtel Technical Services Private Limited* v. *WS Atkins Rail Limited*[12] and *Citation Infowares Limited* v. *Equinox Corporation,*[13] it was held that in international commercial arbitrations, where the governing law of the contract is a foreign law, Part I would still apply and that a mere choice of a foreign law as the governing law of the agreement cannot be construed as an express or implied exclusion of Part I.[14]

However, a slight departure was made in *Yograj Infrastructure Ltd.* v. *Ssang Yong Engg & Construction Co. Ltd.*,[15] wherein the curial law regulating the procedure of the conduct of the arbitration was the Arbitration Rules of the Singapore International Arbitration Centre, 2007 ("SIAC Rules"). The SIAC rules, vide Rule 32, state that where the seat of the arbitration is Singapore, the law of arbitration would be the International Arbitration Act of Singapore. By virtue of the aforesaid rule, the Court held that the proper law being the Singapore law, the Act would not apply to the arbitration proceedings. However, the Court opined that in the absence of any other stipulation in the arbitration clause with regard to the law governing the arbitration proceedings, it is well settled that the law governing the contract would apply.

As a welcome change, in *BALCO*, the Supreme Court outlined the crucial distinction between foreign and domestic awards under the Act. The Court clarified that Part I applies not only to arbitrations in India where both parties are Indian, but also to international commercial arbitrations which take place in India. The awards in arbitrations seated in India are domestic awards, distinguishable from foreign awards for the purposes of the Act.[16]

In the present case, the Supreme Court seems to have deviated from the trend that was set by *BALCO*, where it laid down clear interpretation of the provisions of the Act. To the contrary, the Court has, on the basis of the principles held in *Bhatia* and subsequent cases prior to *BALCO*, held that Part I would be applicable. However the construction of the present arbitration clause ousts the jurisdiction of the courts in India by invoking the principle of implied exclusion. To elucidate, the Supreme Court considered facts such as - the law governing the contract was English law; the arbitral tribunal was to comprise of persons from the London Arbitration Association; and the English Act expressly stipulates in Section 3 that the seat of arbitration would mean the juridical seat of arbitration, and concluded, as per *Bhatia*, that the arbitration clause had impliedly excluded the jurisdiction of the courts in India.

It is the authors' opinion that the Court ought to have dwelled on whether the disputes arising from the addendum fall within the parameters of *BALCO* or *Bhatia*. Such an exercise was crucial

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[11] *Bhatia, supra* note 6, at 8.
[12] Indtel Technical Services Private Limited v. WS Atkins Rail Limited, (2008) 10 S.C.C. 308 (India).
[13] *Citation Infowares, supra* note 9.
[14] Sanjeev Kapoor, *Court Implies Exclusion of Part I of the Arbitration Act in Favour of Alternative Law*, INTERNATIONAL LAW OFFICE (June 30, 2011).
[15] Yograj Infrastructure Ltd. v. Ssang Yong Engg & Construction Co. Ltd., (2011) 9 S.C.C. 735 (India).
[16] Umer Akram Chaudhry, *Marking their Territory: Bharat Aluminum v. Kaiser Aluminum Technical Services (2012),* KLUWER ARBITRATION BLOG (Sep. 13, 2012), *available at* http://kluwerarbitrationblog.com/blog/2012/09/13/marking-their-territory-bharat-aluminum-v-kaiser-aluminum-technical-services-2012/.

to examine whether the Court could exercise jurisdiction under Part I. In holding that the addendum was executed following *BALCO*, the Court could have considered and applied the doctrine of "presumed intention" to better understand that the parties may have designated the seat of the arbitration to be outside India, thereby ousting the jurisdiction of the Indian Courts under Part I, in accordance with *BALCO*.

(B) The concept of juridical seat

The seat of the arbitration is known to be the juridical seat of arbitration, which can be designated by the parties to the arbitration agreement or by any arbitral tribunal or other institution or person empowered by the parties to do so.[17] Considering that the present case deals with an agreement that identifies a venue for the arbitration and does not expressly stipulate a "seat" of arbitration, it becomes pertinent to examine the renowned decision of an English Court in *Shashoua* v. *Sharma*[18] ("*Shashoua*"), which addressed an aspect of the issue: whether the selection of "venue" for arbitration implies choice of "seat"?

Shashoua concerned a joint venture which was incorporated in India and the proper law or law governing the shareholders' agreement was Indian law. The shareholders' agreement contained an arbitration clause which provided for ICC Rules for conduct of the arbitration and stated that "*the venue of the arbitration shall be London, United Kingdom"*. Disputes arose between the parties and an ICC tribunal was constituted in London. The tribunal passed an interim award against the defendant concerning costs. The claimants were granted leave to enforce the award by the English Court. However, the defendants challenged the jurisdiction of the English Court and approached the Indian Courts to set aside the award. The claimants applied for an anti-suit injunction from the English Courts to restrain proceedings in India and the claimants resisted the application contending that proceedings in India were justified as the seat of arbitration was in India.

The English Court proceeded to examine Section 3 of the English Act, which provides that in the absence of designation by the parties, the arbitral institution or the tribunal (if authorised by the parties) must determine the seat "*having regard to the parties' agreement and all relevant circumstances*". Cooke. J, recalled his decision in *C* v. *D*[19] and stated that an arbitration agreement would weigh more towards the *lex arbitri* than *lex causae*. Further, it was pronounced that an express designation of the arbitration venue as London and no designation of any alternative place as seat, combined with a supranational body of rules governing the arbitration and no other significant law to the contrary, qualified London as the juridical seat and English law as the curial law.[20]

In the authors' opinion, the Supreme Court in *Harmony* undertook the right steps in determining the juridical seat, by interpreting Section 3 of the English Act and phrases in the arbitration clause of the Principal Agreement such as "*arbitration in London to apply*", arbitrators are to be members of the "*London Arbitration Association"* and the contract "*to be governed and construed according to English Law*" and "*if the dispute is for an amount less than US$ 50000 then, the arbitration is to be conducted in accordance with the small claims procedure of the London Maritime Arbitration Association*". However, what may lead to confusion in future is the fact that the Apex court was quick to apply the express and implied principles as set out in *Bhatia* as opposed to its ruling in *BALCO*.

[17] Videocon Industries Limited v. Union of India, A.I.R. 2011 S.C. 2040 (India).
[18] Shashoua v. Sharma, [2009] EWHC (Comm) 957 (U.K.).
[19] C v. D, [2007] EWHC (Comm) 1541 (U.K.).
[20] Phillip Capper, *When is the 'Venue' of an Arbitration its 'Seat'?,* KLUWER ARBITRATION BLOG (Nov. 25, 2009), *available at* http://kluwerarbitrationblog.com/blog/2009/11/25/when-is-the-%E2%80%98venue%E2%80%99-of-an-arbitration-its-%E2%80%98seat%E2%80%99/.

(C) The Doctrines of "Presumed Intention" and "Fair Result"

The doctrine of presumed intention and the test of fair result are imperative to determine the intention of the parties in a case where the intention is ambiguous or not clearly expressed in the contract. However, the test to determine presumed intention would have to be undertaken by reading an agreement in its entirety and not limiting it to the dispute resolution clause. In the decision in *Harmony*, the Supreme Court ought to have dwelled on the construction and interpretation of the Principal Agreement and the subsequent addendum while trying to determine the presumed intention of the parties.

The application of the doctrine of presumed intention will have a bearing on the interpretation of contracts in general and with the intention of the parties in particular. Many a time, parties do not take into account the likelihood of the occurrence of an unforeseen event happening. In such cases, either the concerned party could not perform a particular clause in the contract, and as a consequence is sued for the same, or is subject to consequences that are a part of the agreement. In such circumstances, the doctrine of presumed intention allows the Court to read into the intention of the parties.

It is now settled law that courts may imply terms which are necessary in order to repair an intrinsic failure of expression in the contract or in other words, imply terms which would express the presumed intention and give business efficacy to the contract. The said law has now been used in a plethora of decisions to understand and construe the intent of the parties to a contract and more particularly the interpretation of a vague arbitration clause. In light of the application of the doctrine of presumed intention, the court in the case of *Mitsubishi Heavy Industries Limited* v. *Gulf Bank*[21] held as under:

"It is of course both useful and frequently necessary when construing a clause in a contract to have regard to the overall commercial purpose of the contract in the broad sense of the type and general content, the relationship of the parties and such common commercial purpose as may clearly emerge from such an exercise. However, it does not seem to me to be a proper approach to the construction of a default clause in a commercial contract to seek or purport to elicit some self-contained 'commercial purpose' underlying the clause which is or may be wider than the ordinary or usual construction of the words which each sub-clause will yield."[22]

The Court has further held in the case of *Cargill International S.A* v. *Bangladesh Sugar & Food Industries Corp.*[23] -

"In this connection [counsel] has rightly made the point that, when construing the effect of particular words in a commercial contract, it is wrong to put a label on the contract in advance and thus to approach the question of construction on the basis of a pre-conception as to the contact's intended effect, with the result that a strained construction is placed on words, clear in themselves, in order to fit them within such pre-conception...

On the other hand, modern principles of construction require the court to have regard to the commercial background, the context of the contract and the circumstances of the parties, and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result."[24]

The concept of fair result is an important and essential part of contract jurisprudence. It emanates from the interpretation of the implied covenants of a contract. Disputes pertaining to

[21] Mitsubishi Heavy Industries Limited v. Gulf Bank, [1997] 1 Lloyd's Rep. 343 (U.K.).
[22] *Id.* at 44.
[23] Cargill International S.A v. Bangladesh Sugar & Food Industries Corp., [1998] 1 W.L.R. 461 (U.K.).
[24] *Id.* at 45.

this arise when the contract does not express the nature of the disputes and the interpretation of the same in the manner as provided expressly in the contract would prejudice the interest of one of the contracting parties, thereby eliminating the opportunity of a fair result.

The concept plays a pivotal role, while being read in conjunction with the doctrine of presumed intention, for the reason that presuming the right intention of the party will enable the parties to derive a fair result. In deciding cases based on these doctrines, courts more often than not overlook the primary issues for consideration i.e. would either of the parties be prejudiced by not considering the position of the parties? Would there be injustice being caused by not presuming the intention of the parties?

In the case of *Harmony*, the Court while applying the said principles has only applied the same to the limited extent of interpreting the dispute resolution clause, whilst not taking into consideration more significant and essential components, namely;

(i) The commercial background;
(ii) The context of the contract;
(iii) The circumstances of the parties; and
(iv) The background preceding the contract.

A constructive interpretation of the doctrine on the basis of the above components or parameters would have irresistibly lead in the direction of the presumed intention of the parties, thereby leading to a fair result. In the said case, the Court, in order to apply the doctrine to the fullest, ought to have taken into consideration the addendum in the context of the above parameters. The non-consideration of the same has led to diluting the significance and importance of the application of the doctrine of presumed intention.

(D) Casting the sails for modifications to the contract

The primary rule of construction has been expressed by the maxim, "*ut res magisvaleat quam pereat"*. This principle follows from the general principle of interpretation that contract interpretation must always seek to determine the common intentions of the parties. Every effort should be made by the court to find meaning, looking at substance and not mere form. The assumption behind the invocation of the principle is that each contract is aimed at achieving the parties' common commercial objective. Businessmen may often record the most crucial agreements in a crude and summary fashion. It is accordingly the duty of the court to construe such documents fairly and broadly.

As a matter of practice, parties execute a principal agreement and thereafter, tend to make subsequent alterations or modifications. Such modifications may be exhaustive agreements that go by several colloquial terms such as "addendums", "deed of addition", "deed of amendment" and so on. Other such modifications or alterations may be as short as a one-page-letter, signed by the concerned parties altering a particular clause in a principal contract. Interestingly, some modifications that are exhaustive, such as the addendum in *Harmony*, may contain an arbitration clause which may be the same or similar to the arbitration clause contained in the principal agreement. Certain modifications may even contain an entirely new arbitration clause. Some addendums may even be precise to state phrases such as "*If any dispute or difference should arise under this addendum…"*. The examination of the aforesaid considerations is absolutely crucial for the court to undertake to establish whether a given modification or subsequent agreement flows out of the principal agreement or whether it amounts to qualifying as an entirely different contract in itself.

In the authors' considered opinion, the Court in *Harmony*, ought to have endeavoured to interpret the addendum in the backdrop of the Principal Agreement to conclusively hold that the addendum flows out of the Principal Agreement and is therefore governed by the ruling in *Bhatia*, thereby applying Part I. In the alternate, the Court could have interpreted the addendum and determined whether by executing the addendum, the concerned parties, in fact intended to apply the principles contained in *BALCO*, thereby ousting Part I and the jurisdiction of the Indian courts.

Thus, the Court in *Harmony* had the occasion and opportunity to introduce much required simplicity and stipulate guidelines for an effective determination of the intention of the parties that execute modified or subsequent agreements pursuant to a principal agreement.

7. Conclusion

The case of *Harmony* was a great opportunity for the Supreme Court to consider and analyse the application of pivotal doctrines concerning contracts, which have not been applied and interpreted to their optimum. In cases where there are multiple contracts involving the same parties and that flow out of a common principal agreement, the non-application of the said doctrines and principles have left a dent in the interpretation of contracts, more so, as in the present case, when parties are faced with a precarious situation of having multiple agreements which are executed in both the Pre-*BALCO* and Post-*BALCO* regimes.

In such situations, the Court ought to have considered in depth, analysed and interpreted the contract in a constructive manner, applying the settled principles and doctrines. Had the Court applied the said principles and doctrines in the manner they ought to have been, the Court could have clarified the correct interpretation that has to be afforded in cases involving multiple agreements.

The jurisdiction of courts in India in the context of international commercial arbitration remains a vexed issue. Over the last decade and a half, the Supreme Court has attempted to strike a balance between courts, arbitrators and parties involved, through a series of judicial pronouncements. The Apex Court could have cleared the air and clarified the various issues that have emerged post–*BALCO,* but has instead let the uncertainty propagate.

The case of *Harmony* was a chance for the Supreme Court to set a precedential stance with regard to interpretation of contracts and the interpretation on the applicability of the principles of *Bhatia* and *BALCO*. The judgment, although on a fair reading, has arrived at a conclusion which is reasoned and rational, the same could have been better clarified and would have served as a precedent. The cauldron of confusion shall remain and the wait shall continue, until the Court brings the ship back to dock.

JUDICIAL IMPORT OF THE MODEL LAW: HOW FAR IS TOO FAR?

Sujoy Chatterjee[*]

Abstract

The Indian Arbitration and Conciliation Act, 1996 ("Act") is widely understood to have been modelled or based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 ("Model Law"). However, the practical impact of this construct is two-fold – whether the Model Law can be relied upon by Indian courts while interpreting the provisions of the Act, and if so, the manner or extent to which such reliance should be placed. Judicial pronouncements and research papers involving the Act more-often-than-not rely upon the Model Law and its associated literature, yet surprisingly there is a dearth of jurisprudence on the exact role of the Model Law while interpreting the Act. The issue throws up nuanced questions involving, amongst others, international comity, legislative sovereignty and principles of statutory interpretation. This paper is limited to examining this issue through the narrow prism of how Indian courts have addressed this construct so far, with special focus on the judgment of the Delhi High Court in Union of India v. East Coast Boat Builders and the judgments of the Supreme Court of India in Bhatia International v. Bulk Trading and Bharat Aluminium v. Kaiser Aluminium. The paper briefly touches upon the far-reaching consequences of allowing the Model Law to permeate into the Act. The paper concludes with the author's personal views on the issue. This article is an extension of an 'Arbiter Dictum' blog post titled "Importing the Model Law: How far is too far?" published in March 2014.

1. Introduction

> "… *The present bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules*"[1]
>
> (emphasis added by author)

> "… *AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules*"[2]
>
> (emphasis added by author)

The 176th Report[3] of the Law Commission of India describes India's arbitration law, i.e., the Arbitration and Conciliation Act, 1996 ("Act"), as being "based" on the UNCITRAL Model Law on International Commercial Arbitration, 1985[4] and its Rules ("Model Law"). This view is supported by the Consultation Paper of the Ministry of Law and Justice,[5] Government of India the 246th Report of the Law Commission of India[6] and general academic discourse on the Act,[7] all of which characterize the Act as being either 'modelled' or 'based' on the Model Law.

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[1] The Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE (1996), Statement of Objects and Reasons. [hereinafter *The Arbitration and Conciliation Act*].

[2] *Id.*

[3] Law Commission of India, *The 176th Report on the Arbitration and Conciliation (Amendment) Bill, 2001*, at 5 ¶1.1, *available at* http://lawcommissionofindia.nic.in/arb.pdf.

[4] 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] *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

[5] Ministry of Law and Justice, Government of India, *Consultation Paper on the Proposed Amendments to the Arbitration and Conciliation Act, 1996*, at 1 ¶ 1, *available at* http://lawmin.nic.in/la/consultationpaper.pdf.

[6] Law Commission of India, *The 246th Report on the Amendments to the Arbitration and Conciliation Act, 1996*, at 3 ¶ 8, *available at* http://lawcommissionofindia.nic.in/reports/Report246.pdf.

By way of background, the Model Law is a legal framework which was drafted by a working group of the United Nations, and subsequently adopted by the United Nations Commission on International Trade Law[8] in June 1985, to act as a vehicle for harmonization and improvement of national arbitration laws.[9] Pertinently, the Model Law is not a treaty[10]; nevertheless various countries which have reviewed their arbitration laws since 1985 have based their national laws, to varying extents, on the Model Law.[11]

This general sense of deference to the Model Law may be attributed to a resolution adopted by the General Assembly of the United Nations in December 1985 recommending that all countries give "due consideration" to the Model Law while enacting their national laws.[12] In the context of India, the "due consideration" of the Model Law is specifically reflected in the Statement of Objects and Reasons[13] and the Preamble[14] to the Act, stating in no uncertain terms that the Act was enacted after "taking into account" the Model Law.

This paper aims at analysing the narrow question of whether the "taking into account" of the Model Law is a justification for importing the provisions of the Model Law while interpreting the Act, and more specifically, critiquing the manner in which Indian courts have addressed this issue. The paper shall also endeavour to establish that the extent to which the Model Law can be relied upon by Indian courts while interpreting the Act is not merely an academic question, rather it has far-reaching consequences which have deeply influenced Indian arbitration jurisprudence. The paper concludes with the author's personal views on the issue.

2. Indian courts and the Model Law

Indian courts have referred to and even relied upon the Model Law in numerous judgments,[15] however only a handful of judgments have directly addressed the extent to which the Model Law

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[7] *See generally* Sumeet Kachwaha, *The Arbitration Law of India: A Critical Analysis*, 1.2 ASIA INT'L. ARB. J. 105, 105-126, *available at* http://www.kaplegal.com/upload/pdf/arbitration-law-india-critical-analysis.pdf; Aishwarya Padmanabhan, *Analysis of Section 34 of the Arbitration and Conciliation Act – Setting Aside of Arbitral of Arbitral Award and Courts' Interference: An Evaluation with Case Laws*, *available at* http://manupatra.com/roundup/326/Articles/Arbitration.pdf.

[8] UNCITRAL is a subsidiary body of the General Assembly of the United Nations. It plays an important role in improving the legal framework for international trade by preparing international legislative texts for use by States in modernizing the law of international trade and non-legislative texts for use by commercial parties in negotiating transactions. *See generally*, United Nations, *A Guide to UNCITRAL: Brief facts about the United Nations Commission on International Trade Law*, *available at* http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf.

[9] UNCITRAL Secretariat, *Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration*, at ¶2-3, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

[10] *Supra* note 3, at 6 ¶ 1.2.

[11] *See,* the Report of the Departmental Advisory Committee (DAC), which was the basis of the English Arbitration Act, 1996, *available at* http://uk.practicallaw.com/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1247974981876&ssbinary=true; *See generally, supra* note 3, at 6 ¶1.2.

[12] G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf. The General Assembly of the United Nations has vide Resolution No. 61/33 adopted on 4 December, 2006 recalled Resolution No. 40/72 and recommended that all countries give "favourable consideration" to the Model Law while enacting their national laws.

[13] *Supra* note 1.

[14] *Id.*

[15] *See generally,* Sundaram Finance v. NEPC, A.I.R. 1999 S.C. 565 (India); Olympus Superstructures v. Meena Vijay Khetan, A.I.R. 1999 S.C. 2102 (India); Milkfood v. GMC Ice Cream, (2004) 7 S.C.C. 288 (India); Great Offshore v. Iranian Offshore Engineering and Construction Company, (2008) 14 S.C.C. 240 (India); P. Manohar Reddy

should play a role in interpreting the Act. The answer turns on how the phrase "taking into account" is construed, an erudite analysis of which is found in the judgment of the Delhi High Court in *Union of India & Anr.* v. *East Coast Boat Builders & Engineers Ltd*[16] ("*East Coast Boat Builders*").

(A) Judgment of the Delhi High Court: *East Coast Boat Builders*

In 1998, the Delhi High Court was posed with the question of whether an order passed by an arbitral tribunal under Section 16 of the Act, that a particular dispute is arbitrable, could be treated as an interim award, such that the order could be challenged and set aside under Section 34 of the Act. It was argued before the Delhi High Court that since the Act had been enacted after 'taking into account' the Model Law, Article 16(3) of the Model Law should come into play while interpreting the nature of an order under Section 16 of the Act.

Speaking through Justice A.K. Srivastava, the Delhi High Court rejected the contention that Article 16(3) of the Model Law could be relied upon while determining the nature of an order under Section 16 of the Act, stating:

"… *it cannot be said that each and every provision of the said Model Law and Rules forms part of the Act. Those Model Law and Rules were in fact taken into account while drafting and enacting the Act but whatever has been enacted is the law on arbitration enforceable in India*."[17]

However, the Court sought to distinguish between situations where the provisions of the Act were clear as opposed to situations where the provisions were ambiguous, by observing:

"… *had there been a lacunae in the provisions of the Indian Arbitration Act on the point at issue or if it contained such provisions which is capable of two or more different interpretations then of course internal aid of the preamble to the Act could be taken for interpreting such provision and then the relevant provisions of the said Model Law and Rules could be read so as to interpret that provision because while enacting the Indian Act, said Model Law and Rules were taken into account*."[18]

Therefore, the Delhi High Court held that if a literal reading of a provision of the Act is unambiguous and leads to a certain conclusion, the Court is required to give effect to that conclusion. The reasoning given in *East Coast Boat Builders* on this point is a reiteration of the foremost principle of statutory interpretation, i.e., the literal rule of interpretation (if the literal meaning of a provision is clear and unambiguous, then the provision must be given effect to in accordance with the language used therein).

However, as stated earlier, courts in India have on countless occasions resorted to the Model Law for interpreting the Act,[19] amongst whom the one having the most far-reaching consequences is the judgment of the Supreme Court of India in *Bhatia International* v. *Bulk Trading S.A. & Anr.*[20] ("*Bhatia*").

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v. Maharashtra Krishna Valley Dev. Corp. A.I.R. 2009 S.C. 1776 (India); Sime Darby Engineering v. Engineers India, A.I.R. 2009 S.C. 3158 (India).

[16] Union of India v. East Coast Boat Builders & Engineers Ltd., A.I.R. 1999 Delhi 44 (India).

[17] *Id.*, at ¶ 17.

[18] *Id.*

[19] *Supra* note 15.

[20] Bhatia International v. Bulk Trading S.A. & Anr., A.I.R. 2002 S.C. 1432 (India) [hereinafter *Bhatia*].

(B) Judgment of the Supreme Court: *Bhatia International*

In *Bhatia,* a 3-Judge Bench of the Supreme Court of India was required to interpret, *inter alia*, Section 2(2) of the Act to determine whether Part I of the Act applies to arbitrations taking place outside India. Section 2(2) states that, "*This Part shall apply where the place of arbitration is in India*" From a plain reading of Section 2(2), it is clear and unambiguous that Part I will not apply to arbitrations taking place outside India. Going by the rationale put forth in *East Coast Boat Builders*, giving effect to the literal meaning of Section 2(2) would have put the scope of applicability of Part I to rest.

However, the Supreme Court created an ambiguity for itself while interpreting Section 2(2) by referring to its equivalent provision in the Model Law, i.e., Article 1(2) of the Model Law. Article 1(2) states that, "*The provisions of this Law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.*" The Supreme Court noted that the word "only" appearing in Article 1(2) was absent in Section 2(2). According to the Supreme Court, this omission of the word "only" in Section 2(2) was "significant"[21] and changed "the whole complexion"[22]of the provision, thereby reflecting the intention of the Legislature that Part I of the Act would apply to arbitrations seated in India as well as outside India. While other concerns were raised to support the purposive construction of Section 2(2), these were *negative consequences* of following the literal meaning of Section 2(2) rather than *positive reasons* for adopting a purposive construction of the provision.[23] The author submits that the overarching positive reason in *Bhatia* for adopting a purposive construction of Section 2(2) was the reference to the Model Law, specifically the word "only" in Article 1(2) of the Model Law and its absence in Section 2(2). Therefore, it is debatable whether *Bhatia* would have arrived at the same conclusion had the Supreme Court's scope of analysis been limited to Section 2(2) without any reference to Article 1(2) of the Model Law.

While the subsequent judgment of a 5-Judge Bench of the Supreme Court in *Bharat Aluminium Company & Ors.* v. *Kaiser Aluminium Technical Service Inc. & Ors.*[24] ("*BALCO*") has overruled the ratio of *Bhatia* by limiting the applicability of Part I of the Act to arbitrations seated in India, a less highlighted facet of *BALCO* is its take on the extent of permeability of the Model Law while interpreting the Act.

(C) Judgment of the Supreme Court: *BALCO*

In *BALCO*, the Supreme Court undertook an elaborate study of the objects and reasons of the Act and duly noted that the Act had been enacted after "taking into account" the Model Law. During the course of this extensive analysis, the Supreme Court at one point states:

> "*The aim and the objective of the Arbitration Act, 1996 is to give effect to the UNCITRAL Model Law.*"[25]
>
> (emphasis added by author)

The difference between "taking into account" the Model Law and "give effect to" the Model Law is not mere semantics; rather it transposes the role of the Model Law from that of a base

[21] *Id.* at ¶ 21.
[22] *Id.* at ¶ 27.
[23] *See generally, Id.* at ¶ 14.
[24] Bharat Aluminium Company & Ors. v. Kaiser Aluminium Technical Service Inc. & Ors., (2012) 9 S.C.C. 552 (India) [hereinafter *BALCO*].
[25] *Id.* at ¶ 45.

document which was referred to while drafting the Act to that of a legal framework which is being implemented in India through the Act.

Whether this statement in *BALCO* is merely an *obiter* or an authoritative finding is hard to discern owing to the absence of reasoning. To further complicate matters, the specific question of the extent to which the Model Law plays a role in interpreting the Act was briefly discussed in the judgment. The appellants in *BALCO* had referred to certain observations of the Supreme Court in *Konkan Railway Corporation Ltd & Anr* v. *Rani Construction Pvt Ltd.*[26] *("Konkan Railway")* where the Apex Court had stated:

> "… *the Model Law was only taken into account in the drafting of the said Act is, therefore, patent. The Arbitration Act, 1996 and the Model Law are not identically drafted… The Model Law and judgments and literature thereon are, therefore, not a guide to the interpretation of the Act.*"[27]

It was also argued by the Appellants in *BALCO* that the judgment of the Supreme Court in *S.B.P. & Co.* v. *Patel Engineering Ltd & Anr.*[28] *("S.B.P.")*, which had overruled *Konkan Railway* on the point of the nature of the Chief Justice's function under Section 11 of the Act, had not overruled *Konkan Railway* on the point of the applicability (or more aptly, the non-applicability) of the Model Law while interpreting the Act. However, the Supreme Court in *BALCO* chose not to delve deeper into the issue and the judgment expresses no opinion on whether it agreed with *Konkan Railway* on this point or whether *S.B.P.* had impliedly overruled[29] even this aspect of *Konkan Railway*.

From an overall reading of *BALCO*, it is evident that the Supreme Court extensively referred to the provisions of the Model Law and its conclusions in the judgment were influenced by the Model Law. This, along with the "give effect to" reference in the judgment, has perhaps laid the foundation for the Model Law to be used as a ready reckoner for interpreting the Act in future cases.[30]

3. Critical Analysis: Playing the Devil's Advocate

Arbitration *aficionados* may contend that there is nothing wrong in referring to or relying upon the provisions of the Model Law and its associated literature while interpreting the Act, since it ensures that Indian arbitration jurisprudence as reflected through judicial pronouncements, is in sync with the global trends of international commercial arbitration. While no exception can be taken to India's gradual transformation towards becoming a pro-arbitration jurisdiction, such paradigm shifts are typically policy decisions best left to the realm of the policy-makers and the legislature.[31]

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[26] Konkan Railway Corporation Ltd & Anr. v. Rani Construction Pvt. Ltd., (2002) 2 S.C.C. 388 (India).
[27] *Id.* at ¶ 9.
[28] S.B.P. & Co. v. Patel Engineering Ltd & Anr., (2005) 8 S.C.C. 618 (India) [hereinafter *S.B.P.*].
[29] *Id.* at ¶ 12; For example, the Supreme Court states in *S.B.P.* that, "It is common ground that the Act has adopted the UNCITRAL Model Law on International Commercial Arbitration, but at the same time, it has made some departures from the Model Law".
[30] A passing reference to the Arbitration and Conciliation Act "giving effect to" the Model Law was also made in the judgment of the Supreme Court in TDM Infrastructure v. UE Development India, (2008) 14 S.C.C. 271 (India), a judgment pronounced much prior to *BALCO*.
[31] *See generally, supra* note 6; *See generally*, *Union Cabinet approves ordinance on arbitration*, THE ECONOMIC TIMES (Dec. 30, 2014), *available at* http://articles.economictimes.indiatimes.com/2014-12-30/news/57528899_1_law-commission-ordinance-indian-law; *Cabinet nod to ordinance tweaking arbitration law*, BUSINESS STANDARD (Dec. 30, 2014), *available at* http://www.business-standard.com/article/economy-policy/cabinet-nod-to-ordinance-tweaking-arbitration-law-

While enacting the Act, the Union Parliament had, in its wisdom, given "due consideration"[32] to the Model Law to "bring it, as much as possible, in harmony with the UNCITRAL Model Law".[33] However, once the Act was enacted, is it the judiciary's role to ensure that India's arbitration framework is in line with international expectations? In fact, *Bhatia* is a ripe example of how an Indian court's attempt at reading the Act along with the Model Law led to an environment which completely isolated India from the international arbitration community.

It may be argued that much of the damage done by *Bhatia* has been undone by *BALCO*. It may also be argued that *BALCO* arrived at its conclusions primarily on the basis of the Territoriality principle[34] which permeates throughout the Model Law. Therefore, India's course-correction towards becoming an arbitration-friendly jurisdiction would not have been possible without reference to the Model Law. As a corollary, it would flow that a nationalistic or narrow view of the Act may run counter to the purpose of enacting this legislation, i.e., bringing India in sync with the Model Law to ensure harmonization and uniformity.[35]

However, such argumentation begs the question as to why, despite an attempt to harmonize arbitration laws, countries across the world have incorporated the provisions of the Model Law to different extents and varying degrees in their domestic legislations.[36] The fundamental principles of international commercial arbitration, such as party-autonomy, *kompetenz-kompetenz*, fairness of proceedings, etc., are widely found in national legislations worldwide, and credit for this may perhaps be attributed to the "due consideration" of the Model Law while enacting these national laws. But to say that India, despite incorporating the Model Law into the Act to the extent its law-makers felt fit,[37] should nevertheless rely on the Model Law while interpreting the Act appears to be a case of putting the cart before the horse.

4. Conclusion

The author is of the opinion that the judgment of the Delhi High Court in *East Coast Boat Builders* had laid down the perfect balance of maintaining the sovereignty of the Act. Unlike the approach taken in *Konkan Railway,* which would have shut out the Model Law completely, *East Coast Boat Builders* had carved out limited circumstances in which the Model Law could be relied upon for interpreting the Act. Such an approach is consistent with the build-up to the enactment of the Act, which was not solely a result of the Model Law, but amongst others, recommendations for reform in India, particularly for speeding up the arbitration process and for reducing intervention by courts.[38] However, the author feels that amidst the general enthusiasm to showcase India as a 'hub'[39] of international arbitration, *BALCO* has set the tone for the Model Law to be viewed as the sole driving force and the over-arching primer to the Act.

114122901209_1.html; *Ordinance route for quick arbitration reforms*, THE HINDU (Dec. 31, 2014), *available at* http://www.thehindu.com/news/national/ordinance-to-amend-law-on-arbitration/article6739783.ece.

[32] *Supra* note 12.

[33] Fuerst Day Lawson Ltd v. Jindal Exports Ltd., A.I.R. 2011 S.C. 2649 at ¶ 72 (India).

[34] Alternately referred to as the Jurisdiction theory, this principle cloaks the national arbitration law of the country within which the seat of the arbitration is located as the law governing the arbitration proceedings.

[35] For a broad overview on literal interpretation vis-à-vis purposive construction of a statute. *See generally*, Girdhari Lal & Sons v. Balbir Nath Mathur & Ors, (1986) 2 S.C.C. 237 at ¶¶ 6-16 (India).

[36] *Supra* note 3, at 6 ¶ 1.2.

[37] *Supra* note 31.

[38] *Supra* note 3, at 7 ¶ 1.2.

[39] *Need to promote institutional arbitration to place India amongst top 50 countries in the World Bank's ease of doing business ranking*, FICCI (Dec. 22, 2014), *available at* http://www.ficci-arbitration.com/htm/news-clipping/news.htm#4; *India plays catch-up game*, BUSINESS STANDARD (Mar. 23, 2014), *available at* http://www.business-standard.com/article/opinion/india-plays-catch-up-game-114032300751_1.html.

The author's position on this issue can be aptly crystallized through a simple analogy, wherein the exercise of interpreting a statute may be visualized as being akin to driving on a highway. In this analogy, the legislature has paved the road for the judiciary to drive on by enacting the Act. The Model Law is at best a road-sign or a map-based 'app',[40] i.e., an aid which is available to the courts if the highway bifurcates or has a crossroads (i.e., if there is an ambiguity in the provisions of the statute). However, the author is apprehensive that in the post-*BALCO* era, Indian courts may be heading towards adopting a practice which is becoming increasingly commonplace in our daily lives – always relying on the app!

[40] Depending on which side of the "*taking into account*" debate the reader is on, the Model Law may be treated either as a road-sign laid by the legislature along the highway (i.e., an internal aid) or a map-based mobile application (i.e., an external aid) for determining which route to take if there are multiple roads ahead. In either case, the Model Law is merely an aid which should come into play only when there is an ambiguity in the provisions of the Act.

INCREASED EFFICIENCY AND LOWER COST IN ARBITRATION: SOLE MEMBER TRIBUNALS

Michael Dunmore[*]

Abstract

In international arbitration, many parties prefer to select the arbitrators who will decide their disputes. This is usually done either by each party selecting their own arbitrator in a three-member tribunal or attempting to agree with the counterparty on a sole-member tribunal. Many parties believe that they will have more control over the process by participating in this selection. However, this article will outline that in many arbitrations, the degree of influence a party-appointed arbitrator has or is able to exhort is negligible. This article will advocate that arbitral tribunals should comprise a sole-member, appointed by an arbitration institution. It is more efficient and cost effective to have an institution appoint an arbitrator rather than the parties. In arriving at this conclusion, various issues such as challenges made to the appointments of arbitrators, time constraints in arbitration as well as institutional versus party appointments will be examined.

1. Introduction

One reason why parties may agree to arbitration instead of resolving their disputes in a national court is that they have the ability to select who decides a potential dispute. Frequently, parties draft an arbitration clause wherein each party becomes entitled to appoint a co-arbitrator in a tribunal composed of three arbitrators. However, there has been academic debate on whether party-appointed arbitrators are best suited to resolve disputes. This debate has traditionally focused on an alleged bias of arbitrators that are unilaterally appointed by each party. A popular argument for why some parties are drawn to international arbitration is the hope that the arbitrator they choose will act as their advocate in some indirect way, and in turn, influence the co-arbitrators.[1] However, it does not appear to be the case, except in some circumstances, and even if a party-appointed arbitrator acts as an advocate for the appointing party, it will likely go over poorly with the co-arbitrators.

This article will start from the premise that arbitrators, like judges, are not biased. Like judges, arbitrators' professional careers are dependent on their impartiality. Arbitrators are selected for their reputation and integrity rather than a bias towards the party appointing them.[2] Following this, an arbitrator who has been unilaterally appointed is unlikely to be more biased than the one who is appointed by an institution, and as such it is not advantageous to a party to make a unilateral appointment (the author recognizes that a perceived bias may not be the only advantage a party considers in the selection of a particular arbitrator). If this premise can be accepted, then there are a number of areas where parties can save costs relating to the appointment of an arbitrator. There are a number of factors that need to be considered regarding the selection of an arbitrator. The starting point is considering how many arbitrators should decide a dispute. This article will then move to the issue of the selection of arbitrator(s) by an institution or the parties, and will outline various aspects relating to each. Lastly, this article will discuss considerations involving the time spent when a tribunal is composed. In looking at the issue of arbitrator selection, this article will take the approach that a sole arbitrator appointed by an arbitral institution is the preferred method for composition of a tribunal for reasons of cost saving and efficiency.

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[1] Alexis Mourre, *Are Unilateral Appointments Defensible? On Jan Paulsson's Moral Hazard in International Arbitration, in* INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION 381 (Stefan Michael Kröll et al. eds., 2011) [hereinafter *Mourre*].

[2] *Id.* at 384.

2. Number of Arbitrators

The most obvious method of reducing the cost relating to the composition of an arbitral tribunal is having a sole-member rather than a three-member tribunal. The author believes that tribunals comprised of three members are popular for two main reasons. The first is that each party is able to select its own arbitrator and as a result feels that it has some influence over the process. The second is that when the dispute is complex, parties feel that having more arbitrators will ensure that all issues are analysed and addressed in greater depth.

As for fees, arbitrator fees of a three-member tribunal are considerably more than that for a sole-member tribunal. In addition to arbitrator fees, travel expenses and per diems of each arbitrator must be taken into account. As a result, having three arbitrators in comparison to one can be considerably costly, especially where the amount involved in the dispute is low. If a sole arbitrator is selected, this selection can be done by the agreement of the parties, or in a more efficient manner- by an arbitration institution or other appointing authority. By deferring to an institution to make an appointment, parties can save time and cost as they would not have to research potential arbitrators and attempt to agree on the arbitrator. For instance, in 21% of ICC arbitrations with a sole-member in 2013, the appointment of the tribunal was based on the nomination of the parties.[3]

3. Cost Analysis

One aspect that must be kept in mind is whether the arbitrators' fees will be based on an ad valorem or hourly rate. To demonstrate the cost savings of a sole-member tribunal over a three-member tribunal, two hypothetical amounts in dispute under the ICC Rules (ad valorem) will be considered by the author: 50 million USD and five million USD.[4]

For a hypothetical dispute of 50 million USD, under the ICC Rules, the average total arbitrator fees for a sole-member tribunal are 172,484 and for a three-member tribunal are 517,452 (three times the price). For a dispute valued at five million USD, the average total arbitrator fees for a sole-member tribunal are 87,334 USD and for a three-member tribunal are 262,002 USD.

In addition to arbitrator fees, travel and per diem fees must be paid for each arbitrator. The per diem fees under the ICC rules are 1,200 USD per day when arbitrators require a hotel to stay in and 400 USD per day when no hotel is required, which covers, transportation, meals, etc. during a hearing.[5] For example, if a four-day (short) hearing is held, these per diem rates in addition to the return business class flights from where the arbitrator resides to the place of hearing can add up quickly for a there-member tribunal in a small dispute.

In respect of the costs incurred in the process of the appointment of arbitrators, when parties select the arbitrator(s) as opposed to an institution, each law firm will spend time on researching potential arbitrators for a dispute, which in turn results in a higher legal fee that parties must pay. The extent of research on potential arbitrators that a firm engages in can vary significantly. With this in mind, parties should ideally consider fees related to 'arbitrator research' as a factor with at least some weight as early as drafting the arbitration agreement. Similar to unnecessary legal fees incurred for 'arbitrator research' are fees associated with challenges to the appointment of an

[3] *2013 Statistical Report*, 25-1 ICC INT'L CT. ARB. BULL. (2014) [hereinafter *2013 Statistical Report*].
[4] ICC COST CALCULATOR, http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/cost-and-payment/cost-calculator/.
[5] John Beechey, *Revised Note on Personal and Arbitral Tribunal Expenses, Tribunal Expenses,* ICC INT'L CT. ARB., (Sep. 4, 2013).

arbitrator, which incur considerable time spent on drafting pleadings for both sides (with significant legal fees), as well as delays in the proceedings.

4. The Appointment of Arbitrators

In a majority of arbitrations, arbitrators are appointed by the parties. However it will be argued below that an institution or other appointing authority is best suited to make appointments.

(A) Party Appointments

It has been argued that a system of only institutional party appointments would rob international arbitration of one its foremost advantages and attributes.[6] Proponents of unilateral appointments argue that each side appointing an arbitrator ensures that both "stories" are played for discussion throughout the proceedings. Many believe that the role of the party-appointed arbitrator is to make sure the position asserted by his or her appointing party is understood[7] and that all evidence and arguments are adequately considered. In response to this argument, a chairman of a tribunal is not interested in hearing co-arbitrators re-argue a dispute after it is completed. In this respect, if counsel has not succeeded in persuading the chairman, a party appointed arbitrator is unlikely to do so.[8] Along similar lines of the influence that a co-arbitrator yields, the argument that appointing an arbitrator is advantageous because the party-appointed arbitrator will be able to influence the chairperson is a poor one. This is based on the premise that each co-arbitrator advocate will cancel the other out,[9] although Mourre highlights that having an arbitrator who ensures that the arguments of the party who nominated him or her are considered is not necessarily a bad thing.[10] If each party-appointed arbitrator engages in this, then all arguments will be thoroughly considered by the tribunal. If this is the case, it may then be an advantage to appoint a very well-known arbitrator, who will be less perceived as an advocate for the party that appointed him. In this regard, it could be the case that because the arbitrator is held in high regard by other tribunal members, combined with the impression of neutrality, fellow arbitrators may without reluctance give more weight to that arbitrator's positions. This is based on co-arbitrators being reluctant to agree to a clearly biased arbitrator advocate's position and the notoriety of a well-known arbitrator who may be somewhat persuasive to co-arbitrators.

A similar criticism is that the unilateral appointment of arbitrators leads to a bargaining between the party-appointed arbitrators to determine the outcome rather than arriving at an actual decision made on the merits.[11] However, this relies on the core factor in decision making not being the actual merits of a dispute, which seems very implausible. To what extent this bargaining actually takes place is not clear. There are, additionally, a number of theories and approaches to what extent and how exactly a co-arbitrator could influence a chairman.

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[6] Jorge A. Huerta-Goldman, Antoine Romanetti & Franz X. Stirnimann, *Cross-cutting Observations on Composition of Tribunals*, *in* 43 WTO LITIGATION, INVESTMENT ARBITRATION, AND COMMERCIAL ARBITRATION 129, 131 (Jorge A. Huerta-Goldman, Antoine Romanetti & Franz X. Stirnimann eds., 2013).

[7] Jennifer Kirby, *With Arbitrators, Less Can be More: Why the Conventional Wisdom on the Benefits of having Three Arbitrators may be Overrated*, 26.3 INT'L ARB. J. 337, 344 (2009) *citing* LAWRENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 191, 196 (2000) [hereinafter *Kirby*]; Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT'L J. 395 (1998).

[8] *Kirby, supra* note 7, at 350.

[9] *Id.* at 348.

[10] *See Mourre*, *supra* note 1, at 384.

[11] Ana Carolina Weber et al., *Challenging the "Splitting the Baby" Myth in International Arbitration,* 31-6 ARB. INT'L J. 719, 723 (2014).

A prominent argument in favour of the unilateral appointments of arbitrators is that unilateral appointments permit parties to choose arbitrators with certain qualities and backgrounds; for example, an arbitrator may have expressed a certain opinion in various publications which a party may perceive to be compassionate to its position. In this respect, clearly a party is looking for some type of biased characteristics of the arbitrator. Other times, parties may seek an arbitrator with very niche experiences so that they are well suited to deal with the dispute, for example, experience with palm oil milling in Borneo. Along similar lines, before an arbitrator is appointed by an institution, the institution will also attempt to find an arbitrator whose expertise and experiences are well suited for each dispute. From the author's experience in administering arbitrations, the secretariat in an arbitration institution will search for an arbitrator who is a good fit to each dispute, in particular when there is some novel element involved in such dispute. For example, sufficient expertise to handle a niche dispute, or other factors such as the selection of an arbitrator who is located within a close geography to the parties to cut unnecessary costs, will be factors that are considered.

Another argument frequently made in favour of unilateral appointments is that unilateral appointments allow parties to appoint an arbitrator who is from the same cultural background or country as them; which allows the parties to select an arbitrator who better understands their business practices and position in the dispute. Paulsson indicates that parties should not aim to only select an arbitrator from the same country or culture, based on the assumption that the arbitrator will be more sympathetic or have a better understanding of their case because of the commonalities,[12] which is a point that opponents of Paulsson's approach agree with. The reason behind this is that individuals who frequently engage in international business are more likely to share a common understanding of aspects and expectations of the international business community rather than hold 'nationalized' perceptions; contrasting the assumption that individuals from that same culture or company are more focused domestically and more sympathetic.[13]

Perhaps one of the strongest arguments in favour of unilateral appointments where there are three arbitrators is that three arbitrators with different points of view enhance the tribunal's evaluations of the parties' submissions, which improves the overall arbitral process.[14] This argument relies on the premise that diverse viewpoints are more likely to lead to a correct decision. On the other hand, some argue that the 'three heads are better than one' approach does not apply in arbitration.[15] However, a three-member tribunal may also be used for certain tactical reasons such as increasing the cost of arbitration in hopes that a counterparty may withdraw their claim because they cannot afford to pay the fees, or by appointing a completely biased arbitrator whose tactical actions delay the arbitration.[16] From the author's experiences, parties request for extensions to pay as well as requests for separate advances on costs due to a lack of capital. This occurs more frequently than one may expect.

As a whole, from the above discussion, there are many serious considerations that need to be addressed with regards to the appointment of arbitrators.

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[12] Jan Paulsson, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law: Moral Hazards in International Dispute Resolution, at 8 (Apr. 29, 2010) (transcript available at http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf) [hereinafter *Paulsson*].

[13] *See Mourre*, *supra* note 1, at 383.

[14] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1669 (2nd ed. 2014).

[15] *See Paulsson*, *supra* note 12, at 11.

[16] *See Kirby*, *supra* note 7, at 339.

(B) Challenges to Arbitrators

The most prevalent argument against the unilateral appointment of arbitrators is that there exists a potential bias of arbitrators towards the party that appointed them. This is best addressed by examining how often challenges are made against arbitrators and the rate of success of such challenges. The standard that the ICC uses for challenges is that, "*challenges are decided by the Court using an objective test, rather than a subjective 'in the eyes of the parties' standard*."[17] However, "[t]his is not a totally objective standard, but rather a subjective test, which takes into account independence viewed 'in the eyes of the parties'."[18] In this regard, Whitesell mentions that the standard applied by the ICC Court of Arbitration on whether to confirm an appointment is an objective one.

Without taking a look at the statistics on challenges, one may speculate that unilateral appointments lead to a high number of challenges to arbitrators. However, looking at statistics on challenges, the number of occurrences of challenges being brought and of those that have been successful is extremely small. For example, under the ICC Rules from 1999 to 2008, the ICC Court of Arbitration decided a total of 316 challenges.[19] More recent statistics from 2013 indicate that 66 challenges were brought to the ICC Court with only four being successful.[20] These figures may be contrasted with those of the LCIA; in the thirteen years between early 1996 and May 2009, only 24 challenges were referred to the LCIA Court.[21] Unfortunately, these statistics do not indicate whether the arbitrator was appointed by a party or by the institution. However, it is likely that in the majority of the cases, the appointment would have been made by the former.

From the above examination of the ICC and LCIA statistics on challenges to arbitrators, it can be said that challenges do not frequently occur; a successful challenge is particularly rare. With the ICC and LCIA being two of the largest arbitration institutions, it can be expected that the statistics presented by these institutions are reflective of arbitration in general. These statistics support the notion that arbitrators are not generally biased advocates for the parties that appoint them.

(C) Institutional Appointments

The 2012 White and Case/Queen Mary Survey indicated that only 7% of parties prefer the appointment of an arbitrator by an institution or appointing authority.[22] However, the author believes that, based on the author's experience of working at various arbitration institutions, the frequency of institutional appointments are much higher and do not reflect the parties' preference in the above-mentioned survey.[23]

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[17] Anne Marie Whitesell, *Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, ICC INT'L CT. OF ARB. BULL. 26 (Supp. 2007).
[18] *Id.* at 10.
[19] Jason Fry & Simon Greenberg, *The Arbitral Tribunal: Applications of Articles 7-12 of the ICC Rules in Recent Cases*, 20-2 ICC INT'L CT. ARB. BULL. ¶ 69 (2009) [hereinafter *Fry & Greenberg*].
[20] *See 2013 Statistical Report*, *supra* note 3.
[21] *See Fry & Greenberg*, *supra* note 19, at ¶ 121.
[22] *Current and Preferred Practices in the Arbitral Process*, 2012 WHITE AND CASE / QUEEN MARY INTERNATIONAL ARBITRATION SURVEY, at 5 (Jun. 10, 2015), *available at* http://annualreview2012.whitecase.com/International_Arbitration_Survey_2012.pdf.
[23] *See 2013 Statistical Report*, *supra* note 3 (summarizing arbitrator appointments and confirmations: Nominations by parties, - 55.68%; Nominations by co-arbitrators - 14.6%; Appointments by Court upon proposal from ICC National Committee or Group - 20.69%; Appointments directly by Court - 8.58%; Appointments by an authority other than the Court - 0.45%).

When parties rely on an institution to make an appointment, the institution making the appointment must be a legitimate one, free of cronyisms and other problems where legitimacy comes into question.[24] When an institution makes the appointment of an arbitrator, the institution will pick an arbitrator whose profile, experience and other characteristics will suit the dispute. Many times, when parties try to agree on a sole-member tribunal, they spend a considerable amount of time corresponding regarding a suitable arbitrator. When this fails, a request is then made to the institution, resulting in wasted cost and delaying the composition of the arbitral tribunal. It is preferable, to save this time and costs, that parties agree at the very outset that an institution make an appointment.

Not all institutions use the exact same methods and procedures to select an arbitrator.[25] For example, in the case of ICC, in many instances, a national committee of a certain country makes a recommendation of an arbitrator to the Court of Arbitration. In comparison, the Singapore International Arbitration Centre ("SIAC") or the Kuala Lumpur Regional Centre for Arbitration ("KLRCA") appoints arbitrators from an existing publicly available list based on their expertise and other factors such as availability that make them suitable for the arbitration. When making an appointment, institutions take into account all information (including correspondence between the parties) that they have about a dispute to determine various issues such as the number of arbitrators (when not specified) and the arbitrators to be appointed.[26] In this regard, institutions are familiar with a significant pool of arbitrators and their reputations and make considerably informed decisions prior to the appointment of an arbitrator. Institutions have a high stake in maintaining their own reputations when appointing arbitrators and thus, should be considered very capable in making arbitrator appointments.

5. Time Considerations

Various factors surrounding arbitrator selection affect the time it takes for an award to eventually be rendered. For example, when parties must jointly appoint a sole arbitrator, parties attempting to agree on an arbitrator may, in many cases, request extensions for time to decide. In some disputes, after lengthy discussion, the parties still cannot agree and thus will request the relevant institution to make the appointment for them. The 2013 ICC statistics reveal that out of the 240 appointments of a sole arbitrator only 51 appointments occurred through the agreement of the parties.[27]

One can draw the assumption that in many cases where the ICC has appointed a sole arbitrator, parties would have probably first attempted to agree on a sole arbitrator. As has been highlighted throughout this article, a sole member tribunal will clearly save costs. Having an institution responsible for the appointment of that sole arbitrator at the outset will lead to increased cost savings and increased efficiency in a multitude of ways.

In terms of the numbers of arbitrators to comprise a tribunal, a sole-member tribunal can lead to a faster overall result than three.[28] Along these lines, a sole-member tribunal will also make the scheduling of hearing easier in comparison to a three-member tribunal because of the lower number of possible scheduling conflicts.

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[24] *See Paulsson*, *supra* note 12, at 13.
[25] *See Mourre*, *supra* note 1, at 381.
[26] *See Fry & Greenberg, supra* note 19, at ¶ 16.
[27] *See 2013 Statistical Report*, *supra* note 3.
[28] Yu Jin Tay, *Reflections on the Selection of Arbitrators in International Arbitration, in* 17 INTERNATIONAL ARBITRATION: THE COMING OF A NEW AGE?, ICCA CONGRESS SERIES 112, 113 (Albert Jan van den Berg ed., 2013).

6. Conclusion

From a cost analysis position, having a sole-member tribunal appointed by an institution is the most cost effective approach for the appointment of an arbitrator. This can assist in making international arbitration a fast and cost effective alternative to resolving disputes in national courts. Despite the perception of many parties that they will increase their chances of success through the unilateral appointment of an arbitrator, this does not seem to be the case. A party being able to select its own arbitrator does not pay off in comparison to the additional costs incurred by having a three-member tribunal. Unfortunately, in many disputes, the number of arbitrators is determined when a boilerplate arbitration clause is drafted, without consideration being given to the amount at stake in any potential dispute. When parties must appoint an arbitrator there are many considerations that are taken. There is considerable consensus in the scholarship in this area. The author agrees with the view that, "*if parties really want to enhance their chances of success, they should appoint experienced, impartial arbitrators rather than super-advocates.*"[29]

Along these lines, if a party is considering the appointment of a biased arbitrator, doing so may work against them. Appointing an 'advocate arbitrator' who goes beyond ensuring that all arguments are considered will likely give co-arbitrators a negative impression and could make them more sceptical of the party that made the appointment because of their choice of a co-arbitrator. This could likely also result in co-arbitrators not giving the 'advocate arbitrator's' opinions much weight.[30] Paulsson points to two studies that indicated that 95% of dissenting decisions are made by an arbitrator appointed by the losing party. However, he goes on to state "*it may simply be that the appointing party has made an accurate reading of how its nominee is likely to view certain propositions of law or circumstances of fact.*"[31] The parties in these disputes are worse off economically with a dissenting opinion from their party-appointed arbitrator than having an institution appoint a sole-member tribunal. This is because despite their party-appointed arbitrator deciding in their favour they still lost and had incurred more costs for the three-member tribunal than a sole-member tribunal. In this respect, "*... in practice, if a party wins the vote of the chairman, it wins the issue to be decided; if it does not, it loses. This is why it is the vote of the chairman, and only the vote of the chairman, that is decisive.*"[32] This reinforces the argument that a well-respected arbitrator is the best choice for appointment, and not one who will act as an advocate. A well-respected arbitrator does not necessarily mean the most senior or busiest arbitrator in the world; instead, this can be a diligent arbitrator who demonstrates knowledge of the dispute as well as capabilities as an arbitrator to his co-arbitrators. In addition to the selection of a well-respected arbitrator, for arbitration users, rather than believing that appointing a particular arbitrator will allow them to influence a dispute, it may be worth taking an alternative approach to arbitrator appointment. That alternative approach to arbitrator appointments is having a sole-member tribunal appointed by an institution to take away the counter-party's chance to appoint an arbitrator; this would surely result in the dispute being decided by a truly neutral arbitrator without detriment to either party.

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[29] *See Mourre*, *supra* note 1, at 385.
[30] *See Kirby*, *supra* note 7, at 349.
[31] *See Paulsson*, *supra* note 12, at 9 *citing* Alan Redfern, Dissenting Opinions in International Commercial Arbitration: The Good, The Bad and The Ugly, Freshfields Lecture (2003), *in* 20 ARB. INT'L, 2004 at 223; Eduardo Silva Romero, *Brèves observations sur l'opinion dissidente*, *in* LES ARBITRES INTERNATIONAUX, SOCIÉTÉ DE LÉGISLATION COMPARÉE LÉGISLATION COMPARÉE 179-186 (2005).
[32] *See Kirby*, *supra* note 7, at 346.

TRIBUNAL-ORDERED INTERIM MEASURES AND EMERGENCY ARBITRATORS: RECENT DEVELOPMENTS ACROSS THE WORLD AND IN INDIA

Nikhil J. Variyar[*]

Abstract

This note examines the nature of interim measures granted by arbitral tribunals internationally. Thereafter, it directs the same question to the narrower Indian context. The note explores in detail the minimum international standards to be met by a party seeking interim measures before an arbitral tribunal, that of possible irreparable harm and a reasonable chance of success. These requirements ensure that the claim is not merely vexatious. This note also delves into the world of emergency arbitrators and the enforcement by national courts across the world of their awards. India is yet to see an important case dealing with emergency arbitration, except for the Bombay High Court judgment in HSBC v. Avitel, which has been discussed at length in this note.

The author also critically analyses the various deficiencies of the Arbitration and Conciliation Act, 1996 ("the Act"), in providing for tribunal-ordered interim measures. The wording of Section 17 does not provide for enforcement of orders of arbitral tribunals, but merely allows tribunals to order them. The note also addresses two amendments suggested by the 246th Law Commission Report, for Sections 2(d) and 17 of the Act, analysing how they could improve the arbitration scene in India, while also recommending possible changes.

1. Introduction

Arbitration, by nature, is a creature of consent. It cannot operate in the absence of a validly concluded agreement to arbitrate.[1] It remains, as it always has been, a mechanism for dispute resolution agreed on between the parties, without recourse to courts of law.[2] This includes mechanisms by which the Parties may submit themselves to various arbitral institutions like the ICC International Court of Arbitration, The Singapore International Arbitration Centre ("SIAC") and Indian Institutes like the Nani Palkhivala Arbitration Centre.[3] During an arbitration, certain circumstances require the tribunal or national courts to issue interim measures to maintain the *status quo* or to enforce performance of the contract, on the basis of the probability of irreparable harm, among several other possible situations.[4] Several arbitral institutions within their institutional rules, have allowed tribunals to grant interim measures as early as 1915.[5] This triggered the amendments to the UNCITRAL Model Law in 2006, which brought in several provisions to accommodate emerging trends in international commercial arbitration.[6] One of these amendments was to Article 17 which empowered tribunals to grant interim measures when the situation demanded. Several nations have since then amended their own national arbitration laws. In India, the 246th Law Commission Report 2014 has sought to

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[1] ALAN REDFERN & MARTIN J. HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (4th ed., 2004) [hereinafter "*Redfern & Hunter*"].

[2] *Id.* at 1.

[3] *Id.* at 11.

[4] Fouchard, Gaillard & Goldman, *Part 4: Chapter III - Provisional and Conservatory Measures in the Course of the Arbitration Proceedings*, *in* FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, 721 (1999).

[5] ALI YESILIRMAK, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 2-11 (2005); (For current provisions of arbitral institutions providing for interim measures, see Art. 28, Arbitration Rules of the International Chamber of Commerce, 2012; Rule 26, Arbitration Rules of the Singapore International Arbitration Centre, 2013).

[6] Markus S. Reider, *UNCITRAL Arbitration Rules- Institutional Reform*, 16.6 INT'L A.L.R. 179, 179-184 (2013) [hereinafter *Reider*].

address all areas of arbitral law that they saw as conforming to the scene of arbitration in India.[7] This issue has been dealt with towards the later parts of the note.

2. General Principles governing the grant of Interim Measures

Interim measures are grants of temporary relief protecting parties' rights, pending final resolution of the dispute.[8] They often complement the enforcement of the final award and such measures are essential to the process of arbitration. Provisional measures play a crucial role in all kinds of arbitration.[9] Arbitral tribunals have granted interim measures on a regular basis, based on several principles which have been discussed below. Such interim measures are usually initiated by the parties to protect their own rights.[10] However, in the event that a tribunal feels that its order would be frustrated by its inaction or that one of the parties would face substantial prejudice as a result of such inaction, the tribunal is free, under several laws and procedural rules, to take up the *suo moto* responsibility to issue interim measures.[11]

Although arbitrators are given discretion as well as wide leeway in the minimum requirements for the granting of an interim measure, judicial precedents, awards and juristic opinions have prescribed a minimum threshold that parties have to satisfy in order to obtain favourable interim measures.[12] Further, these minimum requirements should be interpreted in a manner to suit the specific needs every case before the tribunal demands.[13]

Two principles are to be taken into consideration in an application for interim relief:

1. Irreparable harm; and
2. A reasonable chance of success before the final tribunal.[14]

The requirement of *urgency*, which has been developed out of the necessity experienced by the parties, is also generally considered paramount in a plea for interim relief. The International Centre for Settlement of Investment Disputes ("ICSID") in *Occidental Petroleum Corporation* v. *Republic of Ecuador*,[15] has held that when a party starts negotiating with third parties for the same contract, the situation was not only urgent, but one which compulsorily required an interim measure to ensure that the award of the tribunal would not be frustrated.

The next requirement is that of *irreparable harm*, or the requirement that the harm caused cannot be adequately compensated by damages which the party seeking the interim measures could suffer. There has to exist an imminent danger to the rights of a party which would affect the nature of the dispute and the arbitration at a very basic level.[16] The most common situation is where a corporate entity's existence is itself at stake i.e. where the entity would become insolvent

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[7] Law Commission of India, *The 246th Report on the Amendments to the Arbitration and Conciliation Act, 1996*, 37-50 *available at* http://lawcommissionofindia.nic.in/reports/Report246.pdf [hereinafter *246th Report*].
[8] Lee Anna Tucker, *Interim Measures under Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects both Greater Flexibility and Remaining Uncertainty,* 1.2 INT'L COMM. ARB. BRIEF 15, 15-23 (2011) [hereinafter *Tucker*].
[9] *Reider*, *supra* note 6, at ¶¶ 1-10.
[10] *Reider*, *supra* note 6, at ¶¶ 3-5.
[11] *Reider*, *supra* note 6, at ¶¶ 5-19.
[12] *Tucker*, *supra* note 8..
[13] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 920 (2nd ed., 2001).
[14] 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, Art. 17A (Dec. 11, 1985) [hereinafter UNCITRAL Model Law].
[15] Occidental Petroleum Corporation v. Republic of Ecuador, ICSID Case No. ARB/06011, ¶ 61, (Provisional Measures) (Oct. 5, 2012).
[16] *Reider*, *supra* note 6, at ¶¶ 5-33.

in the absence of these measures.[17] The most important situation, in the author's opinion, is where irreparable harm can occur is in the destruction of evidence. However, due to the high burden of proof required to acquire such evidence, there have been no recorded situations in the recent past.

The last requirement to grant an interim measure is for the parties to prove that they have a reasonable chance of success before the tribunal i.e. the establishment of a *prima facie* case.[18] However, in the author's opinion, the tribunal must not pre-judge the case on the basis of the merits in order to grant such provisional measures, as this would create a bias in the tribunal, without the complete investigation of the facts. A prominent case on the subject is United States' Ninth Circuit Court decision of *Toyo Tires* v. *Continental Tire*,[19] where the *prima facie* establishment of the contract and completion of duties on the plaintiff's side had been made. The Court granted injunctive relief, even though the defendant eventually won the case, as the *prima facie* case does not contain an examination on the merits.[20]

3. Tribunal ordered Interim Measures in India

Section 17 of the Act provides that an arbitral tribunal can order interim measures as it deems fit, unless parties expressly agree otherwise. The Act is essentially an adoption of the UNCITRAL Model Law, modified to suit the Indian environment. The Act allows a tribunal to grant measures, based on two conditions – first, a tribunal must regard the interim measure as necessary; and second, the relief has to be in respect of the subject matter of the dispute.

A tribunal is empowered by Section 17 to order a party to take any interim measures of protection in respect of the subject matter of the dispute, and also direct the party in whose favour the order has been passed to provide appropriate security as provided in Section 17(2) of the Act.

Section 17, however, in the opinion of the author, has been poorly drafted as it merely states that the tribunal may pass an interim measure. It neither confers the tribunal the power to enforce its order nor provides for judicial enforcement of such order. The only consequence of a party not taking the interim measure of protection is of such failure being taken into account in the final decision by the tribunal, particularly in any assessment of damages.[21]

In *M.D Army Welfare Housing* v. *Sumangal Services Pvt. Ltd*,[22] the Supreme Court of India, while dealing primarily with a matter under the Arbitration Act of 1940, also sought to observe:

"…*A bare perusal of the aforementioned provisions would clearly show that even under Section 17 of the 1996 Act the power of the arbitrator is a limited one*… e*ven under Section 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof. The said interim order of the learned Arbitrator, therefore, being coram non judice was wholly without jurisdiction and thus, a nullity.*"

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[17] Plama Consortium v. Republic of Bulgaria, ICSID Case No. ARB/03/24 (Feb. 8, 2005).
[18] UNCITRAL Model Law, *supra* note 14; *See also* 2 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1988 (3rd ed., 2009).
[19] Toyo Tire Holdings v. Continental Tire North America, 609 F .3d 975 (9th Cir. 2010) (U.S.).
[20] *See also Société Nationale des Pétroles du Congo and République du Congo v. TEP Congo, Court of Appeals, Paris*, *in* Emmanuel Gaillard & Philippe Pinsolle, *The ICC Pre-Arbitral Referee: First Practical Experiences*, 20.1 ARB. INT'L 13, 34 (2004).
[21] B.P. SARAF, LAW OF ARBITRATION AND CONCILIATION 312 (6th ed., 2012).
[22] M.D. Army Welfare Housing v. Sumangal Services Pvt. Ltd., A.I.R. 2004 S.C. 1344 (India).

This view is clearly detrimental to the jurisprudence of Section 17 of the Act, stating that an order of an arbitrator would be unenforceable by the court, as the Act does not provide for it. Relevant to this is yet another regressive ruling by the Supreme Court, in *Sundaram Finance* v. *NEPC*,[23] where the Supreme Court observed, "… *though Section 17 gives the arbitral tribunal the power to pass orders the same cannot be enforced as orders of a Court.*"

The *Sundaram* ruling, coupled with the clear statement from the *M.D. Army Welfare Association* case is unfortunate outcome of the drafting of the Act, which then went on to be interpreted differently by the Delhi High Court. In *Sri Krishan* v. *Anand*.[24] The Delhi High Court looked into a case where the petitioner sought to enforce an order of a tribunal it had received under Section 17. It availed of Section 9 for the purpose of this petition. In his ruling, Justice Rajiv Sahai Endlaw constructively interpreted the legislative intent behind Section 17, stating that-

"*At the outset I may state that if able to find an answer to the grievance raised by the petitioner of the order under Section 17 being unenforceable and toothless, I am reluctant to hold that such repetition of orders can be sought from the court. Such an interpretation would make Section 17 otiose and redundant… The legislative intent in Section 17 of the Act appears to be to make the arbitral tribunal a complete fora not only for finally adjudicating the disputes between the parties but to also order interim measures.*"

The author unequivocally supports this decision of the Delhi High Court where, in contravention of previous obiters of the Supreme Court, Section 17 was interpreted so as to provide teeth to a tribunal. Law Commission of India, in its 246th Report, has suggested amendments to Section 17, such that a tribunal would have powers similar to that of that of a civil court. The Report suggests removal of the consent requirement which is present in the Act. It also permits arbitral tribunals to pass interim awards and orders similar to Section 9, which, in the opinion of the author, fulfils the intention of the UNCITRAL Model Law amendments of 2006.

However, Section 17 has a limitation of not being applicable until the formation of the arbitral tribunal. This forces parties to approach courts under Section 9, which is where the need for emergency arbitrators comes in.

4. Emergency Arbitrators

An emergency arbitrator is a person, usually appointed by the arbitral institution involved, who awards or orders interim measures which have effect until the formation of a tribunal.

As per the ICC Rules, *"A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal… may make an application for such measures… to the Emergency Arbitrator.*"[25] Thus, an emergency arbitrator is one who can grant interim measures.

The need for such emergency arbitrators arise in situations when the tribunal is yet to be constituted and parties have no alternative but to turn to the state courts. Further, where parties have *expressly* and *validly* excluded the jurisdiction of state courts, even for interim measures, such an option of pre - arbitral interim measures from the state courts is practically impossible. In any case, approaching a state court for the purpose of pre-arbitral interim measures is inconvenient, as in many cases, the legal teams of the parties may not be well versed with the law of the country where the interim measures are to be sought and enforced.

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[23] Sundaram Finance v. NEPC India, (2004) 9 S.C.C. 619 (India).
[24] Sri Krishan v. Anand, (2009) 3 Arb. L.R. 447 (Del) (India).
[25] Art. 29(1), ICC Arbitration Rules, 2012, *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/ [hereinafter *ICC Rules*].

For example, if a dispute arises between a German firm A, and an Indian company B, then the interim measure sought by A against B would have to be sought in India, which creates a language and legal barrier for the lawyers of firm A. This is only aggravated by the differences in the common law and civil law systems of India and Germany respectively. Such situations are common in the new, globalised world and have to be taken into consideration. This is why pre – arbitral interim measures became part of several legal systems and arbitral institutional rules.

There have been criticisms that the inapplicability of emergency mechanisms of the ICC and the International Centre for Dispute Resolution ("ICDR") to third parties (non-signatories) to the contract forms a half measure on part of the drafters of the rules.[26] However, on deeper inspection, it becomes apparent that emergency arbitration can be only used to bind parties who are privy to the arbitration agreement, as arbitration is fundamentally contractual. Joinder of additional parties is done with the sole purpose of making sure that enforcement of the final award of the tribunal is ensured,[27] as third parties cannot be expected to be privy to the details of every contract that it may be remotely related to. Further, with specific reference to the ICC Arbitration Rules of 2012, the emergency arbitrator is required to pass an order within 15 days of hearing the case, which is as early as 18 days from the initial submission of the case to the ICC Secretariat.[28] Thus, emergency arbitrators are more expeditious than state mechanisms.

A curious case is that of the ICC's pre-arbitral Referee provisions, which were adopted in their ICC Arbitration Rules of 1998. Unlike the emergency arbitrator, the Referee was a provision that had to be expressly opted into and did not provide for any judicial authority to be granted to the Referee, but merely provided for a contractual obligation to follow the decision (much unlike the case of emergency arbitrators, who are judicial bodies).

Thus, the increasing demand for a quick and effective process to apply for urgent and conservatory measures within the framework of the underlying arbitration and without redress to the national courts led to the formation of rules providing for emergency arbitrators.

5. Emergency Arbitrators in India

Indian arbitral jurisprudence on the usage and application of emergency arbitrators is not fully developed and is still at a nascent stage.

A recent Bombay High Court decision in *HSBC Pl Holdings* v. *Avitel Post*,[29] is the only Indian decision dealing with emergency arbitrators. An interim injunction seeking the enforcement of an order by a SIAC emergency arbitrator was sought. The Court ruled that the emergency arbitrator did fall under Section 17 of the Act, so as to form an order by an arbitral tribunal.

Interestingly enough, Section 17 of the Act only refers to interim measures or provisional measures. There is no clear distinction on whether the measures are to be made in the form or orders, awards or otherwise. Thus, as a result, it is possible that any future jurisprudence developed by courts would include within its purview 'orders' or 'awards' granted by emergency arbitrators.

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[26] Akhil Raina, *Emergency Arbitrator proceedings under the 2012 ICC Rules*, at https://arbiterdictum.wordpress.com/2014/04/21/emergency-arbitrator-proceedings-under-the-2012-icc-rules/ (last visited Feb. 14, 2015).

[27] BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTI CONTRACT, MULTI-ISSUE AND CLASS ACTIONS 343-344 (2006).

[28] *ICC Rules*, *supra* note 25, at Appendix V.

[29] HSBC Pl. Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd., 2014 Indlaw Mum 29 (India).

This interpretation, however, will most likely not be required. In its 246th Report, the Law Commission has stated that it intends to bring within the purview of the Act, provisions which would validate the application of emergency arbitrator provisions of arbitral institutions.[30]

The Law Commission has also recommended that Section 2(1)(d) of the Act be amended so as to include the clause:[31]

"…*and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator*", such that the new Section 2(1)(d) would read:

"'*arbitral tribunal' means a sole arbitrator or a panel of arbitrators and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator.*"

This amendment to the Act would provide an automatic assent to the duties carried out by an emergency arbitrator and would recognise them as arbitrators, which automatically solves the first question posed by the author in the previous section. The suggestion to include emergency arbitrator within the definition of arbitrator, for the purposes of the entire Act, is a bold move which could make India a centre for international arbitration, as India would become the only country to specifically extend the definition of an arbitral tribunal to include emergency arbitrators.

However, a valid doubt on the recommendations of the 246th Report of the Law Commission of India is the fact that most of India's arbitrations are held *ad hoc* and have not been institutionalised. Taking into consideration that emergency arbitrators are usually appointed by the institution itself, the Law Commission should have, perhaps, suggested including a clause which would allow for appointment of an emergency arbitrator by the court of jurisdiction, instead of having the court deal with the matter in detail.

6. Enforceability of an Emergency Arbitrator's Measures

The last part of the note deals with the question that arises with the enforcement of the order of an emergency arbitrator. For this, one must consider at a fundamental level, if emergency arbitrators can be considered as arbitrators in their own right.

The British High Court in the case of *Walkinshaw* v. *Diniz*,[32] held that mere reference to a dispute resolver as an arbitrator does not amount to that body being an arbitrator. The procedure followed by the body, if of an arbitral form and nature, would be a valid consideration in deciding the type of dispute resolution provided by the body or provision, whichever the case may have been.

The emergency arbitrator, thus, cannot be held to be an arbitrator simply because of the naming. While it is a relevant consideration, it cannot be the only basis for this conclusion.[33] Furthermore, the emergency arbitrator is usually appointed by the institution providing the rules which govern the arbitration agreement.[34] Arbitral rules providing for emergency arbitration do not provide the parties with the right to choose their emergency arbitrator or even to provide

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[30] *246th Report*, *supra* note 7, at 10.
[31] *Id.* at 37.
[32] Walkinshaw v. Diniz, 2000 2 All ER (Comm.) 237 (U.K.).
[33] Baruch Baigel, *The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis*, 31.1 J. OF INT'L ARB. 1, 14-15 (2014).
[34] *Id.*

nominees for the President to consider.[35] This provision is likely to have been principally motivated by procedural expedience, because potential disputes between the parties concerning the appointment of an emergency arbitrator could defeat the purpose of the whole scheme. However, the fact that the emergency arbitrator is never party-anointed or nominated reinforces the idea that the emergency arbitrator is not to be treated as an arbitrator.[36]

Ultimately, the answers to these questions are likely to turn upon whether emergency arbitrators are deemed arbitrators granting relief in the course of proceedings. A strict reading of the Act seems to indicate that its provisions do not apply to emergency arbitrators. However, the author respectfully submits that the Indian courts, if asked to consider the issue, might adopt a constructive, purposive approach and establish a welcome precedent by finding that the provisions of the Act are applicable to emergency arbitrators, where relevant. This may, however, not even be required, as a result of the recommendations of the 246th Report of the Law Commission of India, which has been discussed in the previous section of the note.

The next question that arises as a result of these measures is whether an emergency arbitrator's decision is in the form of an 'award' or an 'order'. This distinction is crucial in deciding the enforceability of the decision of the emergency arbitrator under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention").

Article 29(2) of the ICC Rules of Arbitration 2012 state that the decision of the emergency arbitrator will take place in the form of an order. However, in contrast, the SIAC, Stockholm Chamber of Commerce ("SCC") and ICDR have simply stated in their rules that the emergency arbitrator will have the powers to order or award interim and conservatory relief.[37] The question of whether such power vested in the emergency arbitrator is that of granting an award or an order, is specific to the rules and must be handled on a case - by - case basis. This ambiguity in the form of the decision of the emergency arbitrator has resulted in a great deal of vagueness, which has to be interpreted constructively to give effect to the intent of the tribunal.

In the French case of *Braspetro Oil Services Company* v. *The Management and Implementation Authority of the Great Man-Made River Project*,[38] an ICC Tribunal passed an interim 'order', refusing to relook into a certain aspect of the case, even after new documents had appeared. The *Courd'Appel* at Paris, on reviewing the appeal from this order, held that the qualification of a term as an award is not dependant on the terms used by the arbitrators and the parties. On further inspection into the facts, the Court said that the tribunal had "*handed down a reasoned decision in which they had considered, in detail, the arguments of the parties and had solved, in a final manner, the dispute between the parties concerning the admissibility of [the] request for a review.*" In doing so, and although the tribunal

[35] Guillaume Lemenez & Paul Quigley, *The ICDR's Emergency Arbitrator: Procedure in Action*, *available at* https://www.adr.org/aaa/ShowPDF%3Fdoc%3DADRSTG_004355.

[36] *See generally, ICC Rules, supra* note 25; American Arbitration Association, Rules of Arbitration, *available at* https://www.adr.org/aaa/faces/rules/searchrules?_afrLoop=88902031100465&_afrWindowMode=0&_afrWindowId=v4ar32r1m_1#%40%3F_afrWindowId%3Dv4ar32r1m_1%26_afrLoop%3D88902031100465%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dv4ar32r1m_83.

[37] Schedule 1(6), Singapore International Arbitration Centre (SIAC) Rules, *available at* http://www.siac.org.sg/our-rules/rules/siac-rules-2013#siac_schedule1; Article 32(3), Stockholm Chamber of Commerce (SCC) Rules, *available at* http://www.sccinstitute.com/dispute-resolution/rules/.

[38] Braspetro Oil Services Company v. The Management and Implementation Authority of the Great Man-Made River Project, Cour d'appel [Court of Appeal], Paris, Jul. 1, 1999 MEALEY'S INT'L. ARB. REP., No. 8 (Fr.).

had itself designated its decision as an 'order', the Court approached the issue by looking at the content of the tribunal's decision and not its actual designation.[39]

Similarly, in the case of the US Seventh Circuit Court of Appeals, *Publicis Communications and Publicis SA* v. *True North Communications*,[40] the Court was asked to enforce an order of a London Court of International Arbitration ("LCIA") tribunal requiring one of the parties to produce certain documents essential to the case. The Court disagreed on the contention that this was unenforceable. It held that refusing the enforcement of an award on such 'extreme formality' of a term applied is untenable.

Several courts have adopted this 'substance over form' principle in enforcing the will of arbitral tribunals. However, while this may be true, this requires constructive interpretation on part of the court, which could be avoided by merely amending the various rules in order to eliminate the possibility of misinterpretation in itself.

Lastly, the question of enforceability of an emergency arbitrator (in specific), under the New York Convention comes up. The underlying question is whether interim measures ordered by an emergency arbitrator may be enforced if they are not in fact 'final'? To answer this question, one needs to pose another question: can only 'final' awards be confirmed (or vacated) under the applicable national regime?

There are no straightforward answers to these questions, not least of all because different national courts have approached the broader issue of whether a tribunal's interim decision lacks finality for the purposes of enforcement in different ways. However, while there is a scarcity of case law with specific reference to emergency arbitrators, the adoption of the 'substance over form' principle has paved the way for similar interpretation of decisions of emergency arbitrators, as they essentially arise out of a contract between the parties involved.

In some jurisdictions, the position is relatively clearer. In Sweden, for example, a tribunal's interim measures, whether in the form of an order or award, are not enforceable through the Swedish courts and the party seeking the interim measures would need to approach the court for an enforceable decision.[41] It follows that an emergency arbitrator's interim decision would also not be enforceable through the national courts. In contrast, in other jurisdictions such as Switzerland[42] and Hong Kong[43] the relevant national legislation allows national courts to enforce interim measures ordered by a tribunal (although there is yet to be any definitive guidance from either jurisdiction as to whether the same would apply to an emergency arbitrator's decision).

India, on the enactment of the recommended amendments, would be one of the first countries to legislatively recognise emergency arbitrators.

7. Conclusion

The Indian scenario in relation to interim measures ordered by emergency arbitrators, and to complete enforcement of interim measures ordered by arbitral tribunals, in contrast to international scenario, is not very favourable. This has been sought to be reformed by the amendments recommended by the 246th Law Commission Report, which while being a leap in

[39] Amir Gaffari & Emmy Lou Walters, *The Emergency Arbitrator: The Dawn of a New Age?* 30.1 ARB. INT'L. 153, 153-163 (2014).
[40] Publicis Communication, et al v. True North Communications Inc., 206 F. 3d 725 (Mar. 14, 2000) (U.S.).
[41] Sec. 27, Swedish Arbitration Act (SFS 1999:116) (Swed.).
[42] Art. 183(2), Chapter 12, Federal Statute on Private International Law Act, 1987 (Switz.).
[43] Sec. 35, Hong Kong Arbitration Ordinance, 2011 (Cap 609) L.N. 38 of 2011 (H.K.).

the correct direction, has several flaws which have to be corrected in order to become completely effective.

Emergency arbitration is a very useful pre-arbitral mechanism, and with the inclusion of an emergency arbitrator within the definition of an arbitrator under Section 2(d) of the Act is imported into the Indian arbitration regime. In the opinion of the author, emergency arbitrators ensure that the purpose of the final arbitral award is not frustrated and in this end, should be adopted as the preferred form of pre-arbitral interim measures, over Section 9 of the Act. The Law Commission's recommendations, in the opinion of the author, should be adopted, after considering the changes proposed by various jurists, as they make India an arbitration-friendly country, with costs much lower than Singapore and France, *inter alia*. These recommendations and the efforts behind the 246th Report should be applauded.