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## EDITORIAL



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

# SEAT OF ARBITRATION AND INDIAN ARBITRATION LAW

*Loukas Mistelis**

International arbitration is a well-established mechanism for the settlement of cross-border commercial disputes. In many jurisdictions, such as the United States, it is also an important mechanism for the settlement of specialist commercial disputes. In both domestic and international arbitration, the disputing parties wish to avoid national court adjudication either for reasons of ensuring a neutral and specialist international tribunal (international cases) or a forum which is more efficient or a subject-matter expert (domestic cases). In both instances, essential considerations for arbitrants are confidentiality (or at least a high level of privacy), the right to select an arbitrator with specialist knowledge, and the easier enforcement of arbitral awards.

## I. I. Seat of Arbitration: A Theoretical Debate with Practical Consequences

Many major cities and jurisdictions are competing to attract arbitration cases in their territory as it appears that arbitration contributes to the local economy: Singapore, Mauritius, London, Paris, New York and other cities are promoting themselves as arbitral seats with concerted marketing efforts. According to surveys[1] conducted by the School of International Arbitration, the seat of arbitration is quite an important consideration amongst the various choices parties to arbitration agreements have to make. This is a choice corporate lawyers have to make, often in consultation with outside counsel.[2] However, the most important choice is that of the law governing the contract: parties choose a law to make sure that their contract works but also have to plan for an escape route in case things go wrong (a sort of "pre-nuptial agreement"). It is no surprise that the choice of seat (and the choice of arbitration institution) captures the interest of lawyers. The most important factor influencing the choice of seat is the legal

* LLB, MLE, Dr. Juris, MCIArb, Advocate, Clive M. Schmitthoff Professor of Transnational Commercial Law and Arbitration, Centre for Commercial Law Studies, Queen Mary University of London; Member, Advisory Board, Indian Journal of Arbitration Law.

[1] QMUL School of International Arbitration and White and Case, *2010 International Arbitration Survey: Choices in International Arbitration, available at* http://www.arbitration.qmul.ac.uk/docs/123290.pdf; QMUL School of International Arbitration and PwC, *2006 International Arbitration Survey: Corporate Attitudes and Practices*, *available at* http://www.arbitration.qmul.ac.uk/docs/123295.pdf. *See also*, Loukas Mistelis, *Arbitral Seats: Choices and Competition,* KLUWER ARBITRATION BLOG (Nov. 26, 2010), *available at* http://kluwerarbitrationblog.com/2010/11/26/arbitral-seats-choices-and-competition/.

[2] QMUL School of International Arbitration and White and Case, *2010 International Arbitration Survey: Choices in International Arbitration,* at p. 9, 14, *available at* http://www.arbitration.qmul.ac.uk/docs/123290.pdf,.

infrastructure at the seat (62%), which includes the national arbitration law, the track record in enforcing agreements to arbitrate and arbitral awards in that jurisdiction, and its neutrality and impartiality. The law governing the substance of the dispute (46%) came second. Convenience is also an important factor (45%) including location, industry specific usage, prior use by the organisation, established contacts with lawyers in the jurisdiction, language and culture, and the efficiency of court proceedings. As with the choice of governing law, corporations are also focusing on practical issues – such as access and convenience – while the location of the relevant people involved in the arbitration and the recommendations of external counsel are the least important factors.[3]Cost is the most important aspect of general infrastructure that influences that choice of seat (42%), followed by good transport connections (26%) and hearing facilities (including translators, interpreters and court reporters) (21%). Respondents also listed safety and the absence of bribery as important factors. Efficiency and promptness of court proceedings are the most important aspects of the convenience of a seat (20%), followed by language (16%), good contacts with specialised lawyers operating at the seat (15%) and the location of the parties (11%). Cultural familiarity is also a factor (10%). Interestingly, previous experience of the seat is not a particularly important factor (7%), nor is the location of the arbitrators (6%).[4]

In the list of popular seats, London, Paris and Switzerland always feature very highly. What is particularly intriguing about these three popular seats is that none of them have adopted the UNCITRAL Model Law as their local arbitration law, but have consciously developed positive law with its own distinct features. The English Arbitration Act of 1996[5] is based on the residual jurisdiction of the English courts to support arbitral proceedings, respects party autonomy and also classifies its own provisions as mandatory or non-mandatory.[6] The French law of 2011[7] and the Swiss

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[3] *Id.*, at p. 17.

[4] *Id.*

[5]Arbitration Act, 1996, c. 23, (U.K.), *available a*t http://www.legislation.gov.uk/ukpga/1996/23/contents ["UKAA, 1996"]; Audley Sheppard, *English Arbitration Act 1966, in* CONCISE INTERNATIONAL ARBITRATION 977 (Loukas Mistelis ed. 2nd ed. Kluwer Law International, 2015).

[6] United Kingdom Arbitration Act, 1996, *Id.* § 4, Schedule 1.

[7] French Code of Civil Procedure, 1806, [Law 2011-48 of Jan. 13, 2011 on Reforming the Law Governing Arbitration], *available at* http://www.iaiparis.com/pdf/FRENCH_LAW_ON_ARBITRATION.pdf; Denis Bensaude, *French Code of Civil Procedure, in* CONCISE INTERNATIONAL ARBITRATION, 1133 (Loukas Mistelis ed. 2nd ed. Kluwer Law International, 2015).

Private International Law Act of 1987[8] distinguish between domestic and international arbitration and adopt a "hands-off" approach in relation to the role of the national courts. Those courts' jurisdiction is activated only when the parties so wish or there is a risk of denial of justice. However, they largely wait for arbitral tribunals to make a determination at the first instance. Both the French and Swiss Law provide full support for party autonomy.

Although it is commonplace that the UNCITRAL Arbitration Model Law, in its 1985 and 2006 versions[9] represents best international standards, in that it provides a clear and predictable system for court support and fully respects party autonomy, it appears that two thirds of arbitration cases are seated in non-Model Law countries. The UNCITRAL Model Law operates on the basis of territoriality: that the jurisdiction of courts is activated using the seat of arbitration as the only connecting factor. It is the view of this author that this is a rather unintended consequence of the Model Law drafting; the drafters wanted to have a clear provision of the (territorial) scope of application of the Law rather than intended to localize arbitration supervision and support. In particular, Article 1 of the Model Law clearly intended to provide for the instances in which the Law applies and in doing so, it is a unilateral conflict of laws rule, i.e. a self-limiting rule setting out the scope of application of the law. However, it may well be argued that the drafters did not intend to denounce the concept of delocalization.[10]

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[8] Federal Statute on Private International Law Act, 1987 (c. 12) (Switz.), [hereinafter Swiss PIL] *available at* https://www.swissarbitration.org/sa/download/IPRG_english.pdf; von Segesser & Anya George, *Swiss Private International Law Act, in* CONCISE INTERNATIONAL ARBITRATION, 1189 (Loukas Mistelis ed. 2nd ed. Kluwer Law International, 2015).

[9] Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), available *at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html; Stavros Brekoulakis, et al., *UNCITRAL Model Law on International Commercial Arbitration (1985/2006), in* CONCISE INTERNATIONAL ARBITRATION 835 (Loukas Mistelis ed. 2nd ed. Kluwer Law International, 2015).

[10] HOWARD HOLTZMANN & JOSEPH NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 1, 592-593, 826 (Kluwer Law International 1989). It appears that the delocalization debate did not play a major role in the UNCITRAL Model Law drafting. Quite to the contrary, the commentary clearly states that the seat of arbitration ("place" in the terminology of the Model Law) determines: whether the Model Law applies, whether courts of the place will supervise and/or assist the arbitration, whether the arbitration is international or not and also determines where the award is being made.

At the same time, it is undisputed that they also wished to achieve a high level of legal certainty as to the applicable law and this has been achieved.[11] Presently, 72 States and 102 jurisdictions have adopted the UNCITRAL Model Law.[12] However, it seems that the Model Law alone is not sufficient to establish a jurisdiction as a desirable seat of arbitration.[13] One cannot underestimate the importance of the local judiciary, legal and ancillary professions, and general infrastructure such as hotels, transport links and hearing rooms. In addition, sustained marketing through conferences, tax incentives and promotion through arbitration institutions also appear to be of significant value. And the competition is rather fierce!

One particular aspect of localization of arbitration relates to the exclusive jurisdiction of courts at the seat of arbitration to review arbitral awards. In this respect, parties to arbitration proceedings can typically only challenge an award before the courts at the place[14] of arbitration, assuming the courts at the place of arbitration consider the award "made" or "deemed to be have been made" in its territorial jurisdiction. National arbitration systems consider awards either domestic or foreign, with few systems offering the option of 'international awards', i.e. domestic awards unconnected to the place of arbitration and not subject to the law of the place of arbitration.[15] In this context, the seat of arbitration provides the absolute and exclusive connecting factor.

In the opposing camp, the delocalization supporters challenge the importance of the seat of arbitration and the relevance of the law and the courts over arbitral proceedings within their territorial jurisdiction. The supporters of delocalization challenge the importance of the seat on several grounds. In particular, the choice of seat is often a matter of convenience; the choice of seat is often determined not by the parties but by the arbitral institution they have selected; the choice of seat is often governed by

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[11] The scope of application is well established in Article 1 of the Model Law and this is confirmed largely by the relevant case law. *See*, UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 7, et. seq., *available at* http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf ["UNCITRAL Digest 2012"].

[12] *See* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (Jan. 28, 2016).

[13] The surveys cited in supra note 1 confirm that the three most important arbitral seats (London. Paris, Geneva and Zurich) are in jurisdictions which have not adopted the UNCITRAL Model Law.

[14] We use the terms (legal) seat and (legal) place of arbitration interchangeably to denote the connection of arbitration with the local law and the jurisdiction of local courts. The English Arbitration Act refers to set or juridical seat (section 3) while the UNCITRAL Model Law refers to place of arbitration.

[15] *See* the distinction in the French Arbitration Law 2011: actions against domestic awards pursuant Articles 1494 et seq.; actions against awards made in France in international arbitration pursuant Articles 1518 et seq.; actions against awards made abroad pursuant Articles 1525 et seq.

the desire for neutrality; and the role of the arbitral tribunal is transitory and the seat has no necessary connection with the dispute.[16]

The main argument against delocalized arbitration is that arbitration cannot operate in a legal vacuum and review of awards at the place of arbitration is a fair price to pay for predictability and certainty. At the very least, ultimately, the parties will expect the law to recognize and give effect to the tribunal's award. There are other areas where the support of the courts may be needed, e.g. to uphold and enforce the agreement to arbitrate, to appoint or remove arbitrators, and for interim relief in support of the arbitration process. National courts are often asked to support or intervene for these purposes. This is why arbitration cannot be fully delocalized from the national law.[17]

In fact, delocalized arbitration is self-regulatory arbitration. However, it must also be noted that delocalization relates usually either to the arbitration process or to the award, or both.[18] While the emancipation from the procedural law of the place of arbitration is now accepted[19] and most systems have very limited mandatory provisions relating to arbitral procedure, the enforcement of delocalized awards appears to be problematic- ultimately, the enforcement is controlled by national courts. However, at least French and US courts[20] (but also Austrian, Dutch and a few other courts) have

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[16] Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration,* 17 ARB. INT'L. 19 (2001), at 13. For a comprehensive summary. Loukas Mistelis, *Delocalization and its Relevance in Post-Award Review,* Queen Mary School of Law Legal Studies Research Paper No. 144/2013 (May 8, 2013), *available at* SSRN: http://ssrn.com/abstract=2262257 ["Mistelis-Delocalization"].

[17] William Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 I.C.L.Q. 21 (1983); Stewart Boyd, *The Role of National Law and the National Courts of England, in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 149 (Julian Lew ed. Kluwer Law International, 1986).

[18] Mistelis-Delocalization, *supra* note 16.

[19] Loukas Mistelis, *Reality Test: Current State of Affairs in Theory and Practice Relating to "Lex Arbitri,* 17(2) AM. REV. INT'L ARB. 155 (2006).

[20] Société Hilmarton Ltd v Société Omnium de traitement et de valorisation, Cour de cassation [Cass.] [Supreme Court for judicial matters], *(OTV)*, 121 Clunet 701 (1994) (Fr.); In re Chromalloy Aeroservices Inc and The Arab Republic of Egypt, 939 F Supp 907 (DDC 1996), XXII YBCA 1001 (1997) 1004; République arabe d'Egypte v Chromalloy Aeroservices Cour d'appel de P [CA] [Court of Appeal], Paris,, XXII YBCA 691 (1997) (Fr.).

enforced delocalized awards.[21] Switzerland has given foreign parties the option to contract out of any judicial review in limited circumstances.[22]

In most jurisdictions, delocalization in terms of review of awards at the seat of arbitration after the award has been rendered seems to be quite rare, if not even an endangered species. English law, US law, French law and Swiss law all provide for applications to set aside, annul, or vacate an award at the place where it was made. National systems may have different standards on the grounds for review and the ability of disputing parties to modify or exclude review.[23]

In respect of review of awards, the Model Law – and India is a Model Law jurisdiction – *fully and unequivocally* embraces territoriality. Application to set aside an award may only be brought at the courts of the place of arbitration (noting that the Model Law uses "place" rather than "seat"). It is widely accepted that the current system is satisfactory, certain and efficient.[24] It is clear that pursuant to Articles 1(2), 6 and 34(2) of the Model Law, an award may only be set aside at the place of arbitration, irrespective of where the hearings took place.[25] This sounds reasonable and certain, especially where the place of arbitration was agreed upon by the parties. If, however, there is no party agreement as to the seat, this will have to be determined or implied by various indicators, such as the place of hearings.[26] The UNCITRAL Model Law Case Digest provides an excellent summary of court decisions on these matters.[27]

The arguments given in support of exclusive review of awards at the place of arbitration are largely technical: the place of arbitration is certain and a certain place of challenge promotes efficiency. Proponents also submit that the seat of arbitration can

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[21] Ministry of Defense of the Islamic Republic of Iran v. Gould, 887 F.2d 1357, (9th Cir. 1989) (certificate denied); Iran Aircraft Industries and Iran Helicopter and Renewal Company v. AVCO Corporation, 980 F.2d 141 (2nd Cir. 1992).

[22] Swiss PIL*, supra* note 8 at Art. 192; Swiss Tribunal Fédéral, Dec. 21, 1992, GROUPEMENT D'ENTREPRISES FOUGEROLLE ET CONSORTS, BGE 118 I b, 562, 568 (Switz.).

[23] CHRISTOPH LIEBSCHER, THE HEALTHY AWARD, (Kluwer Law International 2003).

[24] William W. Park, *Why Courts Review Arbitral Awards in* FESTSCHRIFT FÜR KARL HEINZ BÖCKSTIEGEL, 591; Hans Smit, *Annulment and Enforcement of International Arbitral Awards: A Practical Perspective, in* LEADING ARBITRATORS GUIDE TO INTERNATIONAL ARBITRATION 591 (Lawrence Newman & Richard Hill eds., Juris 2008). *See* also, different approach, no need to challenge anywhere, is taken by Philippe Fouchard, *La portee international de l'annulation de la sentence arbitrale dans son pays d'origin*, (1997) REV. ARB. 329.

[25] *See, e.g.,* Court of Appeal of Singapore, PT Garuda Indonesia v Birgen Air, Mar. 6, 2002, [2002] S.L.R. 393, also at http://www.maldb.org/hpjlaw-275.html.

[26] Oberlandesgericht Düsseldorf [OLG] [provincial court of appeal], Mar. 23, 2000, CLOUT case no 374, 6 Sch 02/99 (Ger.).

[27] UNCITRAL Digest 2012, *supra* note 11 at Art. 34.

best assess all these procedural matters, irrespective of whether or not the parties or the proceedings have an association with the seat. It is further suggested that a challenge at the place of arbitration with a rather tight deadline after the award has been rendered ultimately promotes finality, while at the same time leaving ample windows for fairness controls.

## II. The Problems with the Review of Arbitral Awards in India

The vast majority of cases before national courts assume that only courts at the seat of arbitration have jurisdiction for setting aside proceedings. However, one can find few cases of national courts prepared to discuss or even assume jurisdiction for the review of awards, even if the arbitral award was not made within the jurisdiction. This has occasionally been the case in India, where it is possible to challenge an award even if it was not made in the jurisdiction but the law of the merits was Indian Law. In *National Thermal Power Corporation v. The Singer Company*,[28] there was an application in India to set aside an award made in London. The Supreme Court assumed jurisdiction for the challenge on the grounds that the contract was governed by Indian law. This case was decided under the (now much) older Indian Arbitration Act. It held

> *"The choice of the place of arbitration was […] merely accidental in so far as […] the choice was made by the ICC Court for reasons totally unconnected with either party to the contract.*
>
> *On the other hand, the contract itself is [full] of India and Indian matters. The disputes between the parties under the contract have no connection with anything English, and they have the closest connection with Indian laws, rules and regulations. Any attempt to exclude the jurisdiction of the competent courts and the laws in force in India is totally inconsistent with the agreement between the parties."*[29]

There are similar decisions under the former Indian Arbitration Act, e.g. in *Venture Global Eng'g v. Satyam Computer Serv. Ltd.*[30] Two more recent Indian cases manifest confusion as to the relevance of the seat and when arbitral awards are deemed domestic.

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[28] National Thermal Power Corporation v. The Singer Company (1992) 3 S.C.C. 551 (India).
[29] *Id.*
[30] Venture Global Engineering v. Satyam Computer Serv. Ltd. (2008) 4 S.C.C. 190 (India) ["Venture Global"]; Alok Jain, *Yet Another Misad-Venture by Indian Courts in the Satyam Judgment?*, 26(2) ARB. INT'L, 251-280 (2010).

While *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc.*[31] propounds that both the court located at the chosen seat and the court that has subject matter jurisdiction under the Arbitration and Conciliation Act 1996 (a rather "third way" quite controversial view) can review the award, a subsequent decision of the Bombay High Court in *Videocon Industries Ltd v JMC Projects (India) Ltd*[32] has revived the controversy again to the forefront by refusing to exercise jurisdiction (to support the arbitration in an application for provisional measures) in a case with seat in Bombay. Though the decision, being *per in curiam,* cannot be regarded as a shift in the position of law, it does serve to add to the uncertainty among parties to arbitration.

Interestingly, in India parties cannot by agreement confer jurisdiction upon a court that would not otherwise have jurisdiction under the Code of Civil Procedure of 1908.[33] These norms also apply to arbitration matters. Pursuant to the Arbitration and Conciliation Act, the courts of the seat (more precisely, in an arbitration covered by Part I of the Act) have exclusive jurisdiction for setting aside of the award (and the text is identical to that of the UNCITRAL Model Law). The relevant court as per the Act section 2(1)(e) is as follows:

> *"court means the principal civil court of original jurisdiction in a district, an includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court or any Court of Small Causes."*

In other words, there is scope for interpretation of which courts are relevant and there is scope for confusion. *BALCO* is supposed to have settled any controversy as to this interpretation by looking into whether Part I of the Act is based on seat or based on subject matter. The Court wanted to strengthen the importance of the seat and of party autonomy, and noted that even in a case of a neutral seat the courts of the seat will have supervisory jurisdiction over the arbitration. But it seems that the High Court of Bombay

[31] Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc., (2012) 9 S.C.C. 552 (India). ["BALCO"].
[32] Videocon Industries Limited v. Union of India, A.I.R. 2011 S.C. 2040 (India) ["Videocon"].
[33] Modi Entertainment Network v WSG Cricket Ptr Ltd. (2003) 4 S.C.C. 341, at 351 (India).

in *JMC*[34] has taken a step backwards. Moderate commentators would take the view that the Indian Act has a *lacuna* (as to definition of court) that has to be addressed.

In the second case *Aargus Global Logistics v NNR Global Logistics,*[35] the background included an ICC clause without a specified seat. The ICC fixed Kuala Lumpur as a seat despite a disagreement between the parties. The Indian courts assumed jurisdiction to hear a petition from the successful party in the arbitration to have the award enforced, and the unsuccessful party filed an application under section 34 to have the award set aside. The Court admitted the setting aside application by relying on *Bhatia International*[36] and *Venture Global*.[37] It also stated that the application would not have been admitted if the award was foreign and that this would only be relevant if the agreement was executed after 6 September 2012. Admittedly, a bizarre argument, that *Balco* made law of inter-temporal application, i.e. modified the Act! This strange proposition, however, originates not in the second judgment but in *BALCO* itself.

It is my considerate view that, unless these two cases can be seen as "teething problems" while the lower courts appreciate the consequences of the Supreme Court decisions, we have a serious problem about national courts and arbitration in India as well as in some of its neighbouring jurisdiction.

Of course, on the other end of the spectrum we have cases from other jurisdictions (not UNCITRAL Model Law inspired) like *Putrabali v Rena*:[38]

> *"An international arbitral award, which does not belong to any state legal system, is an international decision of justice and its validity must be examined according to the applicable rules of the country where its recognition and enforcement are sought."*

As a matter of fact, forum shopping is then easier when an award has multiple nationalities.[39] This would be the case if the parties choose a particular seat but subject the arbitration to a different law, and possibly the subject matter of the dispute to yet

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[34] Videocon, *supra* note 32.
[35] Aargus Global Logistics v NNR Global Logistics, 2012 VIII A.D. (Delhi)125 (India).
[36] Bhatia International v. Bulk Trading, (2002) 4 S.C.C. 105 (India).
[37] Venture Global, *supra* note 30.
[38] Cour de cassation[Cass.] [Supreme Court for judicial matters], Jun. 29, 2007.
[39] Hans van Houtte, *International Arbitration and National Adjudication*, in HAGUE-ZAGREB ESSAYS ON THE LAW OF INTERNATIONAL TRADE 325 (Voskuil & Wade eds. Kluwer Law International 1983). See also Petar Šarčević, *The Setting Aside and Enforcement of Arbitral Awards under the UNCITRAL Model Law*, in ESSAYS 176, 180-1 (Šarčević ed).

another law. While party autonomy is paramount in arbitration, excessive creativity in the drafting of clauses may lead to unintended consequences.

Finally, if one is to consider the view suggested by Paulsson that review of awards at the place of arbitration only matters if the awards is challenged for internationally accepted grounds, i.e. grounds listed in Article V(1)(a) to V(1)(d) of the New York Convention, and any setting aside of awards on purely domestic grounds should be irrelevant,[40] it is also important to appreciate potential for forum shopping around or even after the challenge of awards.

## III. The 2015 Arbitration Act: The Way Forward?

On 23 October 2015, India adopted the Arbitration and Conciliation (Amendment) Ordinance 2015[41] (the "Ordinance") by exercise of an extraordinary power granted to the President. The Ordinance very clearly attempts to limit or even restraint judicial intervention in arbitration as well as deal with the major issue of delays in actions relating to arbitration. The Ordinance was approved by both houses in the Indian Parliament and received the President's assent on 31st January, 2015. After this, it was notified in the Gazette of India and came into force immediately. There are many points one could make in relation to this new text from its applicability and the distinction

[40]Jan Paulsson, *The Case for Disregarding LSAs (Local Standard Annulments) under the New York Convention*, 7(2) AM. REV. INT'L ARB. 107-114 (1996); Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, 9(1) *ICC* INT'L CT. ARB. BULL., 14, 19 (1998); Coutelier, Loic E., *Annulment and Court Intervention in International Commercial Arbitration* (August 15, 2011); *available at* SSRN: http://ssrn.com/abstract=1957278 or http://dx.doi.org/10.2139/ssrn.1957278. *See also,* Direction Generale de l' Aviation Civile de l'Emirat de Dubai v. Internationale Bechtel, Paris Court of Appeal Paris Court of Appeals, 29 September 2005.

[41] The Arbitration and Conciliation (Amendment) Ordinance, No. 9 of 2015, INDIA CODE (2015).

between domestic and international arbitrations. Here, the focus will be on issues of seat and review of awards.[42]

At first glance, some clarifications and improvements brought about by the Act in delimiting the role of national courts are very welcome:

- The Act requires the courts to refer parties to arbitration if an arbitration agreement is found to exist. This is a *prima facie* test in clear support of *kompetenz-kompetenz*. q
- The Act also defines the power to appoint arbitrators: the Supreme Court or the High Court can delegate this task to any person or institution, thereby officially recognising and supporting institutional arbitration. The appointment process is to be completed by the courts within 60 days.
- Courts may grant interim relief in support of arbitration prior to the commencement of the arbitration, provided the parties actually initiate arbitration within 90 days from the date of obtaining interim relief from the court. This power is available if the arbitration tribunal cannot grant effective protection.
- Interim relief granted by arbitration tribunals is enforceable by the courts in India.

The Act also takes account of the Supreme Court decision in *BALCO*;[43] now, the Act expressly recognises that parties to foreign arbitration proceedings can seek the assistance of Indian courts for interim measures and for the taking of evidence, unless they specifically exclude the jurisdiction of the Indian courts to provide such assistance.[44] There is, however, a reciprocity requirement: Indian courts will provide support if the arbitration is seated in a country or territory officially recognised by India (for the purposes of the Act).

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[42] Already some comments have been published in relation to the new Ordinance. See, e.g., Vikas Mahendra, *Arbitration in India: A new beginning,* KLUWER ARBITRATION BLOG (Nov. 6, 2015), *available at* http://kluwerarbitrationblog.com/2015/11/06/arbitration-in-india-a-new-beginning/ (last accessed on 14 November 2015); Lacey Yong, *India amends arbitration statute*, KLUWER ARBITRATION BLOG (Oct. 26, 2015), *available at* http://globalarbitrationreview.com/news/article/34253/india-amends-arbitration-statute/ (last accessed on 14 November 2015).

[43] BALCO, *supra* note 31.

[44] In this way the Ordinance deals with problems relating to Marriott International Inc. v Ansal Hotels Limited, A.I.R. 2000 Delhi 337 (India).

Moreover, in further support of the principle established in *BALCO*, the Act makes it clear that Indian courts cannot review and set aside awards made outside India and awards that are deemed to be foreign.[45]

It seems that the Act is making a genuine and mostly successful attempt to modernise the Indian arbitration law by realigning fully with the Model Law. In order to achieve this objective of modernisation and clarification, the Ordinance works in two directions. *First*, it makes the text of the legislation clearer and less ambiguous. *Second*, it clarifies and limits the role of national courts in relation to domestic and foreign arbitral proceedings. It is the clear objective of the Ordinance that the courts will have to contribute to the efficiency of the arbitration process and their overall role is of a supporting nature.

Most importantly, the Act also takes a largely territorial approach. It establishes that the jurisdiction of the Indian courts is activated when the arbitration is seated in India and some jurisdiction is also available to support foreign arbitration proceedings dealing with the problems generated from the *Marriott v Ansal* case. In addition to territorial jurisdiction, some supportive jurisdiction is now available subject to specified limitations. The Act is perhaps not the most daring law reform but it is undoubtedly a significant legal development in support of arbitration. What remains now is to have the courts applying the Act in the way it has been envisaged by the drafters.

[45] The Ordinance also limits public policy as a ground to set aside awards and resist enforcement. What is needed now for public policy to be activated is that the making of an award is vitiated by fraud or corruption; the award violates the fundamental policy of India and; the award is opposed to basic notions of justice or morality. The Ordinance further clarifies that the court cannot review an award on merits while considering whether the award is opposed to the fundamental policy of India.

# MEMOIRS OF A PERSONAL JOURNEY THROUGH INDIAN ARBITRATION LAW

*Dr. Abhishek Singhvi**

Before being designated as a senior advocate in 1993, I gained invaluable experience of the discipline, precision and in-depth preparation involved in international commercial arbitration. In an arbitration located in London, a Danish firm Volund Milijotecknik ["*Volund*"] had sued the Government of India ["GoI"]. The latter had cancelled its contract with *Volund* for supply of a garbage incineration plant intended to convert Delhi's garbage into electricity.[1] Large amounts were paid to *Volund*, equipment was supplied but alas, not a single unit of electricity was ever generated. The reason was an elementary and striking one, but through the negligence of some GoI officers who had negotiated and evaluated the contract, had escaped the attention of GoI. The quality of Danish garbage was simply far superior to Indian garbage and was also carefully sifted by end consumers before dumping in Denmark, in stark contrast to India! Consequently, the calorific value required for incineration just did not exist in Delhi's garbage. Predictably, GoI lost the case since (a) *Volund* had drafted a one sided contract, in its own favour, which was signed hurriedly by GoI; (b) *Volund* had several disclaimers against GoI regarding prior due diligence; and (c) hardly any representation or warranty could be implied against *Volund*. A powerful and eminent arbitral panel, headed by Lord McKenzie Stuart, former President of the European Commission, held 2-1 against GoI (former Chief Justice of India R. S. Pathak, the GoI nominee, dissenting).

Barely over 30 years old and opposed by an eminent silk from London, I learnt how true commercial arbitrations ought to be conducted and, more importantly, how everything I witnessed was either missing or observed in the breach, in Indian arbitrations.

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* Member of Parliament (India); National Spokesperson, Indian National Congress; Senior Advocate, Supreme Court (India); former Additional Solicitor General of India; former Chairman, Parliamentary Committee on Law & Justice (India).

[1] Available on file with the author. The arbitration has also been disclosed in Lok Sabha proceedings of August 20, 1991 as "A Refuse Incineration cum-Power Generation Plant, with research and development ramifications, was set up in Delhi in 1987 with Danish assistance. The project was installed on a turn-key basis by a Danish company who were responsible for the design, supply of plant and equipment, and providing the requisite technology. The company used its own experience and expertise in assessing the calorific value of Delhi's garbage and designing the plant. The turn- key contractor failed to demonstrate successful operation of the plant. In July, 1990, the Government decided to wind up the project, and compensation for the full project cost has been claimed from the Danish company. Arbitration proceedings have been initiated in the case.", *available at* http://parliamentofindia.nic.in/ls/lsdeb/ls10/ses1/03200891.htm.

These practices are known to everyone but sadly, 25 years later, are still missing in Indian arbitrations. They include sitting from 9 am to 5 pm; finishing final arguments in one go, in blocks of 1 or 2 weeks; never cancelling or changing a date; imposing strict time limits for each segment of oral arguments; invariably commencing oral arguments immediately after concluding witness examination; using computer technology, instant transcripts and steno typists whose shorthand simultaneously converts to readable text on screens; and, last, but not the least, costs being actual and real costs, of both the arbitral panel as also the winning side being borne by the losing party.

While I have waited unsuccessfully for these to happen in domestic Indian arbitrations over the last quarter century, the irony is that these practices are routinely observed even in India-located international arbitrations, frequently involving Indian judges and lawyers, working with foreigners. This shows that when the stakes are high and we are forced to work as per international standards, we can do it and do it quite well.

Undoubtedly, the costly nature of the aforesaid process itself generates discipline, commitment and a sense of responsibility among each stakeholder. Barely had the *Volund* arbitration started, the English silk opposing me told me during a lunch break that his name stood approved for High Court judgeship, which, even now, is a prestigious appointment in the UK and was much more so at that time. He told me that he had even risked losing the judgeship offer, though ultimately he managed to obtain a short deferment of his appointment, only so that he could complete the *Volund* case. Having invested so much time and money in it, he said, his client could not afford for him to walk away in its midst or alternatively, he could be sued for professional irresponsibility! Such a sense of professionalism is still absent in India's domestic arbitrations. The manner in which arbitration laws have been applied in Indian courts has posed further challenges to the efficacy of arbitration in the country.

Even before the aforesaid independent handling of an actual major international commercial arbitration, I was privileged to be associated with the second[2] and the final[3] ladders (six judgements in total, from the single judge bench of the High Court, to the Division Bench, and ultimately to the Supreme Court) in the series of litigation between

[2] General Electric Co. v. Renusagar Power Co. Ltd., (1987) 3 S.C.R. 858 (India) [hereinafter "*Renusagar II*"].
[3] Renusagar Power Co. Ltd. v. General Electric Co., A.I.R. 1994 S.C. 860 (India) [hereinafter "*Renusagar III*"].

Renusagar Power Company ["*Renusagar*"] and General Electric Company ["*GE*"]. As an assisting Counsel in a large team led by my father, Dr. L.M. Singhvi, representing *Renusagar*, we were opposed by eminent counsel like Mr. Nani Palkiwala and Mr. Shanti Bhushan.

In the first decision in the *Renusagar v. GE* series of cases,[4] it was held that the dispute was arbitrable and should go to the arbitral tribunal.[5] In *Renusagar II*, again involving 3 judgments, it was decided that interest upon interest compounded, as awarded to *GE* by the award, was not violative of Indian statutory law. Further, even if it did so violate, the Supreme Court held that that by itself this would not constitute a violation of Indian public policy under the prevailing Foreign Awards (Recognition and Enforcement) Act, 1961 ["FARE Act"]. Finally, in *Renusagar III*, after 3 more rounds of judgements, it was held that the obligation of *Renusagar* to make *GE* whole by making up all deficiencies in U.S. Dollar terms did not constitute a violation of the erstwhile Foreign Exchange Regulation Act and even if it did, it would not constitute a violation of Indian public policy under the FARE Act.[6] This would, it was hoped, "*mark the culmination of the protracted litigation arising out of a contract entered into by the parties on August 24, 1964 for the supply and erection of a thermal power plant at Renukoot in District Mirzapur, U.P.*"[7]

*Renusagar* lost all 3 rounds, totaling to 9 adverse judicial pronouncements. *First*, I believe that the *Renusagar v. GE* judgments constituted a classic case of 'hard cases allowed to make bad law'. Clearly, the then Indian common law on interest, and especially on interest upon interest, as contained in the Code of Civil Procedure of 1908 and the Indian Interest Act of 1978, either frowned upon interest upon interest compounded or provided for far more conservative interest regimes.[8] But the sequence of events in the *Renusagar v. GE* cases reflected the wilful defiance of *Renusagar* in paying any interest upon large sums of interest; the interest itself was withheld for decades by *Renusagar* from *GE*. However, the withheld sums were clearly limited to unpaid interest, and all principal had been paid. The Court viewed *Renusagar* as an empowered and wealthy entity who was violating commercial ethics by retaining large sums of *GE* money, which comprised accumulated unpaid interest, and not paying further interest on

[4] Renusagar Power Co. Ltd. v. General Electric Co. & Anr., (1985) 1 S.C.R. 432 (India) [hereinafter "*Renusagar I*"].
[5] *Id.* at ¶ 64.
[6] *Renusagar III*, *supra* note 3, at ¶¶ 93, 99.
[7] *Renusagar III*, *supra* note 3, at ¶ 1, opening sentence by S. C. Agarwal, J.
[8] *See generally* The Interest Act, No. 14 of 1978, §3, INDIA CODE (1978); CODE CIV. PROC., §34.

the latter. To punish *Renusagar* for its questionable conduct, the courts adopted an artificially narrow and high threshold for interpreting the phrase "public policy" and restricted it to the old classic unconscionable public policy heads, akin to prostitution, wagering and betting contracts, etc. Effectively, the judgments reduced the public policy exception to vanishing point under the FARE Act since hardly any commercial contract or arbitral award would involve that degree or nature of unconscionability as contemplated by *Renusagar II* and *Renusagar III*. *Second*, the decisions illustrated the general tendency of Indian courts to lean in favour of validity of international arbitral awards and limit substantive merit-based interference to a rarity. The Supreme Court set a different standard for the scope of 'public policy' in foreign awards by holding that:

> "*..even if it be assumed that unjust enrichment is contrary to public policy of India, Renusagar cannot succeed because the unjust enrichment must relate to the enforcement of the award and not to its merits in view of the limited scope of enquiry in proceedings for the enforcement of a foreign award under the Foreign Award Act.*"[9]

Ironically, the same principle of hard cases making bad law, manifested itself in the reverse direction in *ONGC v. Saw Pipes*[10] ["*Saw Pipes*"], a case with which I was not associated. The new Arbitration and Conciliation Act of 1996 ["1996 Act"] had come into force in India and at several arbitration conferences, I experienced a growing dissatisfaction with and criticism of the fact that while the old law permitted judicial scrutiny and rectification of suspicious (even tainted) awards arising out of the not so professional Indian arbitral structure, the 1996 Act, replicating the UNCITRAL model, imparted *undesirable* finality, conclusivity and unchallengeability even to such tainted and infirm awards.

Along came *Saw Pipes* and since Justice Shah felt uncomfortable with the award, he distinguished *Renusagar II* in the reverse direction. Since the phrase "public policy" in the old FARE Act was identical in all material respects with the relevant Section 34 of the Arbitration and Conciliation Act, 1996 ["new Act"], the identical phrase "public policy" could hardly be interpreted differently. But finding conclusivity of suspect awards to be indigestible and unacceptable, *Saw Pipes*, through Justice Shah,

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[9] *Renusagar III*, *supra* note 3, at ¶ 93.
[10] O.N.G.C. v. Saw Pipes, A.I.R. 2003 S.C. 2629 (India).

(a) effectively interpreted the same phrase "public policy" radically differently for domestic arbitrations as opposed to foreign-seated international commercial arbitrations;

(b) achieved a result for domestic arbitrations diametrically opposite to the rationale for enacting the 1996 Act itself viz. highly circumscribed judicial scrutiny *even in domestic awards;*

(c) Brought in the same, if not the even more liberal regime of interference based upon "patent illegality", no different and perhaps even more liberal than the "error apparent on the record" bugbear which had plagued Indian arbitration for over 150 years and ultimately led to enactment of the 1996 Act.

The Court went beyond the standard in *Renusagar III* to hold that:

> "[…] *the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar's case, it is required to be held that the award could be set aside if it is patently illegal. Result would be - award could be set aside if it is contrary to: -*
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> *(a) fundamental policy of Indian law; or*
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> *(b) the interest of India; or*
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> *(c) justice or morality, or*
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> *(d) in addition, if it is patently illegal.*
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> *Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."*[11]

The first arbitration case actually argued by me in court, which got me name, fame (and some money), was *NTPC v. Singer* ["*NTPC*"].[12] *NTPC*'s entire case was that despite the parties having agreed to a London-based arbitration, Indian courts would

[11] *Id.*

[12] National Thermal Power Corporation v. The Singer Co., A.I.R. 1993 S.C. 998 (India); National Thermal Power Corporation v. The Singer Co., 1991 (1) Arb. L. R. 313 (Delhi) (India); National Thermal Power Corporation v. The Singer Co., 1990 (2) Arb. L.R. 1 (Delhi) (India).

have jurisdiction to pass orders controlling the arbitration even during on-going arbitral proceedings. This was built upon (a) the peculiar wording of the contractual clause in that case which said "*the courts of Delhi shall have exclusive jurisdiction*" and (b) the anachronistic and *sui generis* Section 9 of the FARE Act which read:

> "*9. Saving. Nothing in this Act shall-*
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> *(a) prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Act had not been passed; or*
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> *(b) apply to any award made on an arbitration agreement governed by the law of India*."

Justice D.P. Wadhwa, sitting as in charge of the original side at Delhi High Court, after hearing my father (assisted by me) for *NTPC* and Mr. D.C. Singhania, for *Singer*, held that only English courts could interfere.[13]

By the time the matter reached the Division Bench, headed by Justice B.N. Kirpal, my father's multiple preoccupations led him to lose interest in the case and *NTPC* persisted with me alone. I argued the appeal for over two weeks and Justice Kirpal, though an aggressive and vocal judge, heard me patiently. He even commended the high quality of an article published by me at that time which espoused non-interference by Indian courts in the arbitral process. The article had been attached by Mr. Singhania to his written submissions! I could only plead that no estoppel can operate against counsel!

The clauses of the contract were loosely drafted and helped my case. However, since no court had till that time been able to digest the bizarre consequence that a London located arbitration could be controlled, in all aspects of conduct of arbitral proceedings, by an Indian court, the Division Bench dismissed *NTPC*'s challenge.[14]

*NTPC* sought written opinions from Justice Deshpande and myself regarding feasibility of an appeal to the Supreme Court. Both opined in the affirmative, though I said that concurrent losses made success difficult and yet I felt it in my bones that the peculiar wording of the clause gave us a chance. Justice Deshpande, who had urged *NTPC* to engage my services for the case in the first place, insisted that I should be allowed to conduct even in the apex court. Barely over 31 years old, not a designated

[13] *Id.* at ¶¶ 24-26.
[14] *Id.* at ¶¶ 36, 38.

senior and with two losses under my belt, I was uneasy and queasy regarding attribution of a further failure in the apex court. So, I myself suggested having some eminent senior advocate lead the apex court battle and *NTPC* engaged Mr. Shanti Bhushan and me to conduct the case.

I distinctly remember that the matter was argued for over 2 days in Court No. 5 of the Supreme Court before a bench headed by Dr. Justice Thommen. Mr. S.K. Dholakia led Mr. Singhania and *Singer*. After Mr. Bhushan and Mr. Dholakia had finished, the case was evenly balanced. Only the afternoon session was remaining and Mr. Bhushan started his rejoinder since the case had to be closed by 4 p.m. that day. Sometime before 3 p.m., Justice Thommen, who had seen my active and vocal assistance of Mr. Bhushan over the last two days, said that since the bench had heard him (i.e. Mr. Bhushan) at length, they would not mind hearing the "young man" who had conducted the case before the Division Bench of the Delhi High Court. It was very gracious of the judges to do that and even more gracious of Mr. Bhushan to immediately agree and sit by my side, and encourage me as I wound up the case over the last hour.

The Bench reserved and, lo and behold, when the judgement came, it reversed both the prior orders. Justice Thommen pitched the decision on my central theme that arbitration cases have to be decided on the peculiar wording of the clause in each case and that the no-one-size-fits-all approach is appropriate.[15] He held that if the parties reposed faith in Delhi courts with such specific language, then they had to be relegated there and nowhere else.[16] He invoked Section 9 of the FARE Act strongly since, coupled with that contractual clause, it made the Delhi courts and Indian law the controlling law of the arbitration, irrespective of the *lex fori* i.e. irrespective of the law of the seat which was English law.[17] The Court found that the express intention to be bound by Indian law suggested that:

> "*the governing law of the contract (i.e., in the words of Dicey, the proper law of the contract) being Indian law, it is that system of law which must necessarily govern*

[15] *Id.* at ¶¶ 14-17.
[16] *Id.* at ¶¶ 19, 42.
[17]The Foreign Awards (Recognition and Enforcement) Act, No. 45 of 1961, § 9, INDIA CODE (1961). "Nothing in this Act shall … (b) apply to any award made on an arbitration agreement governed by the law of India".

*matters concerning arbitration, although in certain respects the law of the place of arbitration may have its relevance in regards to procedural matters*."[18]

A storm broke out and *NTPC v. Singer* was criticized severely by experts and learned authors everywhere. One such severe critic was Jan Paulsson, a renowned global arbitration expert. At a conference in Delhi, he and I had a face off. I consistently maintained that the approach of leaning in favour of judicial non-interference in the conduct of foreign located arbitrations is favourable *generally*, but is subject to the paramountcy of the intention of parties and said that *NTPC v. Singer* was a case where the court did nothing more than enforcing that intention.

At that time, Mr. P.C. Rao, then Law Secretary of GoI, and a relentless crusader for reform of arbitration law, found himself in a corner. Due to legislative delays, the new arbitration law was continuously struggling to be born while his retirement date was fast approaching (upon which he took up a post on the International Tribunal for the Law of the Sea w.e.f. October 1, 1996, where he still serves!)[19]. Just before his retirement, he got the 1996 Act promulgated through an Ordinance. Shortly before that, he telephoned me and sought my opinion about what to do with the *NTPC* decision, which he saw as a huge anomaly in his adoption of the UNCITRAL Model Law on International Commercial Arbitration, 1985.[20] I told him that he simply had to ensure that nothing resembling Section 9 of FARE Act should find its way into the new law. Hence, the new Act brought forth the permanent exorcism of the Section 9 paradigm from Indian law.

Despite several other intervening arbitration cases, especially in the Delhi High Court, a troika of significant recent apex court judgements is all that I have space for in this personal journey. But prior to that, I played a role in *Dresser Rand v. Bindal Agro Chem*.[21] The case involved an interesting but badly drafted arbitration agreement, which ultimately yielded only a short working order of the apex court (but no legal principle) doing indirectly what Section 5 of the 1996 Act says should not be done directly i.e. it

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[18] *Supra* note 18 at ¶ 42.

[19] Profile of ITLOS Judge P. Chandrasekhara Rao, *available at* https://www.itlos.org/the-tribunal/members/judge-p-chandrasekhara-rao/.

[20] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985: WITH AMENDMENTS AS ADOPTED IN 2006 (Vienna: United Nations, 2008), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

[21] Dresser Rand S.A. v. Bindal Agro Chem Ltd. and Anr., A.I.R. 2006 S.C. 871 (India).

restrained parties from proceeding further with a Paris-based international arbitration while not directly injuncting the tribunal![22]

That is also the error which lies at the base of *Bhatia International v. Bulk Trading*[23] ["*Bhatia*"] (a case with which I was not associated), though it has been compounded manifold by a catena of High Court judgements misapplying *Bhatia*. I have always believed that the core of the *Bhatia* principle has validity and resonance i.e. that Indian court's interference under Part I of the 1996 Act[24] should be rare and limited to the temporary preservation of the subject matter of the arbitration to ensure that the arbitration itself and/or the resultant award does not become infructuous. *First*, the *Bhatia* principle was never intended to impede, obstruct or injunct the conduct of foreign-based arbitration itself. *Bhatia* itself involved such an injunction to prevent goods from being dissipated from an Indian port. *Second*, *Bhatia's* real ratio lies in paragraph 32 of the judgement, which holds that it is easy, not only expressly but also *impliedly,* to exclude Indian court jurisdiction. The Court found that:

> "*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. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.*"

*Bhatia* nowhere suggests that Indian courts, without regard for the need to preserve the subject matter, can or should give injunctions arresting or delaying the very conduct of foreign arbitrations.

*Bharat Aluminium Co & Ors. v. Kaiser Aluminium Technical Service Inc* .[25]["*BALCO*"] gave me a chance to expand on this theme before a Constitutional Bench of the Supreme Court and, as few realize, to *de facto* succeed only on this narrow thrust of my argument while losing the case *de jure*. I was the only counsel in *BALCO* who adopted a hybrid and nuanced stance. I said, *first*, that the core of *Bhatia*, as stated above, should be preserved and if limited to paragraph 32 as above, it should not be overruled. *Second*, I argued in the alternative, that even assuming *Bhatia* was decided wrongly, the Court in *BALCO* had to

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[22] *Id.* at ¶¶ 28, 40.
[23] Bhatia International v. Bulk Trading S.A., A.I.R. 2002 S.C. 1432 (India).
[24] The 1996 Act is divided into two parts. Part I contains a complete code for arbitration based on the UNCITRAL Model Law. Part II is limited to enforcement of foreign awards.
[25] Bharat Aluminium Co. & Ors. v. Kaiser Aluminium Technical Service Inc., (2012) 9 S.C.C. 552 (India).

ensure that parties must be able to preserve the subject matter while arbitration is ongoing; else the final award may become unexecutable on account of acts and omissions which will remain unpoliced and unchecked during the arbitration process. I repeatedly gave the example of a hypothetical fort in Rajasthan. I said that if such fort was the subject matter of dispute, Indian courts must have the power to injunct its multiple sales in the interim while arbitration in relation to the fort is ongoing in London. *Third*, I added that it is practically unworkable and unfeasible to suggest that, to prevent such alienation and encumbrance, a party could *only* apply to an English court. By the time such an interim order will be obtained in the U.K. and brought for enforcement in India, the property would have been sold multiple times. I therefore propounded a nuanced restatement of *Bhatia*, not its whole scale rejection, to the effect that *even in foreign based arbitrations, Indian courts must be imparted some jurisdiction to preserve the subject matter, temporally and spatially limited in duration and scope, purely in aid of the main arbitration and never to delay, injunct or arrest the arbitral conduct itself, otherwise the arbitration itself would become futile and infructuous.*

*Fourth*, I argued, again in the alternative, that if Part I of the 1996 Act is excluded simpliciter, an aggrieved party would be rendered completely remediless while the subject matter of the arbitration itself could be dissipated or alienated under his nose. Hence, if the Constitutional Bench, I argued, intended to exclude Part I and overrule *Bhatia*, it must, on the principle of avoiding a remediless situation, allow a suit purely for interim relief to deal with the above specific paradigm. *Lastly*, and again in the alternative, I argued that if all the above is unacceptable to the Court, it should apply the doctrine of prospective overruling, since hundreds of cases and thousands of parties across India, had arranged their affairs on the basis of the prevailing *Bhatia* principle as followed by its manifold progeny. These parties, I argued, should not be penalized by the apex court's new-found wisdom in *BALCO*.

I have no doubt that the pragmatic force of the "remediless" paradigm affected and heavily influenced the apex court's ultimate decision. Though the judges felt that a suit for interim relief alone could open floodgates of litigation (and hence rejected my argument), they introduced an even more powerful caveat than that I had asked for i.e. they made the judgement not merely prospective but went as far as to apply it only to agreements entered into after the date of the judgement!

*Renusagar III* and *BALCO* both evocatively validate the "realism" theory of law, enunciated forcefully by American jurist Karl N. Llewellyn in his famous work "The Bramble Bush".[26] The theory is nothing but human psychology at work- that judges are humans first and judges later. They invariably first arrive at their sense of justice of the case and will thereafter, while stretching or adapting the law for consistency and future workability, ensure that the latter fits the former and not vice versa. *Renusagar III* and *BALCO* are clear and strong examples, amongst many others, of this overriding characteristic of judge-made law.

*Enercon (India) Ltd. v. Enercon GMBH*,[27] the second of the recent troika involving me (and the author of the troika, Justice Nijjar) was a half victory. It illustrated the basic principle that after decades of international arbitration jurisprudence, involving large teams of in-house personnel, outsourced experts and plenty of precedential guidance, arbitration clauses continue to be drafted most shabbily and clumsily. Witness this clause—

> "*All disputes, controversies or differences which may arise between the Parties in respect of this Agreement including without limitation to the validity, interpretation, construction performance and enforcement or alleged breach of this Agreement, the Parties shall, in the first instance, attempt to resolve such dispute, controversy or difference through mutual consultation. If the dispute, controversy or difference is not resolved through mutual consultation within 30 days after commencement of discussions or such longer period as the Parties may agree in writing, any Party may refer dispute(s), controversy(ies) or difference(s) for resolution to an arbitral tribunal to consist of three (3) arbitrators, of who one will be appointed by each of the Licensor and the Licensee and the arbitrator appointed by Licensor shall also act as the presiding arbitrator.*"

Clearly a lesson in how arbitration clauses ought not to be drafted! I succeeded in the herculean task, on behalf of the foreign party, of persuading the apex court that sufficient and basic *intent to arbitrate* could be gleaned and extracted from this clause. However, on the second part we lost, viz., that though we were able, though just about, to spell out intent to arbitrate, there was no material to imply an exclusion of Part I, and

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[26] KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES TO LAW AND LAW SCHOOLS (2008).
[27] Enercon (India) Ltd. & Ors. v. Enercon G.M.B.H. & Anr., A.I.R. 2014 S.C. 3152 (India).

hence Indian courts' jurisdiction could not be excluded. Given the bizarre language of the agreement and the fact that the agreement was pre-*BALCO*, I think the judgment is supportable. Shades of *NTPC v. Singer* are seen here, leading, not unjustifiably, to contractual text-based interpretation, even where the text is completely flawed!

*Reliance Industries v. Union of India*[28] ["*Reliance I*"] was the third of the recent troika and I enjoyed conducting it for the winning party. It definitively settled the Part I controversy and clearly held, perhaps for the first time, that designation of a foreign seat *automatically* excludes Part I altogether, rendering Indian courts completely without jurisdiction. The Court cited an amalgam of Section 9 (court ordered interim relief), Section 11 (appointment of arbitrator by courts) and Section 34 (setting aside of awards) cases, from *Dozco*,[29] *Videocon*,[30] *Yograj*[31] to *BALCO*, while distinguishing *Venture Global*[32] and succeeded in clearing several cobwebs.

GoI persisted, despite *Reliance I* having decided that the challenge to an arbitrability ruling of the arbitral panel before the Delhi High Court was without jurisdiction. GoI again filed a second Section 14 petition in the Delhi High Court questioning and challenging the continuance of the arbitral panel's mandate ["*Reliance II*"]. On appeal,[33] the Apex Court, in its most recent major judgement on international commercial arbitration, made short shrift of it and definitively enshrined the doctrine of automatic exclusion of Part I and Indian courts' jurisdiction by specification of a foreign seat. The Court also clarified that if Part I is excluded, it cannot be argued that some sections of Part I are not excluded (e.g. Section 14 as in *Reliance II*) while others are (like section 9, as in *Reliance I*).

This has been an interesting and intellectually invigorating journey and it is by no means nearing its end. There are several lessons to be drawn from my experience. *First,* it has taught me the importance and vital real life role of judicial realism, well beyond that of juristic principle or precedential discipline. *Second*, it reflects the need for careful Indian adaptation and alteration of foreign codes and models like UNCITRAL Model Laws, before their hurried or wholescale importation. A small but practically significant

[28] Reliance Industries Ltd. v. Union of India, A.I.R. 2014 S.C. 3218 (India).
[29] Dozco India P. Ltd. v. Doosan Infracore Co. Ltd., (2009) 3 A.L.R. 162 (India).
[30] Videocon Industries Limited v. Union of India and Anr., (2011) 6 S.C.C. 161 (India).
[31] Yograj Infrastructure Limited v. Ssang Yong Engineering and Construction Co. Limited, (2011) 9 S.C.C. 735 (India).
[32] Venture Global Engineering v. Satyam Computer Services Ltd., (2008) 4 S.C.C. 190 (India).
[33] Union of India v. Reliance Industries, Special Leave Petition (Civil) No. 11396 of 2015 (India).

example shows that while the new 1996 Act was intended to give greater life and efficacy to international arbitral awards, loose drafting of Section 36 of the Act has judicially established that mere filing of section 34 objections, even without a court notice on those objections, stays the operation of the award *automatically*.[34] This is enormously ironical because even under the much-maligned Arbitration Act of 1940, there was no *automatic* stay of the award and the court had to specifically order stay on awards! Indeed, this aberration of the 1996 Act encourages award debtors to file objections, howsoever unnecessary or frivolous. *Third*, the correct way to rectify aberrations like *Bhatia* or *Saw Pipes* is focused legislative amendment but humongous Parliamentary delays compel intervening judicial rectification (as of *Bhatia* by *BALCO*), triggering of yet another chain of interpretive acrobatics and further judicial precedents. *Fourth*, the aforesaid principles of "patent illegality", introduced by the flawed *Saw Pipes* decision, and automatic stay of award flowing from Section 34 are crying out for urgent legislative reform. I look forward to being part of other challenging aspects of this interesting journey.

[34] *See* Fiza Developers and Inter-Trade Pvt. Ltd. v. A.M.C.I. Pvt. Ltd., 2009 (11) SCALE 371 (India). The Court found that: "Section 36 provides that an award shall be enforced in the same manner as if it were a decree of the court, but only on the expiry of the time for making an application to set aside the arbitral award under Section 34, or such application having been made, only after it has been refused. Thus, until the disposal of the application under Section 34of the Act, there is an implied prohibition of enforcement of the arbitral award. The very filing and pendency of an application under Section 34, in effect, operates as a stay of the enforcement of the award."

Article

# INDIAN ARBITRATION LAW: LEGISLATING FOR UTOPIA

*Armaan Patkar**

**Abstract**

*The law of Arbitration in India is at a cross-road. India has spent the last twenty years pushing forward a permissive party autonomy arbitral regime which sets out a framework of provisions for arbitration and the making, challenging and enforcement of awards, whilst allowing the wishes of contracting parties to mould internal procedure to suit them. The Courts are expected to play a minimal interventionist role, only stepping in when the parties fail to act, or where specifically required by law. This was an attempt to lure international trade and investment by facilitating alternate dispute resolution & bypassing judicial systems. Theoretically, the system is workable, but it has become cumbersome and complex.*

*Therefore, the law of Arbitration in India requires reconsideration. In this light, this Article discusses whether the recent Arbitration and Conciliation (Amendment) Act, 2015 will do the job. It seeks to do so keeping in mind the unique problems of dispute resolution in India and the critical importance of contract enforcement. In doing so, the author considers a restrictive version of the current system whilst analysing the law and jurisprudence of other jurisdictions, wherever contextually required. In conclusion, the author proposes changes to the law and advocates a shift to a restrictive version of the current system, in the search for arbitral utopia.*

## I. Introduction

Man is not made for law, but the law is made for man.[1] Acts are justified by law, only if they are warranted, validated and made blameless by law.[2] This recognizes that

* Associate, Cyril Amarchand Mangaldas, Mumbai.

[1] Law Commission of India, *Need for Justice-dispensation through ADR etc., 222nd Report,* 9 (Apr. 2009). It appears that the Law Commission of India ["LCI"] drew inspiration from the words of Mark 2:27 in the Holy Bible ("*the Sabbath was made for man, not man for Sabbath*"). *See also* JOHN J. COUGHLIN, LAW, PERSON, AND COMMUNITY: PHILOSOPHICAL, THEOLOGICAL, AND COMPARATIVE PERSPECTIVES ON CANON LAW 6 (Oxford Univ. Press, 1st ed. 2012) [COUGHLIN].

[2] COUGHLIN, *Id.* at 9.

man preceded law which evolved as a means of social control, in a time where accountability for actions was often incommensurate to the actions. Similarly, the Arbitration and Conciliation Act, 1996 ["The Act"] was also made for man and not vice-versa. This begs the question: What does the Act warrant, validate and make blameless?

The Act is inherently permissive; it grants party autonomy and allows parties to derogate from the provisions of the Act in certain matters. Where the law and the arbitration agreement are silent, the arbitrator[3] assumes the responsibility to lead the way. This allows substantial flexibility which may be responsible for India's abstruse loyalty to ad-hoc arbitration. However, this system, though flexible, is often faced with procedural hassles, delays and a low ratio of effective hearings.[4] In this light, examining whether we need the law to be permissive, restrictive or something in between assumes importance. This is because even assuming that ad-hoc arbitration is cost-effective, considering the time value of money and the interests of investment certainty, it may be '*cheaper*' to opt for Institutionalized Arbitration.[5] We also see proceedings being dragged on to force parties to settle or at least, delay impending liability. Having lost the dispute, the award-debtor can try and slip the award through an enforcement loophole or drag on challenge proceedings. Such situations should be rendered impossible by law or at least be made highly unlikely.

An idyllic law that looks good in the gazette but does not work on the ground will not do either. It must keep pace with the rapid growth of international trade and investment[6] and will be tested on the crucible of the Indian economy and investment environments. This is because there is a unique relationship between law and

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[3] In this Article, "Arbitrator", "Tribunal" and "Arbitral Tribunal" are used inter-changeably, which is consistent with the Act. *See* The Arbitration & Conciliation Act, No. 26 of 1996, § 2(l)(d), INDIA CODE (1996) "Act"].

[4] This is a chronic problem of the Indian justice system. Reportedly, a majority of the daily cases in the Supreme Court and High Courts (80-90 per cent) are adjourned without effective hearings. Often cases are listed for hearing 30-40 times; with as low as 3-6 effective hearings. *See* Indira Unninayar, *Where Justice Remains Elusive,* COMMON CAUSE, http://www.commoncause.in/publication_details.php?id=147.

[5] For insights into valuation of litigation risks based on factors such as time value of money, *see* R.J. Rhee, *The Effect of Risk on Legal Valuation,* 78 U. COLO. L. REV. 193 (2007), and Annika Reinemann et al., *The Valuation of Litigation, Valuation Strategies,* BRITTAN PARK (Mar./Apr. 2006), http://www.brittanpark.com/bp_pdf/bpv-the-valuation-of-litigation.pdf.

[6] *See generally* K. Sarma et al., *Development and Practice of Arbitration in India -Has it Evolved as an Effective Legal Institution,* 1 CDDRL WORKING PAPERS (Oct. 2009), http://iis-db.stanford.edu/pubs/22693/No_103_Sarma_India_Arbitration_India_509.pdf.

development; rational legal systems allow individuals to structure transactions and eliminate uncertainty. Consequently, predictable dispute resolution laws facilitate economic development. Douglas C. North[7] believes that contract enforcement is the single most important determinant of economic performance and that in *Utopia*, there would be a neutral enforcement agency adjudicating disputes, resulting in an outcome that satisfies both parties, without any costs. It is a world where no one can shirk or cheat.[8]

More so, the 2015 World Bank Report ranking India 186th out of 189 countries in contract enforcement[9] is an alarming reminder that our dispute resolution laws need to change; especially with our overburdened judicial system seeing a continuously growing number of cases due to increasing competition and complexity of international business. Since arbitration is a preferred mode of dispute resolution in cross-border contracts, there is no better time like the present, to overhaul the Act.

## II. The Proposals & The Arbitration and Conciliation (Amendment) Act, 2015: A New Era for Arbitration

The Act was meant to provide an effective and expeditious framework, inspire confidence and attract and reassure international investors. During its lifetime, it was reviewed several times, an amendment bill was proposed and withdrawn, ordinances were floated,[10] and Law Commission of India ["LCI"] Reports were issued.[11] Last

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[7] Douglas C. North is a Joint Nobel Memorial Prize Laureate for Economics (1993).

[8] D.C. North, *The Contribution of the New Institutional Economics to an Understanding of the Transition Problem,* ANNUAL LECTURES 1, UNU WORLD INSTITUTE FOR DEVELOPMENT ECONOMICS RESEARCH 3,4 (Mar. 1997), http://www.wider.unu.edu/publications/annual-lectures/en_GB/AL/_files/83424984784568456/default/annua-lecture-1997.pdf.

[9] WORLD BANK, DOING BUSINESS REPORT, GOING BEYOND EFFICIENCY 192 (12th ed. 2014), *available at* http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB15-Full-Report.pdf. ["World Bank Report 2014"].

[10] *Arbitration Notes, Amendments to the Indian Arbitration Act – now imminent?* HERBERT SMITH FREEHILLS (Feb. 2, 2015), http://hsfnotes.com/arbitration/2015/02/02/amendments-to-the-indian-arbitration-act-now-imminent/.

[11] These *inter alia* include the 176th & 246th LCI Reports; The Arbitration and Conciliation (Amendment) Bill, 2003 (Dec. 2003); the Dr. Justice B.P. Saraf Committee on Arbitration Report (Jan. 2005); Departmental Related Standing Committee on Personnel, *Proposed Amendments to the Arbitration & Conciliation Act, 1996*, 9th Report (Aug. 2005); Ministry of Law and Justice, *Proposed Amendments to the Arbitration & Conciliation Act, 1996*, Consultation Paper (Apr. 2010).

August, the Cabinet, led by our famously pro-development leader,[12] approved a proposal ["proposals"] based on the Law Commission's recommendations to amend the Act, with the goal of making India an international commercial arbitration ["ICA"] hub by making it user-friendly and cost effective. This culminated in the Arbitration and Conciliation (Amendment) Act, 2015 ["2015 Act"], promulgated, largely on similar lines to the proposals. This is the first step towards ushering in a new era for arbitration in India.

### A. *Appointment of Arbitrators*

The 2015 Act amends §11 to grant the power of appointment under §11 to the Supreme Court or the High Courts (or their designates) as the case may be,[13] instead of their respective Chief Justices (or their designates). It has been clarified that designating a person or institution for the purposes of §11, is not a delegation of judicial power.[14] This negates *SBP & Co.*[15] where the Supreme Court *inter alia* held that the power under §11(6) is judicial.[16] The 2015 Act also provides that no appeals will lie against orders passed under §11, including letters patent appeals. Since these are administrative orders, no appeal will lie under Article 136 of the Constitution either,[17] though the option of a writ remedy may remain available against such an order. However, since the Act provides alternative efficacious remedies in some cases,[18] Courts may be unwilling or at least circumspect in entertaining writ petitions on this ground.

With respect to the scope of enquiry by the Courts under §11, the LCI proposed to limit it to a *prima facie* examination of the existence and validity of the arbitration agreement, with appointments being refused only where there is no arbitration agreement or the agreement is null and void. Since this adjudication was to be on a *prima facie* basis, the final decision on such matters would be left to *kompetenz-kompetenz*.[19] However, the 2015 Act adopts a different approach. It simply provides that

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[12] Shri. N. Modi, 15th Prime Minister (current).
[13] *See* 2015 Act, § 6.
[14] *See* Act, § 11(6A).
[15] SBP Co. v. Patel Engineering Ltd. and Anr., (2005) 8 S.C.C. 618 (India).
[16] *Id.* at ¶ 46.
[17] *Id.* at ¶ 46 [only appeals under Article 136 would lie against orders under (the erstwhile) §11(6), since these orders were held to be judicial orders.]
[18] *See, e.g.,* Act, §12, 13, 16.
[19] This refers to the arbitral tribunal's powers of *kompetenz-kompetenz* or *competence de la competence i.e.* that it is for the Arbitral Tribunal itself to determine whether it has jurisdiction in the matter, subject to ultimate court-control. *See* SBP & Co., *supra* note 15 at ¶ 95, 96 and Act §16.

notwithstanding contrary judicial opinion, such as *National Insurance v. Boghara Polyfab*,[20] the Courts under §11 must confine themselves to examining whether an arbitration agreement exists and leave the rest, including examining the validity of the agreement, to the tribunal.

B. *Impartiality and Independence*

The 2015 Act seeks to prevent impartial arbitration under Part I, which earlier lacked adequate safeguards to prevent or remove biased arbitrators, either at the threshold or on the initial discovery of bias. It required arbitrators to disclose circumstances which are likely to give rise to justifiable doubts about the arbitrator's independence and impartiality, but left it to the arbitrator to decide if disclosure was required.[21] The 2015 Act specifies circumstances which will give rise to such doubts, such as direct or indirect; past or present; financial, business, professional etc. relationship with or interest in any of the parties or subject matter in dispute. A new Fifth Schedule, largely based on the Red (Waivable and Non-waivable) and Orange lists (requiring disclosure) [22] of the I.B.A. Guidelines on Conflicts of Interest in International Arbitration,[23] is added to act as a guide as to what would constitute such justifiable doubts including matters such as employment, commercial, controlling influence, a close family member having financial interest in the dispute etc. While this does limit the discretion earlier enjoyed by arbitrators to avoid disclosure, in a situation where the arbitrator decides against disclosure on the basis that the circumstances stated in the Fifth Schedule would not apply to him, the parties would still have to seek his recusal and challenge his appointment under §13 of the Act.

There is also a new Seventh Schedule, which sets-out criteria which make a person ineligible for appointment as an arbitrator. This schedule reproduces the criteria in the Fifth Schedule which was taken from the Red List of the I.B.A. guidelines. An important implication of the introduction of this Schedule is that government employees will be ineligible to be appointed as arbitrators in government contracts. Further, these disqualifications apply notwithstanding prior waivers, except if made after disputes

[20] National Insurance v. Boghara Polyfab, A.I.R. 2009 S.C. 170 (India) at ¶ 17.
[21] *See* Act, §12.
[22] There is also a Green List which does not require disclosure which includes social media affiliations/relationships such as Linkedin.
[23] THE IBA GUIDELINES, *available at*http://www.ibanet.org/ENews_Archive/IBA_July_2008_ENews_ArbitrationMultipleLang.aspx.

arise.[24] However, §14 should be amended to deem that such ineligible persons are *de jure* unable to perform their functions. This would mean that the mandate of the arbitrator would *ipso facto* terminate and would require his substitution, as contemplated under §14 read with §15, without having to resort to the recusal procedure and its associated problems, discussed below. The LCI also suggested an amendment on these lines, based on its belief that the disqualifications contemplated under §12(5) are more serious than the matters contemplated under §12(1), for which disclosure requirements were better suited.

The question remains whether the Act's challenge procedure involving recusal is sufficient to enforce such requirements. This is because the challenge procedure, unless the parties otherwise agree, is a request for recusal;[25] followed by a *judex in causa sua* decision of the arbitrator on the challenge (if the arbitrator refuses the request or if both parties do not agree to the challenge). If the challenge fails, the arbitration continues, without remedy to the parties, until the making of the award, when the remedy of setting aside the award under §34 read with §12 becomes available.[26] Setting aside such an award will be too little too late and the party may then have to re-agitate his claim in fresh proceedings. In such cases, the Court can only refuse the arbitrator his fees but cannot provide any compensatory relief to the parties that challenged the appointment. One option is a judicial appeal to a failed challenge but it would run contrary to the objective of minimizing intervention and may allow frivolous challenges to delay proceedings.[27] Instead it may be considered to provide certain safeguards, such as requiring the arbitrator to give detailed reasons for dismissing the challenge; or imposing a penalty on arbitrators who fail to make disclosures, in addition to denial of fees, as above, including,

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[24] The LCI's rationale behind having such an exception, is to allow real and genuine party autonomy *i.e.* by allowing waivers in cases such as family arbitrations or where a party has blind faith in an arbitrator. *See* Law Commission of India, *Chapter II, Introduction to the Proposed Amendments*, *246th Report, 31* (Aug. 2014).

[25] To be made within 15 days of the constitution of the arbitral tribunal. *See* Act, §12, 13.

[26] *See* Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd., (2007) 5 S.C.C. 304 (India) at ¶ 14 [If the appellant feels that the arbitrator has not acted independently or impartially, or he has suffered from any bias, it will always be open to the party to make an application under section 34 of the Act to set aside the award on the ground that arbitrator acted with bias or malice in law or fact.]. *See also* Bharat Heavy Electricals Limited v. C.N. Garg, 2001 (1) RAJ 388 (Del.) at ¶ 13[Bias and prejudice are contrary to public policy].

[27] A judicial challenge is permitted under the Model Law, in case of a failed challenge before the arbitrator. However, this was contrary to the objectives of the Act and was accordingly, not incorporated into the law. *See* UNCITRAL Model Law on International Commercial Arbitration (1985), art. 16(3).

in fit cases, requiring the arbitrator to bear the costs, in whole or part, of parties who *bona fide* challenge his appointment.[28] To tone down the severity of these provisions, it could be considered to allow arbitrators to claim by way of defence they were not aware of the circumstances in question or that they acted in good faith.

### C. *Reference by Courts to Arbitration*

An arbitration agreement would be redundant, if judicial proceedings are allowed to be initiated and continued on the same subject matter. Therefore, the Act provides for a referral mechanism whereby a judicial authority, seized with an arbitrable dispute, is required to refer the parties to arbitration on the application of a party, subject to certain conditions, the non-observance of which enables the authority to continue with the matter.[29] However, the Act was silent regarding cases which contain matters or persons outside the scope of the arbitral agreement. Accordingly, the Supreme Court in *Sukanya Holdings*[30] *inter alia* held that in such cases there cannot be splitting of the cause of action or parties and a part-referral to arbitration. It held that for parties in civil proceedings to be referred to arbitration, the entire subject matter of the suit and the parties should be subject to the arbitration agreement.[31] This view is correct in principle, as parties who have not agreed to arbitrate or who intend to only refer certain disputes to arbitration, should not be forced into arbitration, even though this view favours the continuation of proceedings in Court and is consequently counter-intuitive to alternate dispute resolution. Accordingly, the LCI proposed that referral of parties who have agreed to arbitrate, should be refused if the non-parties to the arbitration agreement (impleaded in civil proceedings), are necessary parties in such proceedings.[32] The effect of this proposal is that impleading a non-party to the arbitration agreement in such proceedings would not *ipso facto* defeat referral to arbitration of the parties to the arbitration agreement, unless such party is a necessary party in such proceedings. This has not been provided for in the 2015 Act.

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[28] The party who did not challenge the appointment should not be entitled to the benefit of this provision and can be left to bear its own costs.
[29] Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Anr., A.I.R. 2003 S.C. 2252 (India) at ¶ 12.
[30] *Id.* at ¶ 12.
[31] *Id.* at ¶12-17.
[32] Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996, 246th Report,* (Aug. 2014), Proposed §8.

However, this does not contemplate referring such non-parties to arbitration and accordingly, the LCI proposed to amend the definition of '*Party*' under Part I to include persons claiming through or under parties, legislatively recognizing *Chloro Controls*,[33] in the context of Part I. However, the 2015 Act adopted a different approach. It amended §8 to also allow '*persons claiming through or under parties*' to apply for referral to arbitration in line with the language of §45 and §54, notwithstanding contrary judicial opinion. This was needed to remove the uncertainty surrounding the application of *Chloro Controls* in the context of Part I. In this case the Supreme Court *inter alia* held that there may be instances where parties to arbitration, may not be signatories to both the arbitration agreement and the substantive contract containing the arbitration agreement, but may be so *'inextricably inter-linked'* that they would fall within the scope of reference under §45.[34] They could even be subjected to arbitration without their consent, in exceptional cases such as direct relationships with signatories, direct commonality of subject matter and composite transactions,[35] because in such cases, parties act with a common primary object in mind. In such cases, the Courts can read the principal and supplementary agreements together as also look into the intention of the parties, attending circumstances[36] and circumstances which demonstrate an implied consent to arbitrate.[37]

The uncertainty was with respect to the application of this ratio to §8. A recent decision of the Delhi High Court in *HLS Asia,*[38] despite noting that *Chloro Controls* was made in the context of §45 and the New York Convention, seemed to take *Chloro Controls* as laying down a general principle of law, which may be extended to cases under Part I. It

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[33] Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. and Ors., (2013) 1 S.C.C. 641 (India) ["Chloro Controls"].

[34] *Id.* at ¶ 65 [There is a substantial variance between the language contained in §8 and §45,54, which deal with domestic and foreign arbitrations, respectively. The effect of variance is that under §45 and 54, persons who are not signatories/parties to the arbitration agreement may request a referral to arbitration, provided they claim through or under the parties, which is not permitted under §8.].

[35] *Id.* at ¶ 68. [A composite transaction was where performance of the main agreement may not be feasible without the aid, execution and performance of the supplementary or ancillary agreements and where it would be needed to achieve a common object and collectively have a bearing on the dispute.]

[36] *Id.* at ¶ 68, 71.

[37] *Id.* at ¶ 167.

[38] H.L.S. Asia Ltd. v. M/s. Geopetrol International Inc. & Ors., 2013 I.A.D. (Del.) 149. This was a case involving a consortium acting through an appointed representative. The recitals in the agreement in question stated that the respondent was signing the agreement for and on behalf of consortium. However, each individual consortium member did not execute the agreement.

went on to hold on the facts of the case that individual members of a consortium, who had not executed the contract containing the arbitration clause, could be referred to arbitration, in view of their inter-relationship which made them necessary parties to the dispute. The author believes that this view is not correct and relies on the Bombay High Court's decision in the *Mumbai International Airport* case,[39] which clarified this issue, when called upon to do so in the course of arguments.[40] The Court rejected the argument that *Chloro Controls* at certain places,[41] elucidates general principles of law, not specific to foreign arbitrations and held those paragraphs only permit (that too only sometimes, depending on the facts and attending circumstances) a consolidation of arbitral claims to avoid multiplicity and to ensure consistency of results.[42] The Court refused to read *Chloro Controls* to allow, under Part I, a party to drag a person to arbitration, with whom there is no privity of contract. It went on to hold and the author agrees with this view, that there is a material distinction between §8 and §45, which fall under different parts of the Act and deal with different types of arbitrations.[43] There is also a clear difference in the language of §8 & §45; whilst the former only refers to the parties to the arbitration agreement, the latter also refers to a person claiming through or under such party. Yet in its wisdom, the Court noted that there may not be a universal principle to follow in cases of multi-party over-lapping agreements and therefore, did not conclusively settle the issue. *HLS Asia* was also distinguished as being a case where a consortium appointed a leader who was authorized to act on behalf of the consortium's members.[44]

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[39] H.D.I.L. v. Mumbai International Airport Private Limited and Ors., Appeal (L) No. 365 of 2013 (November 28, 2013) ["M.I.A.L"].
[40] *Id.* at ¶17.
[41] Chloro Controls*, supra* note 33 at ¶ 82, 87, 88 & 89.
[42] M.IA.L. *supra* note 39 at ¶ 17.
[43] This holds true with respect to §54 as well in the context of Geneva Convention on the Execution of Foreign Arbitral Awards, (Sept. 26, 1927).
[44] In a later decision of the Bombay High Court in Rakesh S. Kathotia v. Milton Global Ltd., 2014 (4) Bom. C.R. 512, the Court noted that there may be instances in domestic arbitrations, where signatories may be construed to have undertaken obligations on behalf of either entity forming part of a group of companies/entities, and consequently, bind such parties, in appropriate cases. The court noted that the M.I.A.L. case (*supra* note 39) also allowed non-signatories to be bound by the arbitration agreement, in case of '*umbrella agreements*' and subsidiary agreements thereunder, where performance of one depends on performance of the others(s). The Court also referred to *H.L.S. Asia* (*supra* note 38) and noted that the Delhi High Court permitted the referral of a non-signatory party to arbitration, who was directly affected by the arbitrable dispute and who is a party to subsidiary agreements but not to the principal agreement, containing the agreement to arbitrate.

In view of the language of §8, as it stood before the amendment, juxtaposed with §45 and §54, non-signatories should not be referred to arbitration under §8. However, the law must recognize that there are complex commercial arrangements where multiple-parties execute multiple documents forming one composite transaction, which may not have even one document executed by all parties. It seems that the Courts are moving in this direction. Accordingly, the amendment to §8 is welcome. Now, non-signatories may take part in arbitration proceedings, as long as it is necessary and proper to do so, being persons claiming through or under the parties to the arbitration agreement.[45]

The amended §8 also allows the Court to refuse to refer the matter for arbitration, if it finds that *prima facie* no valid arbitration agreement exists. This is different from §11, which only contemplates the examination of the existence of the agreement to arbitrate, when considering applications under §11 and not its validity. This could be due to these provisions being different in nature and the remedies contemplated therein.[46] *Per contra*, though these sections are different, they are complementary and therefore, it may have been better to have a common standard of review in both cases.[47] Had the 2015 Act adopted such an approach, as also suggested by the LCI (II.A-2nd para, above), §8 and §11 would have been well aligned. However, by prescribing different criteria for both §8 and §11, there is scope for nuanced judicial interpretation.

In case of refusal under §8, a judicial appeal lies under §37. If the Court does refer the parties to arbitration, the arbitral tribunal can still exercise *komptenz-kompetenz* under §16. Further, the pre-condition of §8(2) has also been relaxed to allow parties to file applications under §8 supported by a copy of the arbitration agreement and a petition to the Court praying that the Court call upon the respondent to produce the original or the certified copy. However, LCI's proposal to specify that pleadings filed in interim applications will not be considered a submission to jurisdiction of the Court, has been

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[45] NDA Hotline, *Arbitration reforms in India: End of the Endless Saga? Analysis of the Ordinance*, NISHITH DESAI (Oct. 27, 2015),http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20Hotline/Dispute_Resolution_Hotline_Oct2715.pdf.

[46] Aakanksha Kumar, *The Arbitration Ordinance, 2015 – Less isn't always more. [Part I]*, ARBITER DICTUM (Nov. 5, 2015), https://arbiterdictum.wordpress.com/2015/11/05/the-arbitration-ordinance-2015-less-isnt-always-more-part-i/.

[47] Promod Nair, *When good intentions are not good enough: The Arbitration Ordinance in India*, BAR & BENCH (Nov. 4, 2015), http://barandbench.com/when-good-intentions-are-not-good-enough-the-arbitration-ordinance-in-india/ ["P. Nair"].

omitted. This should have been included in the 2015 Act for the sake of certainty that such pleadings will not be considered a waiver of the right to apply under §8.[48] There is also an inadvertent error in the newly inserted proviso to §8(2) which refers to the narrower term "*Court*" instead of the term "*judicial authority*" used in §8(1). This should be rectified.

D. *Recourse Against Arbitral Awards*

§34, 48 and 57, provide for challenges/enforcement exceptions, with respect to awards under Part I, the New York and Geneva Conventions respectively, *inter alia* on the touchstone of the public policy of India. Therefore, when the Supreme Court in *Saw Pipes,*[49] seemingly, in the context of domestic awards, held that awards can be set aside under §34 if the award suffered from patent illegality[50] as a violation of the public policy of India, it was possible to extend this view to §48 and 57 as well. Initially, Supreme Court did apply the wider *Saw Pipes* formulation in *Phulchand Exports*[51] in the context of §48. This was later over-ruled by a larger three judge bench in *Shri Lal Mahal*[52] which

[48] §8 of the Act *inter alia* provides that the application for referral under §8 must be made before the *'first statement on the substance of the dispute'*. *See also* Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. and Ors., A.I.R. 2011 S.C. 2507 (India) at ¶ 19 [Willing participation in and submission to judicial proceedings, could amount to a waiver of the right to referral to arbitration, depending on the conduct of the parties. However, defendants can defend applications for interim relief]. Followed in 2014 by T.N. Generation and Distribution Corporation Ltd. v. P.P.N. Power Generation Co. Pvt. Ltd., 2014 (4) S.C.A.L.E. 560 at ¶ 51.

[49] Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd., A.I.R. 2003 S.C. 262 (India) ["Saw Pipes"].

[50] If the award was contrary to the terms of the contract, it would be considered patently illegal. *See also* Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 S.C.C. 445 (India) at ¶ 14. *See also* McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 S.C.C. 181 (India) at ¶ 59 and Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd., (2006) 11 S.C.C. 245 (India) at ¶ 103 *(patent illegality must go to the root of the matter, such that it is so unfair and unreasonable as to shock the conscience of the court),* D.D.A. v. R.S. Sharma and Co., (2008) 13 S.C.C. 80 (India) at ¶ 21 and J.G. Engineers (P) Ltd. v. Union of India, (2011) 5 S.C.C. 758 (India), MSK Projects (I) (IV) Ltd. v. State of Rajasthan, (2011) 10 S.C.C. 573 (India), at ¶ 17.

[51] Phulchand Exports Ltd. v. O.O.O. Patriot, 2011 (11) S.C.A.L.E. 475 at ¶ 13. R.M. Lodha, J. speaking on behalf of the Bench, noted that there is merit in the submission that the *Saw Pipes* exposition of the public policy of India, may be used in interpreting §48(2)(b), that public policy can be given wider meaning and that the award could be set aside, if it is patently illegal.

[52] Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 S.C.C. 433 (India) at ¶ 28 ["Shri Lal Mahal"].

applied the narrow *Renusagar*[53] interpretation to §48. In doing so, it held that it was safe to observe that *Saw Pipes*[54] allowed a departure from its interpretation, in matters of enforcement of foreign awards, based on the subtle distinction between the jurisdiction of a Court under §34 to challenge an award, before it becomes final and executable, in contradistinction to the enforcement of an award under §48, after it becomes final. This distinction necessitates a wider meaning of public policy including patent illegality to be adopted under §34 while a narrow meaning should be taken under §48.[55] Interestingly, both *Shri Lal Mahal* and the judgement it over-ruled *i.e. Phulchand Exports*, were delivered by R.M. Lodha, J. though speaking for two different benches, with the larger bench in *Shri Lal Mahal* prevailing.

The LCI also noted that §34 and §48, prior to the 2015 Act, were *pari materia*, though there is greater legitimacy for judicial intervention in domestic matters, contrasted with an examination of the correctness of a foreign award or an ICA award.[56] In this light, the 2015 Act specifies that domestic awards other than ICA awards may be set aside on the grounds of patent illegality, appearing on the face of the award. This directly allows judicial intervention to address patent illegalities in purely domestic awards, instead of indirectly relying on an expansive construction of "public policy".[57] However, this ground is qualified in the 2015 Act by excluding erroneous application of the law or re-appreciation of evidence, from the scope of the patent illegality ground for setting aside awards. The 2015 Act also clarifies that under §34, 48 and 57, awards in violation of public policy would mean those awards which are:

i. Induced by fraud or corruption, or in violation of certain provisions of the Act;[58]

ii. Opposed to the fundamental policy of Indian law; or

iii. It is in conflict with the most basic notions of morality or justice.[59]

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[53] Renusagar Power Co. Ltd. v. General Electric Co., A.I.R. 1994 S.C. 860 (India) ["Renusagar"]. The narrow interpretation formulated in this case was expanded by *Saw Pipes* to include patent illegality. However, *Shri Lal Mahal* (*Id.* at ¶ 26), borrowed the rationale adopted by the Court in *Renusagar* to hold that §48 was to be interpreted in narrow terms, proceedings on the belief that *Saw Pipes* dealt only with domestic awards.

[54] Saw Pipes, *supra* note 49.

[55] Shri Lal Mahal, *supra* note 52 at ¶ 18, 22, 24-28 & 31.

[56] *See* 246th Report, at ¶ 34, 35.

[57] *See* 246th Report, at ¶ 36.

[58] *See* Act, §75, 81.

Whilst the exceptions of fraud, corruption and fundamental policy of Indian law have been retained, the scope of public policy has been reduced by omitting the *Saw Pipes* formulation of '*interest of India*';[60] by qualifying justice or morality by adding the words '*the most basic notions*' to the phrase; and by separating patent illegality from public policy. Whilst morality or justice are not new terms in the context of setting aside of arbitral awards, there is no Indian decision for guidance as to what could constitute '*the most basic notions of morality or justice*';[61] Accordingly, *Parsons and Whittemore*,[62] may be referred to as a guiding light in interpreting this phrase. In this case, a U.S. Court held that the phrase should be construed narrowly, so as to prevent matters of international politics from becoming a public policy loop-hole to contract enforcement. The observations of J. Smith, J. in the case, may be referred to in this regard:

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[59] *See* Associated Builders v. Delhi Development Authority, A.I.R. 2015 S.C. 620 (India) at ¶ 12 ["Associate Builders"] [An award can be said to be against justice only when it shocks the conscience of the court. Morality would mean sexual morality and the scope of this term could extend beyond sexual morality, only if it shocks the conscience of the Court. The concept of morality implies deviation from standard norms of life and good conscience. (Noting Gherulal Parekh v. Mahadeo Dass Maiya, 1959 Supp. (2) S.C.R. 406). This necessarily depends on the evolution of civilization and therefore, no universal standard can be laid down for such a concept, which must remain fluid to meet the present needs of society. In this context, the Court noted that §23 of the Indian Contract Act, 1872, (which deals with lawful/unlawful consideration and objects for contracts) indicate legislative intention to give '*morality*' a restricted meaning. This would prevent the over-lapping of the terms '*morality*' and '*public policy*'.]

[60] *Id.* at ¶ 12 [Concerns of India as a member of the world community in its relations with foreign powers, which will have to be considered on a case by case basis].

[61] *See* Renusagar, *supra* note 53 at ¶ 50-57. [Referring to the approach of the American Courts with respect to public policy, in its application to the recognition and enforcement of foreign arbitral awards under the New York. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the Court referred to the decision of the U.S. Court of Appeals in *Parsons & Whittemore* (*see below at* 62), where the Court refused to enforce awards on the grounds of public policy, unless the enforcement would violate the state's most basic notions of morality and justice.]

[62] Parsons & Whittemore Overseas Co., Inc., v. Societe Generale De L'industrie Du Papier and Anr., 508 F.2d 969 (2d Cir. 1974) ["Parsons & Whittemore"]. This was a case before the U.S. Court of Appeals for the Second Circuit, New York, in the context of the public policy exception to the enforcement of arbitral awards under the New York. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). In this case, the Court refused to deny enforcement of a contract on the ground that there was a political 'falling-out' of the U.S. and Egypt, when in May, 1967, there was a large exodus of employees of the Plaintiff-appellant out of Egypt, due to Egyptian expressions of hostility towards Americans in Egypt, in the context of the looming Arab-Israeli war. On June 6, 1967, the Government of Egypt broke diplomatic ties with the United States and ordered the expulsion of all Americans from Egypt, unless they apply for and obtain a special visa.

> *"To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy'. Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis."*[63]

Courts in Singapore[64] and Hong Kong[65] have also noted that public policy is to be construed narrowly and is not to be *'wheeled out on all occasions'*.[66] This is pro-enforcement and comforts investors that public policy will not be invoked to re-open closed matters.[67]

With respect to '*fundamental policy of India*', the LCI noted that the Supreme Court's decision in *Western Geco*,[68] construed the phrase in a wide sense (noting that *Saw*

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[63] *Id.* at 974.

[64] P.T. Asuransi Jasa Indonesia (Persero) v Dexia Bank S. A., [2006] 1 S.G.C.A 41 at ¶ 59 (Sing.) [Awards contrary to the '*forum's most basic notions of morality and justice*' are contrary to public policy, as awards which *inter alia* shock the conscience, or are clearly injurious to the public good, or are wholly offensive to the ordinary reasonable and fully informed member of the public. (*See also* Deutsche Schachbau v Shell International Petroleum Co. Ltd., [1990] 1 A.C. 295 (Lloyds' Rep.) 246 (U.K.) at ¶ 254, referred to in *P.T. Assuransi* at para 59]. It may be noted that *Saw Pipes* (*supra* note 49) was referred to in this case (*See* para 56, 57) with the Court respectfully disagreeing with its decision, on the basis that there is a difference between the legislative intent behind Indian and Singaporean law and that the Singaporean legislative policy is to minimize curial intervention in international arbitrations. It also noted that the High Court of New Zealand in Wellington also disagreed with the broader view of *Saw Pipes* in *Downer-Hill Joint Venture v. Government of Fiji* [2005] 1 NZLR 554 (HC) 80 (N.Z.).

[65] Paklito Investment Ltd. v. Klockner East Asia Ltd., [1993] H.K.C.U. 0613 (H.K.). *See also* A v. R, [2009] H.K.C.F.I. 342 (C.F.I) (H.K.), Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd., [1999] 2 H.K.C.F.A.R. 111 (C.F.A) (H.K.).

[66] *Id.*

[67] A v. R, [2009] H.K.C.F.I. 342 (C.F.I) (H.K.), per Reyes J. "*Public policy is often invoked by a losing party in an attempt to manipulate an enforcing court into re-opening matters which have been (or should have been) determined in an arbitration. The public policy ground is thereby raised to frustrate or delay the winning party from enjoying the fruits of a victory. The court must be vigilant that the public policy objection is not abused in order to obtain for the losing party a second chance at arguing a case. To allow that would be to undermine the efficacy of the parties' agreement to pursue arbitration."*

[68] O.N.G.C. Ltd. v. Western Geco International Ltd., (2014) 9 S.C.C. 263 (India) at ¶ 39, 40 ["Western Geco"]. It may be noted that the 246th Report of the LCI was based on the assumption that the phrases '*fundamental policy of Indian law*' and '*most basic notions of morality or justice*' would be construed in a narrow sense. In making its recommendations in the Report, the LCI did not have the benefit of referring to the later *Western Geco* judgement *inter alia* construed '*fundamental policy of India*' in a wide sense and set-out its expanded

*Pipes*[69] had not dealt with this phrase), and added three fundamental juristic principles, so deeply embedded in our jurisprudence that they can be described as part of a fundamental policy of Indian law;[70]

i. Judicial approach free from arbitrariness, caprice, whims and other extraneous considerations;

ii. Principles of natural justice; and

iii. The decision must not be so perverse or so irrational that no reasonable person would have arrived at such a decision.[71]

However, the Court did clarify that this was not an exhaustive enumeration of the fundamental policy of India law. This may even include instances where awards are not supported *inter alia* by inferences which should be drawn from the facts of the case, even if the case requires the arbitrator to exercise discretion in making awards.[72] Accordingly, as was also proposed by the LCI, the 2015 Act has clarified that Courts cannot review awards on their merits when testing them for contraventions of the fundamental policy of India. The author believes that this amendment is essential, since the power to review an award on its merits would be akin to an appeal, contrary to the Act's stated objective of limiting judicial intervention.[73] The language of §28 (Rules applicable to substance of dispute) has also been watered down by requiring the arbitrator to decide matters taking into account the terms of the contract, as opposed to

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scope. Accordingly, the LCI issued a supplementary report, to limit the possible expansion of the scope of the above phrases, by excluding adjudication on merits. *See* Law Commission of India, *"Public Policy" Developments post-Report No.246*, *Supplementary to the 246th Report*, (Feb. 2015).

[69] Saw Pipes, *supra* note 49.

[70] Western Geco, *supra* note 68 at ¶ 28, 29.

[71] Western Geco, *supra* note 68. This principle was described as a salutary juristic fundamental principle. *See also* the principle of "reasonableness" laid down in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation, [1948] 1 K.B. 223 (Eng.), *Associated Builders*, *supra* note 59 (findings not based on evidence, taking irrelevant factors into account and ignoring vital evidence, will result in perverse decisions).

[72] Western Geco, *supra* note 68 at ¶ 30. This decision was followed by *Associate Builders*, *supra* note 59, a subsequent two-judge bench of the Supreme Court. However, the Court introduced a caveat to *Western Geco* by stating that the Courts are not required to act as Courts of appeal. Consequently, the Courts are not supposed to interfere with errors of fact, unless it is accompanied by arbitrary, capricious action on the part of the arbitrator. Where the view taken by the arbitrator, measures up in quality to a trained legal mind, the Court must not sit as a Court of appeal and correct errors of fact (para 12).

[73] *See* Act, Statement of Objects and Reasons, at ¶ 4(v).

'*in accordance with'* the terms of the contract and relevant trade usages, to reduce the scope of challenges to arbitral awards with respect to contraventions of the terms of the contract.[74]

E. *Enforcement of Awards*

Before the promulgation of the 2015 Act, §34 barred the enforcement of awards until the time-limit for §34 applications ran out or, an application was made and had failed. Thus, simply filing an application under §34 within the limitation period of 30 days, acted as an automatic stay of the award. This was without providing any entry barriers to frivolous applications, such as the option to issue orders of deposit or security,[75] unlike the powers conferred on appellate Courts under the Code of Civil Procedure, 1908 ["CPC"].[76] §9 of the Act, which contemplates interim measures of protection post the making of the award (but before it is enforced under §36), is also of no assistance in this regard. This was unsuccessfully attempted by award-holders to seek deposit of the award amount in the Bombay High Court. Rejecting their contentions R.S. Dalvi, J. ruled that §9 contemplates the power of the Courts to grant interim relief to protect the subject-matter of the arbitration agreement and not the award amount or the Petitioner's right to the receipt of the award.[77]

Accordingly, the 2015 Act mandatorily requires parties to file a separate stay application, in which a conditional order may be passed by the Courts, having due regard

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[74] *See* Law Commission of India, *Chapter II, Introduction to the Proposed Amendments*, *246th Report,* 35 (Aug. 2014). *See also* Saw Pipes, *supra* note 49.

[75] *See* CODE CIV. PROC. 1908 O. XLI R.1(3) read with 5(5). [An appellant seeking stay of the execution of a money decree, must provide a deposit or security, if ordered, as a condition precedent, failing which the applicant is disentitled to seek a stay order. However, this would not require dismissal of the appeal or denude the appellate court of it jurisdiction to entertain the appeal on merits.] *See* Kayamuddin Shamsuddin Khan v. State Bank of India, (1998) 8 S.C.C. 676 (India) at ¶ 7, 8, followed in M/s. Malwa Strips Pvt. Ltd. v. M/s. Jyoti Ltd., A.I.R. 2009 S.C. 1581 (India) at ¶ 10. *See also* Union of India and Ors. v. Amitava Paul and Ors., A.I.R. 2015 (Cal.) 89 (India) for a detailed analysis and history of O. XLI R.1,5.

[76] National Aluminium Co. Ltd. v. Pressteel and Fabrications Pvt. Ltd. and Anr., A.I.R. 2005 S.C. 1514 (India) at ¶ 10 & 11.

[77] M/s. AFCONS Infrastructure Ltd. v. Board of Trustees of the Port of Mumbai, 2014 (1) Bom. C.R. 794 at ¶ 3, 26. [Though §9 allows the Court to pass interim orders of protection, even after the award is made but before it is enforced under §36, it does not mandate or allow deposit of the award amount pending its challenge. To order deposit of the award under §9 would amount aiding the execution of an award, which is unenforceable under §36.]

to certain provisions of the CPC, with reasons recorded in writing.[78] This would require the applicant to demonstrate sufficient cause, causation of substantial loss (were the application to be rejected) and satisfactorily explain delays in the application. The Court may also consider whether or not the applicant has furnished security for due performance of the decree or order. Accordingly, the Courts are now clothed with sufficient powers to allow only legitimate challenges against awards and to make sure that, frivolous attempts at frustrating or delaying enforcement will cost the applicant.

### F. *Delays and Time-Lines*

#### i. Interim Relief by Courts & Arbitral Tribunals

The 2015 Act amends §9 to provide that arbitral proceedings must commence within ninety days of the order granting interim relief or within such further time as the Court may determine. This legislatively recognizes the decision of the Supreme Court in *Firm Ashok Traders v. Gurumukh Das Saluja* where it was *inter alia* held that a party that has obtained relief under §9 pre-constitution of the tribunal cannot '*sit and sleep over the relief*'; this relief is granted '*before*' *i.e.* necessarily in contemplation of arbitration and therefore unreasonable delay would snap the relationship between the relief and the proceedings; in such cases, the Court may require the party to demonstrate its intention and the steps it proposes to take to commence arbitration. It may also impose conditions on the party and recall relief in cases of breach of such conditions.[79] However, it has missed out on the opportunity, as suggested by the LCI, to provide that such relief will automatically lapse upon the expiry of this period, to create the fear of losing interim protection in the minds of the parties.[80] Going one step further, it could have also provided that fresh orders or extensions would not ordinarily be granted after the lapse of the initial order unless the applicant can demonstrate sufficient cause or that the delay was not attributable to him.

The 2015 Act also makes orders under §17 enforceable as orders of the Court; earlier these were neither enforceable by the arbitrator nor the Courts,[81] though the Delhi

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[78] With respect to appeals against decrees for the payment of money. *See* CODE CIV. PROC. 1908 O. XLI R.1,5.
[79] Firm Ashok Traders v. Gurumukh Das Saluja, A.I.R. 2004 S.C. 1433 (India) at ¶ 18.
[80] *Supra* note 32, at Proposed §9(2).
[81] Sundaram Finance Ltd. v. N.E.P.C. India Ltd., (1999) 2 S.C.C. 479 (India) at ¶ 12 [Though §17 gives the arbitral tribunal the power to pass orders, the same cannot be enforced as orders of a court, and it is for this reason only that §9 of the Act gives the

High Court found a way around this by holding that non-compliance of such orders would amount to contempt of the tribunal under the Act.[82] However, making the orders enforceable as above is a simpler and better solution. The 2015 Act has also given arbitral tribunals, powers *pari materia* to the powers held by the Courts under §9, to grant interim relief post-constitution of the tribunal;[83] with a caveat that the Courts would continue to exercise this power where obtaining interim relief from the arbitral tribunal would not be efficacious. It must be considered in this regard, that interim relief under §9 may be granted by the Courts against a person who need not be a party to the arbitration agreement or to the arbitration proceedings. This is because the power of the Courts under §9 is the same as in any other proceedings for interim relief and since the courts have evolved a practice of issuing interim orders *qua* third parties also, this power extends to §9 as well.[84] In contrast to this, §17 can only be applied to the parties in

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Courts the power to pass interim orders during the arbitration proceedings]. *See also* M.D., Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd., A.I.R. 2004 S.C. 1344 (India) at ¶ 59.

[82] *See* Act, §17 read with §27(5). §27(5) provides *inter alia* that if the parties commit a default or contempt of the arbitral tribunal, such parties would be subject to all disadvantages, penalties and punishments, as would be suffered by the parties if the arbitral proceedings were judicial proceedings. *See also* Sri Krishan v. Anand, 2009 (112) D.R.J. 657 at ¶ 16 ["Sri Kishan"]. The question of law in this case was whether interim relief granted under §17, would preclude an application for the same relief under §9. It was held to be so, *inter alia* on the ground that once parties elect to apply for relief under §17, a §9 application for the same relief would lead to multiplicity of proceedings. Further, since proceedings for contempt are available under §17 read with. 27, it cannot be said that the parties have no way to enforce the order.

[83] Recently, the Bombay High Court has held that it cannot grant interim relief once the claim has been dismissed; The power to grant relief under §9 extends up until the award has been enforced or time period for applying for enforcement but its purpose is to prevent frustration of the claim, pending adjudication and enforcement. There is also the requirement that interim relief must be in aid of the final relief. Both of these concepts would not apply where the claim has been rejected as there is no question of protecting the claim or claimant. *See* Dirk India Private Limited v. Maharashtra State Electricity Generation Company Limited, 2013 (7) Bom C.R.493 at ¶ 13,14.

[84] Sri Kishan, *supra* note 82 at ¶ 7. *See also* Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd., (July 10, 2007) (SC) at § 18 [Under §9, Courts would have to consider the classical rules for the grant of such interim measures. It cannot be said that § 9 of the Act is totally independent of the well-known principles governing the grant of an interim injunction.], *See also* Embassy Property Developments v. Jumbo World Holdings Limited, (MADHC) (June 20, 2013) at ¶ 55 [§ 9 is wide in scope, extending even to third parties in whom the properties or goods are vested and even though such parties may not be a party to the arbitration clause in an agreement. Though § 9 can be invoked only by a party to the arbitration agreement, interim relief could be granted even against the third parties. Unless such a power is available, a party successful in obtaining an award may be frustrated. Section 9 is enacted only with the intention of preserving and protecting the subject matter of the arbitral proceedings, even if it is in the hands of third parties. There

arbitration. On shifting the powers of §9 to §17, these powers will no longer be exercisable against third parties and an argument can be made that in such cases it would not be '*efficacious*' to seek relief under §17, and consequently, the Court can grant relief under §9.[85]

It may also be noted that the amended §17 acts as an exception to the general rule that an arbitrator becomes *functus officio* on making the award, as it provides the power to grant interim measures even post-award but before enforcement of the award. However, there is an inadvertent drafting omission, as §32 provides that the mandate of the arbitrator terminates on the making of the award.[86] In this regard, §32 should be amended to include §17 as an exception to the termination of an arbitrator's mandate.

**ii. Appointment of Arbitrators**

The 2015 Act provides that Courts should endeavour to decide applications for appointment under §11 expeditiously, as far as possible, within sixty days.[87] This should have been made mandatory, with extensions to be granted only in fit cases, for fixed periods and with reasons to be recorded in writing. This period of sixty days is calculated from the date of service of notice, which often takes a long time in India. In fact, the

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must be some nexus between the parties to the agreement and the subject matter of such an agreement.], *See also* Pawan Hans Helicopters Ltd. v. AES Aerospace Ltd., 2008 (2) ARB.L.R. 63 (Del.) at ¶ 12, the Delhi High Court *inter alia* held a person seeking relief under §9, must be a party to the proceedings, though relief could be granted by the court, even against third parties, who are not parties to the arbitration agreement. *See also* Axis Bank Ltd. & Ors. Applicants/Interveners, in the matter of Maharashtra Airport Development Company v. Abhijeet MADC Nagpur Energy Pvt. Ltd., Bombay High Court C.S.(L) No. 434 of 2014 in Arbitration Petition No. 452 of 2014 (Apr 10, 2014) at ¶ 12.[In an application for impleadment or in the alternative, permission to intervene, when it was argued that the applicants were neither parties to the arbitration agreement or the subject matter of the reference to arbitration, the Bombay High Court permitted a non-party to intervene in the proceedings, being a persons who is likely to be affected by the relief sought in the proceedings. In this case, the Court permitted lenders to intervene in proceedings, which had a right to recover this money from the petitioner through the respondent (the receivables of a concession agreement were assigned by the respondent to the intervener)], *see also* H.D.I.L. v. M.I.A.L., *supra* note 39.

[85] For example, injunctive relief against a bank to prevent encashment of a bank guarantee will not be permitted under §17 of the Act if the bank is not a party to the arbitration. *See* Avinash EM Projects Pvt. Ltd. v. Gail (India) Limited, 2015 (1) Arb. L.R. 24 (Del.) at ¶11.3,13.

[86] Except in certain cases; *See* Act, §33 [Corrections, interpretations of awards], §34(4) [opportunity to eliminate grounds for setting aside awards] which does not include §17.

[87] Act, §11(13).

Supreme Court recognized that delays in service of processes account for over 50% of the arrears of cases in the courts of Delhi. Accordingly, the Court permitted service by way of e-mail, in addition to the ordinary modes of service, whereby the Court's registry would transmit e-copies of pleadings, notices etc.[88] Similarly, the High Courts of Delhi and Bombay, in exercise of their powers under the CPC,[89] have also framed rules to permit e-mail service.[90] The Bombay High Court Rules Review Committee also recommended the introduction of rules relating to e-service.[91] This demonstrates judicial intention to permit e-service of judicial processes, in fit cases.

Thus, e-service should be specifically allowed under the Act, with safeguards to ensure proper service, such as requiring a digitally authenticated service report to be provided to the Registry of the Court. This would be in keeping with International practices in progressive jurisdictions, where in certain cases, even social media has been allowed to serve judicial processes. In the UK, Twitter was used to serve an injunction order[92] and in Australia,[93] New Zealand,[94] U.S.,[95] and Canada,[96] Courts have permitted

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[88] C.E.R.C. v. National Hydroelectricity Power Corporation Ltd., Civil Appeal No. 21216 of 2010 (July 26, 2010). The Court however, clarified that this facility was for the time being, only being extended in cases of commercial matters and applications for urgent interim relief.

[89] *See* O. V R. 9. [Allows service of summons to defendants by transmitting a copy by fax message or electronic mail services, in accordance with the rules framed by the concerned High Court in this regard.].

[90] *See* DELHI COURTS SERVICE OF PROCESSES BY COURIER, FAX AND ELECTRONIC MAIL SERVICE (CIVIL PROCEEDINGS) RULES, 2010, *available at* http://delhihighcourt.nic.in/writereaddata/upload/Notification/NotificationFile_NCJIIRHG.PDF; BOMBAY HIGH COURT APPELLATE SIDE RULES, 1960, *available at* http://bombayhighcourt.nic.in/libweb/rules/BHCASR.html. (in case of urgent orders on the appellate side of the Bombay High Court).

[91] BOMBAY HIGH COURT, UNIFIED AND REVISED RULES (ORIGINAL SIDE AND APPELLATE SIDE) DATED DEC. 6, 2011, *available at* http://bombayhighcourt.nic.in/latest/PDF/ltupdtbom20120317120227.pdf.

[92] BOBBIE JOHNSON, HIGH COURT APPROVES INJUNCTION VIA TWITTER, THE GUARDIAN, http://www.theguardian.com/technology/2009/oct/01/twitter-injunction. *See also* David Cran & Georgia Warren, *Service by Twitter - the UK courts embrace technology*, 21.2 ENT. L.R. 81, 81-83 (2010) ["Service by Twitter"].

[93] MKM Capital Property Ltd. v. Carmela Rita Corbo and Gordon Kinsley Maxwell Poyser (a bankrupt) ACTCA Case No. SC 608 (Austl.). (Austl.).

[94] *Axe Market Gardens Limited v Craig Axe* (unreported) High Court, Wellington, CIV 2008-485-2676, 16 March 2009, Gendall A J (N.Z.).

[95] F.T.C. v. PCCare247, Inc., 12 F.R.D Civ. 7189 (2013) ["FTC"]. *See also* Rio Properties, Inc. v. Rio International Interlink, 284 F.3d 1007 (9th Cir. 2002). *See also* Michael C.

service of judicial processes via private messages on Facebook.[97] In Australia, service via text messages has also been allowed in certain cases.[98]

In this regard, the Parliament may be guided by the spirit of the *New England Merchants* case,[99] with respect to technological advances, as follows:

> *"I am very cognizant of the fact that the procedure which I have ordered in these cases has little or no precedent in our jurisprudence. Courts, however, cannot be blind to changes and advances in technology. No longer do we live in a world where communications are conducted solely by mail carried by fast sailing clipper or steam ships. Electronic communication via satellite can and does provide instantaneous transmission of notice and information. No longer must process be mailed to a defendant's door when he can receive complete notice at an electronic terminal inside his very office, even when the door is steel and bolted shut.*"[100]

The Government should also make appropriate clarifications and agreements[101] with other contracting states under the Hague Convention on cross-border service[102] to ensure that there are no legal impediments to service of judicial documents under the Act via e-mail. In this regard, we may note that there is judicial uncertainty as to whether U.S. Courts consider e-mail to be within India's objected modes of service under the Hague

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Lynch., *You've Been 'Poked'! PCCare247' And Service of Process by Social Media*, 249 N. Y. L. J. 99 (2013).

[96] Knott v. Sutherland, (Can.). *See also* Ian Llewellyn, *NZ Court Papers Can Be Served Via Facebook, judge rules,* THE NEW ZEALAND HERALD (Mar. 16, 2009), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10561970.

[97] *See* Service by Twitter, *supra* note 92.

[98] *See Child Support Registrar Applicant v. Leigh* [2008] F.M.C.A. Fam L.R. 1424, 2008 W.L. 5543896 (Austl.), at ¶ 47 (noting that the defendant was given notice of the proceedings by text message), *Yousif v. Commonwealth Bank of Australia (No. 2)* [2011] F.C.R. 58, W.L. 364929 (Austl.) at ¶ 5-7; *See also* Claire M. Specht, *"Text Message Service of Process—No LOL Matter: Does Text Message Service of Process Comport with Due Process?"* 53 B.C. L. REV. 1929, 1953 (2012).

[99] The New England Merchants National Bank v. Iran Power Generation and Transmission Company et al., 495 F. Supp. 73 (1980).

[100] *Id.*

[101] *See* Art.10, 11, *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 1529 A-9432, Hague (Nov. 15 1965). This allows contracting states to permit channels of transmission other than those provided for in the Hague Convention.

[102] *Id. See also* STATUS TABLE, MEMBERS OF THE ORGANISATION, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=conventions.status&cid=17.

Convention. Some cases have held[103] that India's objection to Article 10 of the Hague Convention[104] is limited to the modes of service mentioned therein *i.e.* postal channels and judicial officers, where India is the destination country, there is no impediment to order alternative means of service including e-mail.[105] However, other cases have read the language of Article 10 to include e-mail and consequently, included in India's objections. In these cases, the Courts were not prepared to substitute the language of the Hague Convention, for language not contained therein, even if it would facilitate international service.[106]

The sixty-day limit on §11 applications, supported by e-service and clarifications or agreements with contracting states under the Hague Convention, would be a comprehensive move towards expediting arbitration. However, having to approach the Courts for extensions, as above, may result in parties lining up before the Courts for seeking extensions or parties choosing foreign jurisdictions, in cases requiring detailed examination of evidence or containing complex issues of law or fact. Further, since there is no carve out for institutional arbitrations as provided for in the case of arbitrator fees, requiring Court approval for extensions in institutional arbitration may be considered to be an unnecessary intrusion and may need to be reconsidered.[107]

We may also note that the 2015 Act requires arbitrators to disclose any circumstances which are likely to affect his ability to devote sufficient time to the arbitration[108] and specifically whether he will be able to complete the entire arbitration within twelve months; for the sake of clarity, it may be specified that this period is to be calculated from the date of the order of appointment.

### iii. Duration of Arbitral Proceedings

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[103] FTC*, supra* note 95.

[104] *See* DECLARATIONS, RESERVATIONS MADE BY INDIA UNDER THE HAGUE CONVENTION, http://www.hcch.net/index_en.php?act=status.comment&csid=984&disp=resn.

[105] FTC, *supra* note 95. *See also* Gurung v. Malhotra, 279 F.R.D. 215, 219 (S.D.N.Y. 2011), Anticevic, 2009 WL 361739, In re: S. African Apartheid Litig, 643 F. Supp. 2d, Philip Morris USA Inc. v. Veles Ltd, No. Civ. 2988 (GBD), 2007 W.L. 725412 (Referred to in *FTC*).

[106] FTC, *supra* note 95. *See also* Agha v. Jacobs*,* No. C 07-1800 RS, 2008 WL 2051061 (Referred to in *FTC*); Graphic Styles/Styles International LLC v. Men's Wear Creations &Richard Kumar, Civil Action No. 14-4283 (July 16, 2014).

[107] P. Nair, *supra* note 47.

[108] Act, §12(1)(b).

First proposed in the 2003 Amendment Bill ["2003 Bill"] [109] as also in the proposals, the 2015 Act imposes a twelve-month time-limit for making domestic awards. [110] This may be extended by the consent of parties up to six months and thereafter, further extensions can only be granted by the Courts, who must *endeavour* to decide extension applications within sixty days, with extensions to be granted only if the parties show sufficient cause. This could prevent unnecessary delays and is likely to do wonders for investor confidence.

When granting extensions, suitable terms and conditions such as expedited time-lines, imposition of costs or penalties for delaying the matter, etc. may be imposed. However, it should also have been provided that when granting extensions, Courts must record whether the delay is attributable to any of the parties, which fact may be considered when imposing costs in the award. This would protect parties acting in good faith from deliberate delays in proceedings. However, the 2015 Act does have a general provision for imposition of actual or exemplary costs which can be put to use in this regard but would need the Courts to take a strong stand against unnecessary extensions.

If the parties do not take steps to extend the time-period as above, the 2015 Act provides that the tribunal's mandate terminates *ipso facto*. As regards arbitrators, the Court when granting an extension has the power to reduce the arbitrator's fees by upto 5% per month, in case the delay is attributable to the arbitrator. This is clearly inadequate and will have little deterrent value. An alternative could be to allow the Courts to reduce the arbitrator fees, proportionate to the period of delay attributable to him, subject to the arbitrator being given a reasonable opportunity to demonstrate sufficient cause for the delay or that the delay was not attributable to him. When considering whether the delay is attributable to the arbitrator, the disclosures with respect to ability to devote time to the arbitration[111] should also be considered.

However, the 2015 Act chose to grant the power to impose costs or suitable conditions on the parties or reduce the fees of the arbitrators or order their substitution, as above. It remains to be seen whether Courts will be readily willing to substitute arbitrators or reduce their fees, except in extreme cases or unjustifiable delays. There is

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[109] THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, (DEC. 2003), §23, http://lawmin.nic.in/legislative/arbc1.pdf ["2003 Bill"].

[110] To be calculated from the date of the arbitral tribunal receiving notice of the appointment in writing. See Act, §29A(1).

[111] Act, §12(1)(b).

also the worry that reputed ad-hoc arbitrators such as retired judges will no longer be willing to act as arbitrators merely due to the risk of embarrassment and loss of reputation by an order of fee reduction or substitution. There is also no carve-out with respect to substitution of arbitrators in cases of institutionalized arbitration, which may be viewed as unwarranted interference with their processes.

On the opposite side of the spectrum, the 2015 Act also legally incentivizes speedy arbitration, by providing that the parties may agree that an arbitrator would be entitled to additional fees for finishing the proceedings within six months.[112]

**iv. Conduct of Arbitral Proceedings**

The Act provides that unless the parties otherwise agree, the arbitral tribunal decides how to conduct proceedings including matters relating to nature of hearings, adjournments, presentation of evidence etc.[113] The 2015 Act adds that evidence should be presented in oral hearings, as far as possible and that oral arguments should be scheduled on consecutive days. Further, adjournments should only to be granted for sufficient cause and frivolous adjournments may be subjected to costs, including exemplary costs.[114] However, it should also require the arbitral tribunal to record reasons in writing for granting adjournments and provide that the sufficiency of the reasons may be considered by the Courts, when determining the reduction of fees of the arbitrator or when considering his substitution, for delays attributable to him.

Further, unless parties otherwise agree, the failure to submit the statement of defence within the specified time, is not treated as an admission of the claim. The 2015 Act grants the arbitral tribunal the discretion to treat this default as a forfeiture of the right to defend claims in the arbitration. However, in the interest of preventing uninterested or negligent respondents from introducing additional facts or issues outside the statement of claim, such failure should be treated as a mandatory forfeiture, without the option to restrict the operation of this section by mutual agreement. In such cases, the respondent may be allowed to deal with the assertions of the claimant, to the limited extent of disproving such assertions, without introducing any new facts or issues or making any positive assertions in the respondent's defence. Similar provisions are contained in the CPC, where failure to file a written statement entitles a Court to

[112] Act, §29A(2).
[113] Act, §24.
[114] Act §24 2nd proviso.

immediately pronounce judgment against the defendant or pass such order as it may think fit, in the alternative.[115] In doing so, the Court cannot act blindly or mechanically and must ensure that if the facts set out in the plaint are treated to have been admitted, the plaintiff would be entitled to judgment without requiring proof of the contents of the plaint.[116]

### v. Recourse Against Arbitral Awards

The 2015 Act requires an appellant to give prior notice to the respondent, before making an application under §34.[117] It also provides that such applications should be disposed off within one year of the service of the notice or sooner, if possible. The author's suggestion to allow e-mail or fax service, in addition to recognized postal services, should also be considered in this regard.[118]

With respect to applications for enforcement of N.Y. Convention awards, the LCI proposed to impose a three-month time-limit under §48 to object to the application, with a last-chance extension of 30 days, on showing sufficient cause.[119] It also proposed a time-limit of one year for deciding such objections. Since the proposals referred to amendments to §56, 57 as well, amendments were expected on similar lines with respect to Geneva Convention awards. However, the 2015 Act has not included these provisions. This may be significant from the point of view of protecting India from investment treaty exposure, as discussed below.

## G. *Concerns in International Arbitration*

### i. Jurisdictional Concerns

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[115] CODE CIV. PROC. 1908, O. VIII R.10 (India).

[116] Balraj Taneja & Anr. v. Sunil Madan & Anr., A.I.R. 1999 S.C. 3381 (India) at ¶ 28-30. If the Court is satisfied that the admission of the entire contents of the Plaint, would entitle the Plaintiff to a decree, without requiring any further proof, the Court may proceed to pronounce judgement, in terms of the plaint. However, if the plaint contains disputed facts, the Court should require the plaintiff to prove the averments in the plaint. This is based on a conjoint reading of O. VIII R. 5(2) and 10, which allow the Courts, in their discretion, to require any facts contained in the plaint to be proved by the plaintiff, when a party fails to file a written statement. *See also* The Gujarat Maritime Board v. G.C. Pandya, 2015 (5) S.C.A.L.E. 212 at ¶ 13.

[117] To be supported by an affidavit endorsing valid service, acknowledgement of receipt and compliance with this provision. This is aimed at eliminating the problems of delays in serving notices through Court.

[118] *See 'Appointment of Arbitrators',* above.

[119] To be reckoned from the date of receipt of the notice of the application under §47.

The 2015 Act amends the definition of '*Court*' in the Act to provide that in cases of ICA, only the High Court which would exercise jurisdiction over a suit on the same subject matter, original or appellate,[120] would exercise jurisdiction for the purposes of the Act. This excludes sub-ordinate Courts since the High Courts are better equipped to deal with such matters which are often quite complex. This is supported by the recent Commercial Courts Ordinance whereby specialized divisions were created in the High Courts to deal with commercial disputes.

Aside from increased investor confidence, this change is important from the stand point of limiting India's investment treaty risks. In 2011, India burnt its fingers in the *White Industries* case,[121] where after almost eight years of delays in arbitration, enforcement and related proceedings, the petitioner, an Australian company, invoked arbitration against India, under a bilateral investment treaty ["BIT"][122] and successfully claimed that the delays constituted a violation of the BIT. In addition to suffering a huge award, India's own arguments in this case highlighted, on a global stage, the problems of our dispute resolution system. To offset the blame for the eight-year delay, India argued that the petitioner should have taken the conditions in India as it found them[123] *i.e.* that since India's judicial system was notoriously slow, the petitioner could not claim denial of justice. As a developing country, different standards should be applied to the conduct of India's *'over-stretched judiciary',* as compared to developed countries. India embarrassingly - claimed that *"delay is a natural, well-known and entirely predictable feature in the Indian court system"*.[124] It was held that the Indian system failed to provide the petitioner with effective means of asserting claims and enforcing rights, in consequent violation of its obligations under the BIT. This serves as a reminder that dispute resolution laws have a significant impact on investment environments, which must not be forgotten when formulating the law.

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[120] Over the principal court of civil jurisdiction, which would have jurisdiction to entertain a civil suit on the same subject matter.

[121] WHITE INDUSTRIES AUSTRALIA LTD. V. THE REPUBLIC OF INDIA, UNCITRAL AWARD (NOVEMBER, 2011), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.

[122] AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF INDIA ON THE PROMOTION AND PROTECTION OF INVESTMENTS, NEW DELHI, (Feb. 1999), *available at* http://www.italaw.com/sites/default/files/laws/italaw6021.pdf.

[123] *Id.* at ¶ 5.2.10.

[124] *Id.* at ¶ 5.2.18, 5.2.19.

### ii. Determination of Nationality for ICA

The definition of ICA under the Act is three-pronged in case of non-governmental parties. It requires at least one of the parties to have a (a) foreign place of residence; (b) place of incorporation; or (c) foreign central management and control.[125] Earlier, test (b) and (c) *i.e.* the place of incorporation and central management and control tests, both applied to companies. Under the 2015 Act, test (c) *i.e.* the management and control test no longer applies to companies, which brings the definition of ICA in line with *TDM Infrastructure*;[126] this decision of the Supreme Court had put the place of incorporation test on a higher footing than central management and control (the latter applied only where the former does not and where the former squarely applies, no recourse to the latter is required). Though the end result of this decision was acceptable, the author disagrees with its basis. The Court proceeded on the basis that a company incorporated in India can only have an Indian nationality, which is true; however, such company may still be foreign managed and controlled and it is this test (c) that is considered under the definition of ICA, not the nationality of the parties. The use of the word '*or*' between test (b) and (c) seemingly indicates, to my mind, the legislative intention to treat arbitrations as an ICA, so long as *any one or more* of the tests apply. Whilst this may not work from a tax perspective, where the actual place of business is given importance over the place of incorporation,[127] for the purposes of dispute resolution, certainty is preferable. Therefore, the place of incorporation is a better test, as it is unlikely to be a disputed fact, unlike the central management and control of a company. Accordingly, legislatively recognizing the effect of this decision in the 2015 Act is welcome, as it was possible for a larger bench of the Supreme Court to reconsider this principle.[128]

### iii. Seat vs. Venue of Arbitration

Substantial complexities in relation to the place of arbitration and the laws that apply to it, may be resolved by legislatively recognizing the seat and venue of arbitration separately. This could be done by amending the definition clause to define the seat of

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[125] *See* Act, §2(1)(f). The foreign residence test only applies to individuals: [*See* 2(1)(f)(i)]. There is also a fourth criteria *i.e.* where one of the parties is a foreign government: [*See* 2(1)(f)(iv)].
[126] T.D.M. Infrastructure v. U.E. Development India Pvt. Ltd., Arb. App. No. 2 of 2008 (S.C.) at ¶ 16-29 ["T.D.M"].
[127] *Id.* at 28.
[128] *T.D.M* (*Id.*) was a single-judge decision of the Supreme Court.

arbitration to mean the juridical seat and the venue of arbitration to mean the physical place where proceedings are conducted, with the parties having the power to provide for the seat and venue of arbitration separately.[129] §2 would also have to be amended to clarify that Part I shall only apply where the '*seat*' of arbitration is in India, excepting certain provisions which would have to be expressly excluded by the parties in case of certain foreign-seated arbitrations.[130] This would re-enforce *BALCO's* seat-centric approach.[131] While this was proposed by the LCI, the proposals and the 2015 Act have not considered these amendments.[132]

However, the 2015 Act does provide in a newly inserted proviso to §2(2), that subject to an agreement to the contrary, certain provisions relating to interim relief, court assistance for evidence and appealable orders,[133] will apply to ICA, even if the '*place*' of arbitration is outside India, provided the awards that would be made in such arbitrations would be recognized and enforceable under Part II. This legislatively overrules BALCO which provided that Part I would be inapplicable in foreign-seated arbitrations.[134] Other

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[129] §20 of the Act would also be amended to allow parties to do so. If the parties fail to agree, the seat/venue would be determined by the arbitral tribunal. *See also* Enercon (India) Ltd. and Ors. v. Enercon GMBH and Anr., A.I.R. 2014 S.C. 3152 (India) where the Supreme Court *inter alia* held that the mention of a foreign place as the venue of arbitration, would not necessarily imply that the seat was also in such country, as the parties had chosen Indian law the governing the substantive contract, arbitration agreement and the conduct of the arbitration. Since India had the *'closest and most real connection'* with the arbitration in that case and since the seat was in India, no other Court could have supervisory jurisdiction, concurrent or otherwise. *See also* Carzonrent India Pvt Ltd. v. Hertz International Ltd., O.M.P. 193/2013 (June 30, 2015) at ¶ 21-25 (referring to *Enercon*) where the Delhi High Court also applied the '*closest and most real connection*' test.

[130] Act, §9,27, 31 read with 2(2).

[131] Bharat Aluminium Company and Ors. v. Kaiser Aluminium Technical Service, Inc. and Ors., (2012) 9 S.C.C. 552. at ¶ 63,95,121,196,200 ["BALCO"] [Part I is limited in its application to arbitrations which take place in India. The choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings. There is no provision under the CPC or the Act for a Court to grant interim measures in terms of §9, in arbitrations which take place outside India, even though the parties by agreement may have made the Act as the governing law of arbitration. In order to do complete justice, the judgement was made to apply prospectively, to all arbitration agreements executed after the date of the judgement.].

[132] 246th Report, Proposed §2.

[133] Act, §9,27 37(l)(a) & 37(3).

[134] BALCO, *supra* note 131.

countries have also made similar provisions in their legislations.[135] This would provide a suitable remedy to parties in foreign-seated arbitrations, who wish to seek protection of the Indian Courts with respect to assets located in India or otherwise. It is not the case that there is no remedy in such cases.[136] It is possible for such party to obtain a foreign interim order and file a civil suit on the order in India.[137] Another equally cumbersome option is to file contempt proceedings in a foreign Court in case of non-compliance of such interim order, obtain a foreign judgment which satisfies the conditions of the CPC for execution of foreign judgments (under §44A read with 13), and then seek direct execution in Indian Courts. In this context, the thrust of this suggestion was to provide a meaningful efficacious remedy, unless the parties, in their wisdom and at their risk, decide that they do not need Indian judicial protection or assistance.

Something to note here, is that the language of the 2015 Act permits an implied exclusion of the above provisions. For the sake of clarity, it should have been provided that the parties must *expressly* exclude these provisions, which the LCI also proposed. Further, the provisions of Part I discussed above would become applicable to arbitration agreements which did not exclude the applicability of Part I, under the impression that such exclusion was not required due to BALCO. This means that Indian Courts may now grant interim relief in such cases. In this regard, the 2015 Act clarified that it will apply prospectively from the commencement of the 2015 Act, though parties to arbitral proceedings can choose to give the 2015 Act retrospective application by way of mutual agreement. It must be noted however, that the 2015 Act applies prospectively only in relation to arbitral proceedings commenced after the 2015 Act, and not to arbitration agreements. Therefore, parties to foreign-seated ICA agreements executed prior to the 2015 Act, which did not expressly exclude Part I (since BALCO did not require such exclusion), may consider re-negotiating their arbitral bargains if they wish to ensure continued non-intervention of Indian Courts.

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135 *See, e.g.,* THE ARBITRATION ACT, 1996, §2, (U.K.),, http://www.legislation.gov.uk/ukpga/1996/23/section/2 & §12A, SINGAPORE INTERNATIONAL ARBITRATION ACT, http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A%22fdb4f13d-0fdb-4083-806a-0c16554efd0b%22%20Status%3Ainforce%20Depth%3A0;rec=0.

136 *See* 246th Report, at ¶ 41.

137 Foreign orders for interim relief are not recognized by India for direct enforcement, as they are not final adjudications on merits. See CODE CIV. PROC. §44A read with 13.

There is also uncertainty surrounding foreign-seated arbitrations between Indian parties. This has been the subject of two recent decisions; the Madhya Pradesh High Court in *Sasan Power*[138] and the Bombay High Court in *Addhar Mercantile*.[139] At first blush, these decisions seem to be contrary to each other, but it is not so. These decisions hinged on interpretations of *TDM Infrastructure*,[140] which held that Indian parties cannot derogate from Indian law as a matter of public policy; this would hold true only for §11, as the Supreme Court itself clarified.[141] Further, the Court relied on the non-derogable nature of §28 (deals with the substantive law of the contract) read with §2(6) in support of its reasoning. It did not however refer to the *lex arbitri* and therefore even in cases under §11, the agreement would be contrary to public policy only if two Indian parties contract out of the substantive laws of India but a foreign *lex arbitri* would be permitted. Accordingly, *Sasan Power*, a decision under §45 and not §11, allowed a foreign-seated arbitration. It held that in such cases the nationality of the parties would not be relevant and two Indian parties could willingly agree to a foreign seat. However, *Addhar Mercantile*, a decision arising out of a §11 proceeding where the parties had chosen a foreign substantive law, did not allow two Indian parties to derogate from Indian law, since it was covered by *TDM Infrastructure*. Therefore, *Sasan Power* and *Addhar Mercantile* were not incongruous though the end results were different.

We may note that while *TDM Infrastructure* was made in the context of §11, *Sasan Power* effectively reads down the Supreme Court's statement that Indian parties cannot derogate from Indian law, as a matter of public policy.[142] The question also remains whether it will be possible for two Indian parties to choose a foreign seat, with respect to matters which are not arbitrable as per Indian law. These matters are likely to be tested in the Supreme Court. It may also be noted that Indian Courts would not be able to grant

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[138] Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd., First Appeal No. 310 of 2015 (Sept. 11, 2015) (India) ["Sassan Power"].
[139] Addhar Mercantile Private Ltd. v. Shree Jagdamba Agrico Exports Pvt. Ltd., Arbitration Application No. 197 of 2014 along with Arbitration Petition No. 910 of 2013.
[140] T.D.M, *supra* note 126.
[141] Sassan Power, *supra* note 138 at ¶ 54.
[142] NDA Hotline, *Two Indian Parties Opting for Foreign-Seated Arbitration: No Bar?, Dispute Resolution Hotline,* NISHITH DESAI (October 14, 2015), http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/two-indian-parties-opting-for-foreign-seated-arbitration-no-bar.html?no_cache=1&cHash=038c425ae80e1dc999e1b40785cf8b42. *See* T.D.M, *supra* note 126 at ¶ 20.

interim relief in a foreign seated arbitration between two Indian parties, though it can now do so in foreign seated ICAs.[143]

## H. *New Facets to the Law of Arbitration*

### i. Emergency Arbitration

Recognizing emergency arbitration systems in other jurisdictions,[144] the LCI proposed to include emergency arbitrators in the definition of arbitral tribunal. This is a special kind of arbitration which serves a limited purpose; to grant immediate and urgent interim relief within a fixed time period. The merits of this order can then be examined in detail in a full-blown arbitration and can be upheld, quashed or suitably modified, by the arbitral tribunal. The Bombay High Court, in *HSBC PI Holdings,*[145] has also recognized this concept, when it allowed an application under §9, made to enforce an emergency relief order passed by a S.I.A.C. Tribunal. Unfortunately, the 2015 Act has not provided for emergency arbitration.

The author believes that providing for emergency arbitration is much needed. However, this should not be done by simply amending the definition clause, as all the provisions of the Act will apply to such arbitrations, which could have unintended consequences. Instead, a separate set of provisions, tailor-made for emergency arbitration, should be adopted.

### ii. Confidentiality

[143] Sassan Power, *supra* note 138 at ¶ 71, 72.

[144] For example, *See* N. Vivekananda, *The S.I.A.C. Emergency Arbitrator Experience*, S.I.A.C. (2013), http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/338-the-siac-emergency-arbitrator-experience. The S.I.A.C. Rules require that the appointment of an arbitrator be made within one business day of the acceptance of the application in this regard. Once appointed, the emergency arbitrator sets out a schedule for consideration of the application within two business days. Out of 34 applications for emergency arbitration under the S.I.A.C. Rules, the average time for an interim order from the receipt of an application is 2.5 days and for an award is 8.5 days, and in certain case(s), even as short as one day.

[145] H.S.B.C. PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd. and Ors., Arbitration Petition No. 1062/2012, High Court of Bombay, India, (Jan. 22, 2014).

Parties having confidential or price-sensitive information are concerned that such information may end up in the public domain. This is a worry for parties in ordinary litigation. However, though the Act does not specifically deal with confidentiality issues, parties may choose to lay down rules dealing with such issues in relation to arbitral procedure. [146] This is unlike Hong Kong,[147] SIAC[148] etc. where there are rules which allow parties to specify confidential information which cannot be disclosed by the parties in ordinary circumstances, with exceptions in cases of self-protection, pursuit of legal rights, challenging awards, professional communication, mandatory disclosures, etc. Parties may also make representations to the Court to conceal such information. In some cases, the Courts also have the power to delay publication, up to a certain period of time[149] and Courts/arbitral tribunals are required to consider confidentiality agreements, before directing publication of information. Such measures should be incorporated in the Act, to assure investors that their information will be protected.

### iii. Fast Track Arbitration

The Act, pre-amendment did not prohibit or impede fast-track arbitrations ["FTA"]. Its permissive language relating *inter alia* to appointments, conduct of proceedings,[150] dispensing with oral hearings, *ex-parte* hearings etc., allows parties to adopt fast-track procedure, if it suits them.[151] However, theoretically permitting FTA may not be enough to achieve meaningful FTA.

Recognizing this, the 2003 Bill[152] sought to introduce FTA;[153] however, the Bill did not take off. A decade later, the Government proposed to introduce FTA but in the

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[146] This is with respect to arbitration. As regards conciliation under the Act, §70 provides that a party may submit information to the conciliator on the condition that it is kept confidential and not disclosed to the other party.

[147] ARBITRATION ORDINANCE, CHAPTER: 609, §16, 17 AND 18, *available at* http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/$FILE/CAP_609_e_b5.pdf.

[148] ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE, S.I.A.C. RULES §35, http://www.siac.org.sg/our-rules/rules/siac-rules-2013.

[149] *Supra* note 147, 148.

[150] *I.e.,* such as fixing time limits with respect to the filing of the statements of claim, replies and counter-claims etc.

[151] Indu Malhotra, *Fast Track Arbitration*, XLI/No. 1 ICA'S ARB. Q., ICA 8 (2006).

[152] 2003 Bill, *supra* note 109.

[153] By introducing a new Chapter XI to the Act with substantive provisions supported by a new schedule containing procedural rules. Procedural rules for the entire course of FTA proceedings, such as requiring the simultaneous filing of evidence affidavits, expert

meanwhile, the 2015 Act introduced §29B to the Act. This section provides that parties may adopt FTA before or at the stage of constitution of the tribunal. This should be modified to allow parties to do so even after constitution. It provides that the parties '*may*' appoint a sole arbitrator, as opposed to the compulsory unanimously appointed sole arbitrator, under the 2003 Bill. This is sensible as FTA is unlike emergency arbitration, where compulsorily providing for a sole arbitrator may make sense, as the emergency arbitration serves a limited purpose; once its purpose is discharged, a full tribunal can review the matter on its merits. On the contrary, in FTA, parties may wish to appoint a full tribunal with diverse qualifications, experience or expertise, unlikely to be possessed by a sole arbitrator, and accordingly, should be granted the discretion to so choose.

FTA proceedings are to be completed within a period of six months. With respect to extensions, certain sub-sections[154] of the newly introduced §29A have been incorporated by reference to FTA including matters such as extension by consent or the Courts, grounds for extensions, substitution of arbitrators, imposition of costs, etc. Further, FTA is to be decided on the basis of written pleadings, documents and submission, without any oral hearings. Oral hearings are only allowed on a unanimous request or if the tribunal considers it necessary to clarify issues. When it does have such hearings, the tribunal may do away with technical formalities and adopt appropriate procedure with respect to disposal of FTA. Taking the cue from the 2003 Bill, it should be provided that proceedings should be conducted on a daily basis or at least for three consecutive days on each occasion.[155]

The 2003 Bill provided a set of non-derogable procedures in a new Schedule; these included shortened time-lines for commencement of arbitration and filing of pleadings (notably, to save time, these pleadings are to be accompanied by supporting documentary evidence, witness affidavits, expert opinions, applications for discovery, interrogatories and other supporting material) and day-to-day hearings. It also

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opinions, applications for discovery or production of documents, counter claims etc. along with the principal pleadings, were proposed to support the substantive provisions of Chapter XI. *See* Chapter XI-Single Members Fast Track Arbitral Tribunal and Fast Track Arbitration and the First Schedule in the 2003 Bill.

[154] Act, §29A (3)-(9).

[155] *See* 2003 Bill, First Schedule, art. 3. Oral hearings for recording evidence would only be permitted on request of a party, if the tribunal believes the request to be justified, or if the tribunal considers it necessary to do so. Similarly, at the discretion of the tribunal, oral arguments may be permitted and its duration restricted and oral evidence may also be taken under certain circumstances.

contemplated, decision-making based on written pleadings, supporting evidence and submissions and oral evidence only on a justified request by a party or if the arbitrator considers it necessary. These are all calculated at ensuring speedy arbitration. However, cogent enforcement provisions were also provided for; to ensure adherence to time-lines and implementation of interim orders and directions, FTA tribunals could pass peremptory orders and in case of undue or deliberate delays, the tribunals could impose costs, strike-out pleadings, exclude material, draw adverse inferences and even dismiss a claim for non-prosecution or pass an ex-parte award against a respondent.[156] With these matters being non-derogable, parties could get straight to the crux of the matter instead of wasting time trying to agree on procedural issues.

Such rules should be incorporated in the Act, either in the section itself, or by introducing a new Schedule to the Act like the 2003 Bill did. Alternatively, the Government may later frame a set of FTA rules under the Act.

**iv. Proposed Cost Regime**

Parties often take advantage of the fact that Indian Courts, many times do not award costs and if they do, these costs are usually nominal or parties are made to bear their own costs.[157] Often multiple proceedings are filed and inexpensive lawyers are engaged to carry them on, till they end in due course, without any hope of success, while the respondent, being the one with something to lose, incurs substantial legal fees and costs in *bona fide* defence.[158] Though these observations are in the context of civil proceedings, they ring true for arbitration as well.

Even otherwise, the cost of contract enforcement in India is high, reportedly 40% of the claim, on average.[159] To remedy this, the 2015 Act has granted the Courts and arbitral tribunals, the power to impose costs in proceedings under the Act including *inter alia* the quantum and time for payment.[160] Unless otherwise ordered by the Court or the

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[156] *Id.* Proposed Chapter XI - §43C read with First Schedule.

[157] Salem Advocate Bar Association, Tamil Nadu v. Union of India, A.I.R. 2005 S.C. 3353 (India) at ¶ 37.

[158] Puja Kakar v. Arjun Kakar, C.M. (M.) No. 9/2010 & C.M. No. 77/2010 (January 28, 2010) at ¶ 9 ["Puja Kakar"]. In this case the Delhi High Court referred to such lawyers '*adjournment experts*', who are hired for the primary purpose of obtaining adjournments.

[159] World Bank Report 2014, *supra* note 9 at 192.

[160] 2015 Act, §31A read with 31(8). For the purposes of this provision, the 2015 Act requires that a reasonable standard be applied and that costs should include things such

arbitral tribunal, the losing party will suffer the costs awarded, so that costs follow the event.[161] When awarding costs, the Court or arbitral tribunal, make take factors such as conduct of parties, frivolity of claims, settlement efforts etc. into consideration. The power to take the '*conduct of parties*' into consideration when imposing costs, should be sufficient to tackle frivolous adjournments and sharp practices;[162] Hopefully, this power is not overlooked and is used to deter or at least punish such practices.

Further, agreements for allocation of costs in arbitrations are only valid if made after the disputes have arisen.[163]

**iv. Moving Away ad-hoc to institutional arbitration**

As a party-autonomy legislation, the Act inadvertently favored ad-hoc arbitration. Parties more often than not opt out of specialized institutional arbitration, missing out on the benefits of fixed procedure; specialized administrative and secretarial support, resources and infrastructure; internal reviews;[164] and the advantage of being globally recognized. In addition to missing out on these benefits, ad-hoc arbitration also has

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as arbitrator, court, witness, legal, administrative and other fees and expenses that may be incurred in the court or arbitral proceedings.

[161] This is described by the LCI in its 246th Report at para 71 as an economically efficient deterrence against frivolous conduct. The LCI and the Supreme Court have also recognized the principle that costs should ordinarily follow the event. *See also* Law Commission of India, *Costs in Civil Litigation, 240th Report*, (May. 2012) AT ¶ 1.6, *available at* http://lawcommissionofindia.nic.in/reports/report240.pdf and the Supreme Court of India in Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust and Ors., (2012) 1 S.C.C. 455 (India).

[162] *See* Puja Kakar, *supra* note 158. In this case, the Delhi High Court deprecated the concept of granting adjournments for frivolous reasons [in this case, claiming that the counsel's car containing the case papers were stolen while the counsel continued to argue tagged matters before other forums, which would not be possible if the papers of the case were stolen.] The Court also noted that a separate breed of advocates has cropped up, who are 'adjournment experts' who are deliberately engaged to ensure adjournments. *See also* Thana Singh v. Central Bureau of Narcotics, (2013) 2 S.C.C. 590 (India) at ¶ 5, where the Supreme Court of India noted adjournments are generously granted in India for varied reasons, which deserves to be completely abolished.

[163] Ostensibly, this is to protect weaker parties with little bargaining leverage or parties who may not have entered into the agreement with their eyes open.

[164] Some institutions provide an internal review of draft awards before they are finalized. In this review, the draft award may be modified or the attention of the tribunal may be drawn to certain issues or points in the award which need to be reconsidered. This would reduce the risk of being overturned. For example, under the rules of the International Chamber of Commerce ["ICC"], arbitral tribunals are required to submit a draft to the ICC International Court of Arbitration, for scrutiny in accordance with the ICC Rules of Arbitration. *See* ICC Rules of Arbitration, A. 33: Scrutiny of the Award by the Court.

considerable scope for disappointment; In fact, disputes arising out of matters of procedure, impartiality and independence, are frequent and a considerable extent of the case load in sub-ordinate courts' relates to proceedings to challenge ad-hoc arbitral awards.[165]

Arbitration clauses may not set-out detailed procedure and may only set-out the seat/venue of arbitration, substantive law and the number, qualifications and procedure for appointment of the arbitral tribunal. Therefore, parties may be required to agree on matters of procedure as they arise in the due course of arbitration. This is a difficult proposition as parties in a contentious setting are unlikely to see eye-to-eye regarding even simple procedural issues. It is better to ensure that procedural issues are settled at the outset. In this regard, the law should actively encourage institutional arbitration, whilst also allowing ad-hoc arbitration. Accordingly, the LCI proposed to amend §11 to allow the Courts to take steps to encourage the parties to refer the disputes to professional institutionalized arbitration. Instead, it may be considered to provide that within thirty days of the appointment of an ad-hoc arbitrator, the parties in consultation with the arbitral tribunal, must finalize procedural rules all the way up to the making of the award. If the parties fail or neglect to do so or cannot agree on the procedure to be adopted, the parties will be governed by a list of rules, set-out in a new Schedule to the Act, which should cover most situations. Like the Tables prescribed in the Companies Act with respect to the Articles of Association of a company, unless the parties specifically provide otherwise or exclude or modify the rules in the schedule, these rules will apply and fill in the gaps. In cases of inconsistency, the rules fixed by the parties, will prevail. As regards matters not provided for by either the rules fixed by the parties or deemed adopted from the Schedule, and only in such cases, the arbitral tribunal may exercise its power to determine procedure, currently housed under §19. In this way, parties can avail of the freedom and flexibility of ad-hoc arbitration, whilst at the same time having a set of rules, not unlike institutionalized arbitration, fixed at the outset.

I. *Miscellaneous Provisions*

[165] JUSTICE K.G. BALAKRISHNAN, CHIEF JUSTICE OF INDIA (RETD.), INAUGURAL ADDRESS, INTERNATIONAL CONFERENCE ON 'INSTITUTIONAL ARBITRATION IN INFRASTRUCTURE AND CONSTRUCTION', NEW DELHI (OCT. 2008), http://supremecourtofindia.nic.in/speeches/speeches_2008/16[1].10.08_ciac_conference.pdf.

### i. Arbitrability of Fraud, Corruption and Complex Questions

The 2015 Act has not incorporated the LCI's proposal to legislatively recognize and clarify that the powers of the arbitral tribunal under §16 include ruling on disputes involving; (a) allegations of fraud/corruption; (b) serious questions of law; or (c) complicated questions of fact.[166] This would have been in keeping with the Supreme Court in *Swiss Timing*[167] with respect to Part I arbitrations. It may be noted that the Supreme Court in *World Sport Group*[168] has held that even reference to foreign arbitration under §45 would not be barred, even in cases involving allegations of fraud or malpractice.[169]

### ii. Award of Interest

The LCI in its 246th Report proposed that the Act should allow interest on pre-award interest, without having the benefit of referring to the Supreme Court decision in *Hyder Consulting*,[170] pronounced three months later.[171] At the time, pre-award interest was not allowed.[172] However, *Hyder Consulting* has now declared that the Act permits the inclusion of pre-award interest in the principal sum of the award, when granting interest post-award, bringing India on par with major Arbitration hubs.[173] Additionally, interest is now to be calculated by adding 2% to the prevalent bank rates of interest,[174] as opposed to the fixed rate of 18% which may not match up to commercial expectations.

### iii. Claims, Defence and Pleadings

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[166] 246th Report, Proposed §16(7).
[167] Swiss Timing Limited v. Organising Committee, Commonwealth Games 2010, A.I.R. 2014 S.C. 723 (India) at ¶ 28,31.
[168] World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd., A.I.R. 2014 S.C. 968 (India).
[169] *Id.* at ¶ 29,30 & 32. [except as provided in §45 *i.e.* if the agreement is null and void, inoperative or incapable of being performed].
[170] Hyder Consulting (UK) Ltd. v. Governor, State of Orissa, A.I.R. 2015 S.C. 856 (India). This was a 2:1 majority decision of a three judge bench of the Supreme Court. S.A. Bobde, J., and A.M. Sapre, J. gave separate concurring decisions and H.L. Dattu, C.J., giving a dissenting opinion. *See also* State of Haryana and Ors. v. S.L. Arora & Co., (2010) 3 S.C.C. 690 (India).
[171] The report was issued in August, 2014 whereas the judgment in *Hyder Consulting* (*Id.*) was pronounced in November, 2014.
[172] *See* S.L. Arora, *supra* note 170.
[173] *See, e.g.,* LCIA Arbitration Rules, §26.4; Arbitration Rules of the Singapore International Arbitration Centre, S.I.A.C. Rules, §28.7, Arbitration Ordinance, Chapter: 609, §79 (Sing.).
[174] *See* The Interest Act, No. 14 of 1978, INDIA CODE (1978).

The 2015 Act allows a respondent in Part I arbitrations to plead a set-off or counter-claim. This would not be fair to the other party, who may have intended that certain disputes with the other party ought not to be submitted to arbitration or to arbitration under different rules,[175] and therefore, such counter-claims and set-offs are allowed only if they are covered by the arbitration agreement. This prevents multiplicity of proceedings, by allowing such claims which may be outside the scope of the arbitral reference, but must be within the prescribed fairness threshold *i.e.* covered by the arbitration agreement.

Provisions requiring parties to give advance notice of their intention to submit pleadings should also be introduced as parties often seek adjournments to review pleadings, which are strategically submitted on, or close to the date of hearing so as not to allow the other party sufficient time to respond or consider their contents. Such adjournments are often granted as a matter of course resulting in a waste of fees, costs and charges. Requiring advance notice would allow the parties to avoid convening a hearing, which can be rescheduled to a later date, thereby reducing non-effective hearings and unnecessary costs. This should be included in institutionalized rules, proposed above.[176]

### iv. Fees of Arbitrators

The 2015 Act introduces a Schedule of fees,[177] to act as a guide to the High Court which may frame rules with respect to the determination and manner of payment of arbitrator fees. However, this does not apply to institutional arbitration or ICA and cases where the parties agree to determine fees as per the rules of an arbitral institution. Parties to arbitration will be relieved since they used to find themselves at the mercy of arbitrators, often retired Supreme Court judges, who charge exorbitant fees with the parties keeping quiet in the fear of antagonizing such arbitrators.[178]

## III. Concluding Remarks

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[175] For example, based on the nature of the disputes, the party may want the arbitrator to possess certain special qualifications.

[176] See *'Moving Away from Ad-Hoc to Institutional Arbitration*', above.

[177] Subject to amendments by the Central Government. *See* Act, §11(14).

[178] *See* the observations of the Supreme Court in Union of India v. Singh Builders Syndicate, (2009) 4 S.C.C. 523 (India) at ¶ 10, with respect to high fees charged by certain arbitrators. *See also* Krishnayan Sen, *India Ushers in Reforms in Arbitration Law (Finally!)*, THE FIRM (October 26, 2015), http://thefirm.moneycontrol.com/story_page.php?autono=3794361.

The law of Arbitration, as a species of dispute resolution and contract enforcement law, continues to be linked to the evolution of International business, with arbitration clauses continuing to be heavily negotiated in cross-border transactions. Recognizing this, both the Government and the Judiciary, demonstrated an inclination to make India arbitration friendly, going so far as to dream of India becoming an Arbitration hub. The 2015 Act is the first step taken towards this end by the Government, to fix a law that inadvertently warranted, validated and made blameless; delays, heavy costs, partisan decision-making and enforcement loop-holes, without recourse to adequate remedial measures. This is partly due to inherent flaws in the law and India's peculiar dispute resolution ethos.

The 2015 Act has solved some of these problems. However, there seems to be a need for deeper involvement of the law, at the cost of, but without unreasonably restricting, party autonomy. This must be achieved without increasing, or if possible, even reducing recourse to Courts. To this end, the author proposes that the Act be moulded into a hybrid system which reasonably limits party autonomy; incorporates elements of institutionalized arbitration, international practices and technological advances; and ensures continued minimal judicial intervention. In this light, the 2015 Act, taken with the suggestions of the author, may go a long way in solving most of the Act's foreseeable problems;

*Firstly,* there will be a sense of justice as parties will be protected from partisan adjudication at the threshold; there will be determent of unfair or unwanted practices by imposition of penalties, costs and reduction of fees; increasing accountability;[179] reducing adjournments; and stream-lining of interventionist action.[180]

*Secondly,* major enforcement concerns will be addressed by clarifying the enforcement exceptions of public policy, patent illegality, fundamental policy of India and the scope of review of such exceptions; requiring stay applications as an entry barrier for recourse against awards; granting the power to impose conditions in such cases; and making interim orders of arbitrators enforceable as orders of the Court.

*Thirdly,* reduction in delays in arbitration by imposing time limits on appointment of arbitrators, recourse against awards, shelf-life for interim awards and measures such as

[179] For example, by requiring recording of reasons for adjournments and linking this along with adherence to time-lines etc. with the costs regime.
[180] *See* Act, §8,11,16.

facilitating counter-claims and set-offs, advance notice of pleadings, etc., will push proceedings at a faster pace.

*Fourthly,* international concerns will be allayed by only allowing the High Courts to entertain ICA proceedings and by re-enforcing the place of incorporation test and the seat-centricity principle; as also providing ICA carve-outs.

*Fifthly,* India can move towards institutionalized arbitration by requiring Courts to refer appointments of arbitrators to designated institutions and imposing procedural rules on parties, if they fail to fix the rules themselves, at the threshold of arbitration. The flexibility of ad-hoc arbitration will remain available provided this right is exercised with specified time periods, failing which the Act will fill in the gaps, leaving residuary powers to the arbitrator. Carve-outs to prevent unnecessary intrusion into institutionalized arbitration will support this move.

*Sixthly,* it will breathe new life into the Act by providing for emergency arbitration, FTA, protection of confidential information and allowing e-service.

*Lastly,* providing for appropriate clarifications and modifications will avoid unnecessary judicial interpretational involvement as also exceptions, wherever required to tone down the tenor of the law.

It is possible that these proposals may be considered utopian. However, even if some of the proposals in this article are made into law, it will bring us closer to North's vision of a perfect dispute resolution which is neutral, costs nothing and takes no time.

Editorial Note

# ARBITRABILITY OF COMPETITION LAW DISPUTES IN INDIA – WHERE ARE WE NOW AND WHERE DO WE GO FROM HERE?

*Tanya Choudhary**

## Introduction

In the contemporary era of ever increasing global trade and commercial disputes, the role of arbitration as an alternative method of dispute resolution is steadily growing.[1] By agreeing to arbitrate, private parties waive their right to approach the national courts in order to avail the benefits of a flexible, neutral and impartial forum of adjudication. However, the private nature of arbitration and the confidentiality of the decision making process often give rise to debates on whether certain 'public law' issues involving public interest can be settled by way of arbitration.[2]

Competition law is one such matter through which the State checks unacceptable economic activities by using punitive damages as a means of deterrence.[3] Since competition law exists to prevent market distortions, enhance overall efficiency of the market and safeguard consumer welfare,[4] there is a substantial public interest element involved in punishing violations of competition law, raising doubts about the 'arbitrability' of competition law disputes.

Simply put, 'arbitrability' refers to the ability of a dispute to constitute the subject matter of arbitration.[5] The concept encapsulates three aspects, (i) whether the disputes, having regard to their nature, could be resolved by a private arbitral forum or whether

* V Year Student, National Academy of Legal Studies and Research.

1 Marna Lourens, *The Issue of 'Arbitrability' in the Context of International Commercial Arbitration (Part I)*, 11 S. AFR. MERCANTILE L.J. 363, 363 (1999).

2 Assimakis P. Komninos, *Arbitration and EU Competition Law* 7 (Univ. Coll. London, Dep't of Law, Working Paper, 2009) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520105 ["Komninos"]. *E.g.,* Robert Gorman*The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 4 U. ILL. L. REV. 635 (1995); Robert B. von Mehren, *From Vynior's Case to Mitsubishi: The Future of Arbitration and Public Law*, 12 BROOK. J. INT'L L. 583 (1986).

3 Maria Valmana Ochaita, *Civil Liability for Infringing Competition Rules: Grounds, Standing and Scope of Damages*, *in* PRIVATE ENFORCEMENT OF COMPETITION LAW 572 (2011); Patricia Hanh Rosochowicz, *Deterrence and the Relationship Between Public and Private Enforcement of Competition Law,* 25 EUR. COMPETITION L. REV. (2005).

4 See, *e.g.*, Indian Competition Act, No. 12 of 2003, Preamble, INDIA CODE (2002); Treaty on European Union 1992, art. 3(1); Namibia Competition Act (2003), Cap. (1); South Africa Competition Act 89 of 1998 art. 2 (S. Afr.); Competition & Consumer Act 2010 s 2 (Austl.); Commerce Act, 1986, 1A (N.Z.).

5 Alexis Mourre, *Arbitrability of Antitrust Law from the Europe and US Perspectives, in* 1 EU AND US ANTITRUST ARBITRATION: A HANDBOOK OF PRACTITIONERS 1, 3 (Gordon Blanke & Philip Landolt eds., 2011).

they are exclusively reserved for public fora (courts); (ii) whether the disputes are covered by the arbitration agreement and (iii) whether the parties have referred the disputes to arbitration.[6] Since the answer to the last two questions do not raise public policy concerns and are specific to the facts of each case, this article is intended to deal only with the first question of subject-matter arbitrability.

The arbitrability of competition law disputes becomes a critical question when a dispute arises between parties who have a pre-existing contractual relationship (a franchise agreement, joint venture, technology licenses, distribution agreements etc.) and the agreement contains a clause to refer all disputes to arbitration.[7] In a contractual dispute, competition law could be invoked either as a *shield* (say, where Party A claims for breach of contract and party B defends himself by claiming nullity of the contract because it is anti-competitive) or as a *sword* (for instance, where one party is claiming damages for loss suffered due to other party's anti-competitive behaviour).[8] Can competition law disputes be referred to arbitration leading to a binding award enforceable by courts?

This issue has been the subject of intense debate throughout the world,[9] while the matter continues to remain relatively unexplored in the Indian context. The present article attempts to fill this lacuna by analysing this seemingly uneasy interface between arbitration and competition law regimes in the Indian setting.

The present article has both positive and normative aspects. The article first explores whether there are any restrictions on the arbitrator's power to decide competition law issues under the existing legal regime of India and then discusses the

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[6] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 S.C.C. 532 ¶ 21 (India) ["Booz Allen"].

[7] John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C.L. REV. 219 (1986).

[8] Organization of Economic Co-operation and Development [OECD], *Arbitration and Competition*, OECD DAF/COMP (2010) 40 ["OECD"]; Komninos, *supra* note 2.

[9] Fiona Trust & Holding Corp. v. Privalov [2006] EWHC (Comm) 2583 (Eng.); Cour d'appel [CA] [regional court of appeal] Bologna, July 18, 1987; *accord.* Coveme v. Compagnie Francaise des Isolants, (Fr.); Premium Nafta Products Ltd v. Fili Shipping Company Ltd., [2007] UKHL 40 (appeal taken from Eng.); Ludwig Von Zumbusch, *Arbitrability of Antitrust Claims under US, German and EEC Law: The International Transaction Criterion and Public Policy*, 22 TEX. INT'L LJ 291 (1987); John Beechey, *Arbitrability of Anti-Trust/ Competition Law Issues – Common Law,* 12 ARB. INT'L (1996); Frank-Bernd. Weigand, *Evading EC Competition Law by Resorting to Arbitration?*, 9 ARB. INT'L 249 (1993); JH Dalhuisen, *The Arbitrability of Competition Law*, 11 ARB. INT'L 151,151 (1995); Hamid Gharavi, *The Proper Scope of Arbitration in European Community Competition Law*, 11 TUL. EUR. & CIV. 185 (1996); J Bridgman, *The Arbitrability of Competition Law Disputes*, 1 E.B.L.R. 147 (2008); Nevin Alija, *To Arbitrate or Not to Arbitrate…Competition Law Disputes*, 5 MEDITERRANEAN J. SOCIAL SCIENCES 641 (2014).

normative justifications and advantages of allowing arbitration in competition law. To situate the debate in its proper context, Part I of the article discusses the international experience of arbitrability of competition law disputes and the remaining article then critically analyses the legal position in India. Part II provides a synoptic perspective of the arbitration regime in India and attempts to formulate a working definition of arbitrability by an analysis of existing case laws. Part III undertakes a critical evaluation of the Competition Act, 2002 to assess whether a dispute involving competition law could satisfy the test of arbitrability, highlighting in particular, the legal impediments in arbitrating such a dispute. Finally, Part IV is a normative evaluation of the pros and cons of entrusting arbitrators with competition law disputes.

### A. *Genesis of the Debate: A glance at the International Position*

At first glance, the two branches of law – arbitration and competition law - seem to be diametrically opposite. *Competition law* is dominated by public order, requiring the state to promote competitive markets and protect public interest while in contrast, *arbitration law* is a private consensual method of dispute resolution centred around party autonomy.[10] In such a case, whether or not competition law disputes can be subjected to arbitration has been the subject of considerable discussion throughout the world, particularly in the United States ["US"] and the European Union ["EU"].[11]

Historically, private resolution of disputes through arbitration was considered ill-suited for competition law issues because fear prevailed that competition law issues are fact-intensive and therefore, too complicated for arbitrators; or that the private nature of arbitration means that the competition law would not be applied openly or consistently; or that arbitrators have a pro-business bent of mind which might lead to under-enforcement of laws.[12] Since there is no appeal from an arbitral award, arbitration was often seen as a 'black hole to which rights are sent and never heard from again.'[13]

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[10] Ioan Lazar & Laura Lazar, *Considerations on International Commercial Arbitration in Competition Matters in the European Union*, 15 CURENTUL JURIDIC 103, 107 (2012).

[11] James R. Atwood, *The Arbitration of International Anti-trust Disputes: A Status Report and Suggestions,* INT'L ANTITRUST L. & POL'Y (1994); H. Paul Lugard, *EC Competition Law and Arbitration: Opposing Principles?,* 19 E.C.L.R. 295 (1998); Assimakis P. Komninos, *Arbitration and the Modernisation of European Competition Law Enforcement*, 24 WORLD COMPETITION 211 (2001).

[12] American Safety Equipment Corp. v. J.P. Maguire, 391 F.2d 821 (2d Cir.,1968); *accord.* Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 (1974); Jacques Werner, *Application of Competition Laws by Arbitrators: The Step Too Far*, 12 J. INT'L ARB 21,23 (1995); Emanuela LecchI & Michael Cover, *Arbitrating Competition Law Cases* (March 2008) www.charlesrussell.co.uk.

[13] William W. Park, *National Law and Commercial Justice, Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647 (1988-89).

Besides these public policy concerns, the problem stood further compounded in the European Union where the European Commission initially enjoyed exclusive jurisdiction over competition law disputes. Since the national courts in EU did not have the power to hear competition law disputes,[14] arbitral tribunal which are considered to be a substitute of courts, were also denied the jurisdiction to hear disputes involving competition law.[15]

This judicial hostility towards arbitration underwent a change in the 1980s and early 1990s, beginning with the US judgment of *Mitsubishi Motors Corp v. Soler Chrysler Plymouth,*[16] where the court held that an arbitration clause in an international contract should be given full effect even if that means submission of antitrust issues to arbitration. The Courts acknowledged that arbitrators in this time and era, deal with complex problems and when faced with the adjudication of competition law disputes, it is always possible to select an arbitrator who is an expert in the field of competition law.

A similar change was witnessed in the European Union where Regulation 1/2003 decentralized competition law and allowed the national courts of member states to hear competition law matters.[17] In the landmark judgment of *EcoSwiss China Time Ltd. v. Benetton International NV,*[18] the European Court of Justice affirmed arbitral tribunal's power to hear competition law disputes. As a result, arbitration of competition law is now a *fait accompli* in US[19] and European countries.[20]

Against the backdrop of this international experience, let us now analyse whether arbitration can play a role in resolving competition law disputes under the existing legal regime in India.

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[14] Council Regulation No. 17/62 (Feb. 6 1962).
[15] Komninos, *supra* note 2.
[16] Mitsubishi Motors Corp v. Soler Chrysler Plymouth, 473 U.S. 614 (1985).
[17] Council Regulation (EC) No. 1/2003 (Dec. 16 2002). *See also* Carl Baudenbacher & Imelda Higgins, *Decentralization of EC Competition Law Enforcement and Arbitration*, 8 COLUM. J. EUR. L. 1 (2002); Julian Lew, *Competition Laws: Limits to Arbitrators' Authority, in* ARBITRABILITY – INTERNATIONAL AND COMPARATIVE PERSPECTIVES (Loukas Mistelis & Stavros Brekouslakis eds., 2011).
[18] Case C-126/97, Eco Swiss China Time Ltd. v. Benetton Int'l N.V., 1999 E.C.R. I-3055.
[19] GKG Caribe Inc. v. Nokia-Mobira Inc., 725 F.Supp. 109, 110-113 (D.P.R. 1989) ["GKG Caribe Inc."]; *accord.* Gemco Latino-America Inc v. Seiko Time Corp., 671 F.Supp. 972, 979 (S.D.N.Y. 1987); Gilmer v. Interstate Johnson Lane Corp., 500 U.S. 20 (1991).
[20] Cass., sez. un., 21 augosto 1996, n. 47, I-137 (It.) ["Cass., sez. un."]; *accord.* Dirland Telecom SA v. Viking Telecom AB, [2005] E.C.L.R. 432, 438 (Swed.); Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA et al. (2006) ECR 1-6619 Joined Cases C-295/04 anc C-298/04.; ET Plus SA v. Welter, [2005] EWHC (Comm.) 2115 (Eng.); Cour d'appel [CA] [regional court of appeal] Paris, 1991, Ganz v. Nationale des Chemins de Fer Tunisiens (SNCFT), 478 (Fr.); Cour d'appel [CA] [regional court of appeal] Paris, 1993, Labinal SA v. Mors and Westland Aerospace Ltd., 645 (Fr.).

B. *A Look at the Arbitration Regime in India and the Question of Arbitrability*

Since there is no universal definition of the concept of 'arbitrability,'[21] the source of restrictions on arbitrability (arbitrators power to hear certain disputes) lies within the national laws - *either* in the rules normally found in the arbitration laws *or* in other statutes that reserve certain disputes to be adjudicated by the national courts only.[22]

In India, both international and domestic arbitration are governed by the Arbitration and Conciliation Act of 1996 ["the Act"] which is based on the UNCITRAL Model Law on International Commercial Arbitration.[23] The Act does not enumerate any category of disputes as being non-arbitrable. Instead, it allows arbitration of all disputes arising out of a legal relationship, whether contractual or not,[24] thus, giving the impression that all disputes are arbitrable regardless of their nature. However, this notion is dispelled by Section 2(3) of the Act which declares that the Act would not affect any law by virtue of which certain disputes may not be submitted to arbitration. That there are restrictions on arbitrability is further confirmed in Sections 34(2)(b) and 48(2) of the Act which empower the Courts to set aside an arbitral award or refuse its enforcement in case "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force" or if the "award is in conflict with the public policy of India."

Since these statutory restrictions are couched in vague terms and offer little guidance, the concept of 'arbitrability' has crystallized over time with case laws setting forth limitations on parties' freedom to arbitrate. In the seminal case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited*,[25] the Supreme Court of India held that all disputes relating to *rights in personam* are amenable to arbitration (right *in personam* is an interest protected solely against specific individuals); and all disputes relating to *rights in rem* (right exercisable against the world at large) are required to be adjudicated by courts and public tribunals only. Some examples of such non-arbitrable disputes are disputes pertaining to the rights and liabilities arising out of criminal offences,[26] matrimonial

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[21] U.N. *Comm'n on Int'll Trade L., Rep. on its32d Sess., U.N. Doc. A/54/17; Supp. No.17 (June 1999).*
[22] JEAN-FRANCOIS POUDRET ET AL., COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 101 (2d ed. 2007) ["POUDRET"].
[23] The Arbitration & Conciliation Act, No. 26 of 1996, Preamble, INDIA CODE (1996) ["Arbitration & Conciliation Act"].
[24] Section 7 of the Arbitration and Conciliation Act 1996 defines the term 'Arbitration agreement.'
[25] Booz Allen, *supra* note 6.
[26] State of Orissa v. Ujjal Kumar Burdhan,(2012) 4 S.C.C. 547 (India).

disputes, insolvency and winding up,[27] testamentary issues like grant of probate,[28] succession certificate, admiralty suits,[29] foreclosure of mortgage,[30] and eviction or tenancy matters governed by special statutes.[31]At the same time, this rule allows flexibility to the extent that even disputes relating to sub-ordinate rights *in personam* arising from rights *in rem* are considered to be arbitrable.[32] For instance, where a criminal matter such as physical injury gives the injured the right to claim damages, the dispute can be referred to arbitration.[33] Similarly, while an arbitral tribunal cannot grant a judicial separation, a husband and wife may refer to arbitration the terms on which they shall separate.[34]

Developing on the ruling in *Booz Allen (supra)*, the case of *Kingfisher Airlines Limited v. Prithvi Malhotra Instructor*[35]placed a further restriction on arbitrability. It was held that even an action *in personam* would not be non-arbitrable if it has been reserved for resolution by a public forum as a matter of public policy. This is not to suggest that creation of special tribunal with respect to certain subject matter *per se* precludes arbitration in that subject matter. Instead, disputes would be considered non-arbitrable only where a particular enactment creates special rights and obligations and gives special powers to the Tribunals that are not enjoyed by civil courts.[36]

*HDFC Bank v. Satpal Singh Bakshi*[37] serves as a perfect example for the point being made. The issue involved in the case was whether a matter falling within the jurisdiction of the Debt Recovery Tribunal (established by the *Recovery* of Debts Due to Banks & Financial Institutions Act, 1993) could be submitted to arbitration. The Delhi High Court observed that the tribunal was not created to adjudicate on special rights created under the said statute but for expeditious disposal of cases arising under the general law of the land such as contract law.[38] In such a case, the Court concluded that the matter falling within the jurisdiction of the Debt Recovery Tribunal can be heard by

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[27] Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd., (1999) 5 S.C.C. 688 (India).
[28] Chiranjilal Shrilal Goenka v. Jasjit Singh, (1993) 2 S.C.C.507 (India).
[29] Osprey Underwriting Agencies v. ONGC Ltd., A.I.R. 1999 Bom 173 (India).
[30] Booz Allen, *supra* note 7.
[31] Fingertips Solutions Pvt. Ltd. v. Dhanashree Electronics Ltd.,2011 Indlaw CAL 805 (India).
[32] Booz Allen, *supra* note 7.
[33] Keir v. Leeman, (1846) 9 Q.B. 371 (Eng.), *See* Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan, (1999) 5 S.C.C. 651 (India); Booz Allen, *supra* note 7.
[34] *Id.*; Soilleux v. Herbst, (1801) 2 Bos, Wilson v Wilson (1848) 1 HL Cas 538; Cahill v. Cahill, [1883] 8 A.C. 420 (Eng.).
[35] Kingfisher Airlines Limited v. Prithvi Malhotra Instructor, 2013(7) Bom C.R. 738 (India).
[36] *Id.*
[37] HDFC Bank v. Satpal Singh Bakshi, (2013) 134 D.R.J. 556 (India).
[38] *Id.* at ¶ 14.

an arbitral tribunal as well.[39] On the other hand, in the context of the Industrial Disputes Act 1947, the Court in *Kingfisher* observed that the Act confers certain special rights on workmen which are not available under the general laws and provides industrial tribunals for the adjudication of disputes involving these rights. An industrial dispute is not seen as a private dispute between the employer and employee but seen as affecting the industry as a whole. This implies that industrial disputes have been reserved by the legislature for adjudication by the public forum as a matter of public policy and arbitration of such disputes is not permissible. Similar is the case with the state Rent Control Act, where the provisions of the Act are required to take precedence over the contract between the parties so as to protect the interests of the tenants. In *Natraj Studios Pvt. Ltd. v. Navrang Studios*,[40] the Supreme Court held that the arbitral tribunals, which are a substitute to civil courts cannot hear a dispute under the Rent Control Act because the statute provides these rights to be adjudicate in the specialized tribunals only. This suggests that the decision in such cases cannot be heard by an arbitral tribunal despite the fact that the decision involves a right *in personam*, and not a right *in rem*.

These cases make it amply clear that the determination of arbitrability in the Indian context would require a two-fold enquiry. At the first stage, it needs to be determined whether the subject matter of the dispute is a *right in rem*, in which case, the dispute would not be amenable to arbitration. If, however, the dispute involves a *right in personam*, then the next question to be answered is whether the adjudication of such a dispute is reserved by the legislature exclusively for public fora as a matter of public policy. An affirmative answer to the second question would imply that arbitration in the subject matter is not permissible. The following section seeks to apply this working formula of arbitrability to competition law matters.

### C. *The Competition Law regime in India and the Legal constraints to Arbitrability of Competition Matters*

After the economic reforms of 1991 in the form of market liberalization, India enacted the Competition Act to usher in a competitive market and to prevent potential market distortions.[41] In furtherance of this aim, the Competition Act prohibits anti-competitive behaviour between market players (cartels, price fixing etc.) having an

[39] *Id.*
[40] Natraj Studios Pvt. Ltd. v. Navrang Studios, A.I.R. 1981 S.C. 537 (India).
[41] Dept. of Company Affairs, *Report of the High Level Committee on Competition Policy and Law* (2000).

adverse impact on competition,[42] prevents a dominant enterprise in the market from abusing its dominant position[43] and regulates mergers between enterprises that would result in a substantial reduction of competition in the market.[44]The Competition Act is primarily enforced through the Competition Commission of India ["CCI"] which is vested with both regulatory and quasi-judicial powers[45]and the Competition Appellate Tribunal ["COMPAT"], established to sit in appeal from orders of the CCI;[46] with the Supreme Court serving as the ultimate appellate authority.[47]

Interestingly, the Competition Act does not provide for an alternate method of dispute resolution and the CCI or COMPAT do not have statutory powers to direct parties to use such methods. The only time that the Court was confronted with the issue of arbitration of matters covered under the Competition Act was in *Union of India v. Competition Commission of India*.[48] In this case, parties who had entered into a Concession Agreement with the Ministry of Railways for operating container trains, filed a complaint before the CCI alleging that the Railway Board was abusing its dominant position by imposing increased charges and restricting access to infrastructure. The Railways challenged the CCI's jurisdiction to hear the dispute in view of the extant arbitration agreement between the parties. However, the Delhi High Court allowed the CCI to hear the matter notwithstanding a valid arbitration clause, on the ground that the scope and focus of CCI's investigation is very different from the scope of an enquiry before an Arbitral Tribunal. It was observed that 'the Arbitral Tribunal would neither have the mandate, nor the expertise, nor the wherewithal'[49] to prepare an investigation report which is necessary to decide the dispute in question.

In another case *Man Roland v. Multicolour Offset,*[50]involving a similar factual matrix, under the Monopolies and Restrictive Trade Practices Act, 1969 ["the MRTP Act"] (the predecessor of the Competition Act), the Supreme Court held that the remedies available under the MRTP Act are in addition to the remedies that may be available under contract

[42] The Competition Act, No.12 of 2003, § 3, INDIA CODE (2002).
[43] *Id.* at §4.
[44] *Id.* at §5.
[45] *Id.* at §7.
[46] *Id.* at § 53A.
[47]*Id.* at § 53T.
[48] Union of India v. Competition Commission of India, A.I.R. 2012 Del 66 (India).
[49] *Id.* at ¶ 16.
[50] Man Roland v. Multicolour Offset, (2004) 7 S.C.C. 447 (India).

law. The courts would, therefore, continue to have jurisdiction despite the arbitration agreement between the contractual parties.

In both these cases, the Court's conclusion that the right to file a suit before the CCI/ Court is an unwaivable right was grounded on the perception that the scope of proceedings in CCI/ MRTP Commission is different from the scope of proceedings before an arbitral tribunal whose mandate is circumscribed by the terms of the contract. Though these judgments provide useful insight into the judicial mind-set, they cannot be seen as a blanket denial of arbitration for competition matters.[51] This is because in both the cases, the courts have held that the arbitration clause does not take away the jurisdiction of the MRTP Commission/ CCI but there is no precedent to suggest that competition law disputes cannot be adjudicated in an arbitral tribunal where both the parties wilfully submit the dispute to arbitration. In such a scenario, whether the Courts would enforce the arbitration agreement continues to remain inconclusive. Similarly, what would be position when the arbitrator gives an award on a matter involving competition law and the award is subsequently challenged before the Court? Would the court then refuse to enforce the award on public policy considerations?

Since there is no authoritative judgment which considers these issues from a public policy perspective, arbitrability of competition law disputes still remains an open question in India.[52] The following section attempts to determine the arbitrability of competition law disputes by undertaking a two-fold enquiry based on general principles of arbitrability discussed previously.

**i. Whether a Claim Arising under the Competition Law is a right in rem?**

It is interesting to note that disputes that can arise under competition law have both 'private' and 'public' elements.

Section 19(1) of the Competition Act empowers *any person*, *consumer or association* to file information with the CCI with respect to any (alleged) contravention of the Competition Act. This is followed by an investigation (by CCI's specialized investigation wing called the Director General) and once the fact of infringement is established, the CCI is empowered to punish the violation by imposing a penalty, issuing a 'cease and

[51] Anubha Dhulia, *Arbitrability of Competition Matter: With Special Reference to India*, COMPETITION LAW REPORTS (2012).
[52] *Id.*

desist' order etc.[53] Based on this finding of infringement, Section 53N additionally allows *third parties affected by anti-competitive conduct* to approach the COMPAT and claim compensation for the loss suffered by them due to the anti-competitive conduct. Compensation can also be claimed for losses suffered due to the failure of the other party to comply with the orders of CCI/COMPAT.[54]

It is argued that the fact that 'any person' can bring a claim under Section 19 without any personal injury/interest in the matter highlights the public interest nature of the remedy. Any order made under Section 19 determining the validity of an agreement or imposing liability on the defaulter would therefore, be an order *in rem* because an anti-competitive behaviour not only harms the interests of the rival businesses that directly sustain losses but also has an impact on all the consumers, retailers who are forced to pay higher price for the goods. Since the remedy for a complaint under Section 19 would affect public interest at large i.e. persons other than the parties to the arbitration agreement, such an order can only be granted by CCI in exercise of the power conferred upon them by the statute.

Section 53, on the other hand, provides statutory rights and remedies only to an 'aggrieved party' and such a claim would involve determining the rights and interests of only the individual party in the subject-matter of the case. Even if the right to recover damages requires the arbitral tribunal to make a finding of liability, it would not involve penal consequences but would merely be a step towards establishing a civil monetary claim or any other contractual remedy. This indicates that such an application involves a right *in rem* which is purely *inter partes* and does not affect the rights of third party who are strangers to the arbitral proceedings.

Therefore, the suggestion is that to the extent the Competition Act allows a private remedy, the test of *Booz Allen* stands satisfied and competition law does involve a *right in personam* capable of being arbitrated. When faced with an analogous question under the Business Practices and Consumer Protection Act 2004 ["BPCA"], the Supreme Court of Canada contrasted the wording of section 171 of the BPCA Act with that of section 172 and found that while under section 171, damages can be sought only by 'the person who suffered damage,' a section 172 claim may be initiated by 'virtually anyone' regardless of

[53] The Competition Act, No.12 of 2003, § 27, INDIA CODE (2002).
[54] *Id.* at § 42, 53.

whether he was affected by a consumer transaction.[55] The court observed that the fact that such persons do not necessarily act in their personal interest highlights the *public* nature of the remedy under section 172. The difference in language led the Court to conclude that while claims under Section 172 was not arbitrable, section 171 claims could nonetheless be arbitrated.[56] Using the same rationale, the Federal Court of Appeal in a subsequent judgment held that Section 36 of the Canadian Competition Act 1985 is a private claim and arbitration is possible for this civil law aspect of competition law i.e. where parties claim damages for violation of competition law or allegation regarding the voidability of anti-competitive agreements.[57]

### ii. Whether Adjudication of Competition Disputes is Reserved for the Exclusive Jurisdiction of public fora?

Having established that competition law, to the extent that it allows claims and remedies under the private law, is amenable to arbitration, the next logical question is whether adjudication of such civil disputes is reserved for the exclusive jurisdiction of public forum under the Competition Act.

As mentioned earlier, the CCI is an overarching body to sustain and promote competition within the Indian markets. The Preamble and Section 18 of the Competition Act entrusts the CCI with an obligation to eliminate anti-competitive practices, protect the interests of consumers and ensure freedom of trade of all market participants. Section 61 of the Competition Act bars the jurisdiction of civil courts to entertain any competition law matter.

Applying the logic of *HDFC Bank case*, it is amply clear that the CCI was created to adjudicate on special rights created under the Competition Act and the dispute does not arise under the general law of the land (contract law, common law etc.). This leads us to conclude that the provision setting an exclusive jurisdiction of CCI could perhaps be construed as excluding arbitrability of competition law disputes.

One might argue that Section 61 of the Competition Act cannot preclude arbitration since Section 5 of the Arbitration Act begins with a *non-obstante* clause and provides that *notwithstanding anything in any other law*, the jurisdiction of the Court is

[55] Seidel v. Telus Communications Inc., ¶ 32 [2011] 1 S.C.R. 531 (Can.).
[56] *Id.* at ¶ 36.
[57] Murphy v. Amway Canada Corporation, ¶ 60-66 [2013] F.C.R. 38 (Can.).

excluded where there is an arbitration agreement.[58] However, this contention was shot down by the Court in *Central Warehousing Corporation v. Fortpoint Automotive Pvt. Ltd.*,[59] where it was observed that Section 5 cannot be read in isolation. It has to be necessarily juxtaposed with Section 2(3) of the Arbitration Act which states that the provisions of the Arbitration Act will not affect any other law by virtue of which certain disputes cannot be submitted to arbitration. In light of this judicial interpretation, there is little doubt that the exclusive jurisdiction of CCI restricts the arbitrability of competition law issues in India.

On the strength of this analysis, it can be reasonably concluded that given the extant competition and arbitration jurisprudence in India, it is highly unlikely that the Courts would allow arbitration of competition law disputes. Competition law disputes involve two facets - one is the administrative law aspect of competition law which includes imposition of public sanctions such as fines for infringement.[60]A claim under such provisions involves a *right in rem* and fails to satisfy the first prong of the 'arbitrability test' and is therefore wholly unsuitable for arbitration. In fact, administrative aspects of competition law are not considered arbitrable in any jurisdiction in the world due to the public interest involved.[61] At the same time, violation of competition law also entails civil law consequences whereby an aggrieved person is entitled to make an individual, private claim for compensation for loss suffered due to anti-competitive behaviour or any other contractual remedy. Such civil law disputes satisfy the first prong of the arbitrability test since they involve *right in personam*. Despite this, these disputes would not be amenable to arbitration because Indian laws assign the CCI/ COMPAT with the sole mandate to address competition disputes, to the exclusion of any other body.

### D. *Utility of resolving Competition Law matters using arbitration – Is There a Need for Change?*

[58] Arbitration & Conciliation Act, *supra* note 23 at § 5 - Extent of judicial intervention: Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

[59] Warehouse Corporation v. Fortpoint Automotive Pvt. Ltd., 2010 (1) Bom C. R. 560 (India).

[60] Sotiris Dempegiotis, *EC Competition Law and International Commercial Arbitration: A new era in the interplay of these legal orders and a new challenge for the European Commission*, 1 GLOBAL ANTITRUST REV. 135, 139 (2008).

[61] *Id.;* Organization of Economic Co-operation and Development [OECD], *Arbitration and Competition*, OECD DAF/COMP (2010) 11.

Determining whether or not competition law disputes should be arbitrable has to be based on the consideration of two policy objectives. On one hand, there is a need to safeguard public interest by reserving sensitive matters for resolution only by national courts and on the other hand, arbitration needs to be promoted as a vibrant system of dispute resolution for imparting certainty and convenience to business transactions. In India, judicial hostility towards arbitration arguably stems from the concern that public interest would be injured if competition law disputes are allowed to be resolved by arbitration. However, as discussed earlier, there is now an overwhelming international judicial consensus[62] that these are 'archaic misconceptions' and with the proliferation of arbitration, the relevance of public policy is diminishing on the international front, opening up the gateway to arbitration in hitherto foreclosed areas.[63]Though 'arbitrability' of a dispute is governed by the municipal law of each jurisdiction, arbitrability of competition law has emerged as a transnational principle.[64]

It is also worth mentioning that precluding arbitration in competition law disputes is not the only way to protect public policy. One alternative is that the CCI can allow parties to go for arbitration and at the same time play the dual role of *parens patriae* and *amicus curiae* in the arbitral proceedings.[65]In the *Mitsubishi* case that allowed arbitration of antitrust disputes in the US, the Court balanced its strong stance in favour of arbitrability with an obligation for the arbitrator to apply the antitrust law. This means that while the arbitrators can determine questions involving competition law, the courts are empowered to take a 'second-look' at the contents of the arbitral award at the enforcement stage to verify that questions of competition law have been properly addressed (popularly known as the 'second-look' doctrine).[66] In case of non-application/ incorrect application of the Competition Act (say, where enforcing the arbitral award would mean giving effect to an anti-competitive agreement) the Court can refuse to enforce the award on the ground that it runs counter to the public policy of the state.

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[62] GKG Caribe Inc., *supra* note 19; Cass., sez. un., *supra* note 20.
[63] Pavle Flere, *Impact on EC Competition Law on Arbitration Proceedings*, 3 SLOVN. L. REV. 155 (2006).
[64] Komninos, *supra* note 2.
[65] Rahul Satyan, *Policing Mergers, Remedies & Procedure* (Oct. 31, 2011), http://cci.gov.in/images/media/ResearchReports/Policing%20Mergers_%20Remedies%20&%20Procedure.pdf.
[66] *See, e.g.*, Radieati di Brozolo, *Anti-trust: A Paradigm of the Relations Between Mandatory Rules and Arbitration – A Fresh Look at the "Second Look"*, 1 INT'L A.L.R. 23 (2004); Patrick Baron & Stefan Liniger, *A Second Look at Arbitrability – Approaches to Arbitration in the United States, Switzerland and Germany*, 19 ARB. INT'L 27 (2003); S.I. Strong, CLASS, MASS AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW 255 (2013)

This 'second-look doctrine'[67] which originated in US and was subsequently mirrored in EU judgements,[68] adequately ensures that arbitration would not provide private parties a chance to circumvent the mandatory competition law.

Another safeguard could be the use of Section 27 of the Arbitration Act that allows an arbitral tribunal to seek assistance from the Court in taking evidence. This provision can be used by the arbitral tribunals to consult the CCI when confronted with questions of competition law. This is an established practice in EU where the European Commission routinely acts as *amicus curiae* in arbitral proceedings involving competition law to protect the public's interest in the correct and uniform application of European Competition law.[69]

Furthermore, the arbitration of competition law disputes can offer an array of advantages. The protection of competition in India is heavily dependent on prosecution of anti-competitive behaviour by the CCI and the paucity of private actions is one of the greatest shortcomings of the Indian Competition law regime.[70]In case of an infringement, howsoever huge the penalty imposed by the CCI maybe, the aggrieved party does not receive any restitution for the losses suffered due to anti-competitive practices. A report published in 2014 indicates that in the past five years of CCI's establishment, almost all the cases decided by the CCI are pending in appeal before the COMPAT or further before the Supreme Court.[71] Consequently, no private claim has reached its conclusion and the aggrieved parties are still awaiting a remedy.[72]Enforcement of competition law by private parties is the backbone of the US competition law regime and even countries like UK are

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[67] POUDRET, *supra* note 22, at 301.

[68] Cour d'appel [CA] [regional court of appeal] Milan, 15 juillet 2006, Terrarmata v. Tensacciai, Riv. dell'arbitrato 2006, 744 (It.); Cour d'appel [CA] [regional court of appeal] Florence, 21 marzo 2006, Nuovo Pignone SpA v. Schlumberger, Riv. dell'arbitrato 2006, 741 (It.); Dom av 24 mars 2005, Gerechtshof Haag, Marketing Displays International Inc. mot VR Van Raalte Reclame B.V. Gjengitt i van den Berg (2006) (Neth.).

[69] *E.g.,* A.E.S. Summit Generation Limited and A.E.S.-Tisza Erdma Kft. v. Republic of Hung., ICSID Case No. ARB/07/22 (Sept. 23, 2010).

[70] Payel Chatterjee & Simone Reis, *Private enforcement of competition issues, Competition Commission of India vis-à-vis- Alternate Forums – Is it actually an option?* (July 10, 2014), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Article/Private%20Enforcement%20of%20Competition%20Law%20Issues.pdf.

[71] Rahul Goel & Anu Monga, *Private Antitrust Litigation 2014*, GLOBAL COMPETITION REV. 74, 77 (2014); *See also* Amit Kapur et al., *India*, www.jsalaw.com; Farhad Sorajee, *India Cartels*, www.gloallegalinsights.com; Aman Malik, *Complaints Dwindle as CCI Faces Awareness Deficit,* LIVE MINT (Jan. 25, 2016), http://www.livemint.com/Politics/p3uUm7UvYnBZTbbgljwU7K/Complaintsdwindle-asCCI-faces-awareness-deficit.html.

[72] *Getting the Deal Through: Private Antitrust Litigation*, 1 GLOBAL COMP. REV., 7, 2014, at 78.

now encouraging private enforcement.[73] By allowing compensation, India can effectively involve private players in the enforcement of competition law and the fear of paying high compensation would prove as an additional deterrent for violation of competition law.[74]

Arbitration offers a greater degree of flexibility, privacy and confidentiality of information than court proceedings which would make it easier for private parties to vindicate their claims under competition law.[75]Viewed from this angle, arbitration of competition disputes is compatible with the aims of Indian competition policy in terms of promoting competition and consumer welfare and it would not threaten the edifice of competition law[76] since public enforcement (imposition of fines etc.) would still be the prerogative of the competition authorities. Arbitration should therefore, not be viewed as a substitute to CCI but rather as an accompanying vehicle to further the effective enforcement of competition law.

It is also important to consider that precluding arbitration of competition matters impairs the effectiveness of arbitration as an adjudication vehicle because it would mean that a reluctant party can make frivolous allegations of competition law infringement only to stonewall arbitration, thus defeating the whole purpose of the arbitration agreement.[77]

Therefore, it is evident that allowing arbitrators to deal with competition disputes is conducive to the development of both the arbitration and competition law regimes in India. To achieve this end, the current problem of non-arbitrability of competition law disputes can be resolved in two ways. The problem can be resolved legislatively, following the EU model, through decentralization of Competition law i.e. an amendment to the Competition Act removing the bar on civil courts' jurisdiction in handling competition law disputes. However, the other solution would be a judicial change in the criteria for determining the 'arbitrability' of disputes. The Indian judiciary has received sharp criticism for its existing trend of categorizing certain disputes as non-arbitrable for the sole reason that a special court has been given exclusive jurisdiction over it by special

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[73] Barry Rodger, *Competition Law Litigation in the UK Courts: A study of all cases 2009-2012,* 6 G.C.L.R. 55 (2013).

[74] Darragh Killeen, *Following in "Uncle Sam's" footsteps? The evolution of private antitrust enforcement in the European Union*, 34 E.C.L.R. 480 (2013).

[75] Carl W. Hittinger & Terry Smith, *Arbitrating Antitrust: Are Things Getting More Complicated?*, (Feb. 6,2012),http://www.thelegalintelligencer.com/id=1202541387095?keywords=Arbitrating+Antitrust:+Are+Things+Getting+More+Complicated&publication=The+Legal+Intelligencer.

[76] OECD, *supra* note 8.

[77] JAN PAULSSON, THE IDEA OF ARBITRATION 119 (Oxford Univ. Press, 1st ed. 2013).

statute.[78]It is argued that to determine the arbitrability of a particular category of disputes, the only relevant question to be answered should be whether the nature of dispute is such that its resolution would significantly affect the public interest or interest of individuals who have not agreed to have the dispute resolved by arbitration (i.e. determination as to whether the dispute constitutes a *right in rem/in personam*).[79]In case this test is satisfied and in the absence of an express prohibition on arbitration, the Courts should not oust the private parties' right to submit the dispute to arbitration.

### E. *Conclusion*

Recent times have witnessed significant developments in the field of arbitration in India. Between 2008 to 2011, India saw a 200 percent growth in the number of disputes that have been referred for arbitration[80] and recent surveys suggest that more than 90 percent of Indian companies who have a dispute resolution policy, would prefer arbitration, rather than litigation, for resolution of future disputes.[81] This growth coincides with, and is propelled by a sincere effort on the part of the Indian judiciary to minimize intervention in arbitral proceedings.[82]

In a series of progressive judgments over the past few years, Courts have consistently reinforced India's pro-arbitration approach. Consider for instance, the case of *BALCO v. Kaiser Aluminium*[83]where the judiciary declared that Indian courts have no power to intervene in a foreign seated arbitration; or *Shri Lal Mahal Ltd. v. Progetto Grano Spa*[84] where the Court significantly narrowed down the 'public policy' exception as a ground for review of a foreign arbitral award. As recently as in 2014, the case of *Enercon (India) Ltd. v. Enercon Gmbh*[85] saw Indian Courts infusing life into a nearly unworkable arbitration clause; while in *HSBC Pl Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd.*[86]

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[78] Pankhuri Agarwal, *Arbitrability of Disputes in India: Still Grappling in the Dark*, 5 THE ARBITRATOR 2, 5 (2013).
[79] *Id.*
[80] Arpinder Singh, *Emerging Trends in Arbitration in India: A study by Fraud Investigation & Dispute Services,* ERNST & YOUNG (2013), http://www.ey.com/Publication/vwLUAssets/EY-FIDS-Emerging-trends-in-arbitration-in-India/$FILE/EY-Emerging-trends-in-arbitration-in-India.pdf.
[81] *Corporate Attitudes & Practices Towards Arbitration in India*, PWC NETWORK (May 2013), http://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf.
[82] Arpinder Singh & Yogen Vaidya, *Taking a Pro-arbitration Turn*, THE FIN. EXPRESS, May 15, 2014, http://m.financialexpress.com/news/column-taking-a-proarbitration-turn/1250892.
[83] BALCO v. Kaiser Aluminium, (2012) 9 S.C.C. 552 (India).
[84] Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 S.C.C. 433 (India).
[85] Enercon (India) Ltd. v. Enercon Gmbh, (2014) 5 S.C.C. 1 (India).
[86] HSBC Pl Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd., Appeal No. 196 of 2014 in Arbitration Petition No. 1062 of 2012*, High Court of Bombay (India).*

and *World Sports Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte Ltd.,*[87] the courts established a break from the past by allowing arbitration to proceed even when the dispute involved allegations of fraud.

As India is attempting to reclaim its position on the stage of international arbitration, allowing arbitration to resolve competition law disputes, albeit with some safeguards, would be a step in the right direction to align India's arbitration regime with international standards. A predictable arbitration regime would prove immensely useful in reducing risks in trans-border commerce, thus making the Indian markets more accessible to commercial parties.

[87] World Sports Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte Ltd., A.I.R. 2014 S.C. 968 (India).

Article

# ON THE MAINTAINABILITY OF REVIEW AGAINST A SECTION 11 ORDER

*Harshad Pathak**

Abstract

*Section 11 of the Arbitration & Conciliation Act, 1996 provides a detailed mechanism for appointment of an arbitral tribunal through judicial interference. It empowers the Chief Justice of India in international commercial arbitration, and the Chief Justice of the relevant High Court in non-international commercial arbitration, to appoint arbitrators under certain select circumstances. However, unlike the position under the UNCITRAL Model Law, the exercise of power under Section 11 of the Indian enactment entails the exercise of a judicial function, resulting in a judicial order. This poses several concerns, one of them being the issue of maintainability of review against an order passed under Section 11 of the 1996 Act. By means of the present paper, I will assess the maintainability of a review petition filed against a Section 11 Order for appointment of an arbitral tribunal, with reference to the various conflicting judicial decisions on the issue, and the anomalous situation created in India as a consequence of the same. On the basis of the well-recognized distinction between substantive and procedural review, I will put forth an argument that a Section 11 Order is amenable to review on grounds of procedural infirmities. However, absent any specific conferment of such power, a Section 11 Order, owing to its statutory nature, cannot be reviewed on substantive grounds.*

## I. Introduction

Commercial arbitration is a method of dispute resolution by which parties mutually agree to definitively resolve their arbitrable disputes by one or more independent adjudicators of their own choice, referred to as either arbitrators or, collectively, as an arbitral tribunal. The arbitral tribunal so constituted renders its decision in the form of an arbitral award, which is binding upon the parties. Though any party may assail the resultant arbitral award before an appropriate Court[1] under Section 34 of

* B.A., LL. B. (Hons.), National Law University, Delhi; Associate (Dispute Resolution), Luthra & Luthra Law Offices, Mumbai (I am grateful to Poorvi Satija, B. A. LL.B. (Hons), National Academy of Legal Studies and Research for her invaluable inputs on the issues addressed herein, as well as for reviewing the initial drafts of the present paper).

the Arbitration & Conciliation Act, 1996 ["Arbitration Act"] or even by raising objections under Section 48 of the Arbitration Act if the foreign award is sought to be enforced in India, it may only do so on certain limited grounds enlisted therein. These grounds do not ordinarily involve any assessment of the merits of the dispute. Commercial arbitration, as such, essentially entails the renunciation of a person's right to seek legal redress before a Court, and thus, imposes enormous consequences on all parties who are signatories to the arbitration agreement. It then does not come as a surprise that almost every commercial dispute sought to be resolved through arbitration poses a rather critical preliminary question - where, and by whom, will this dispute be decided? In nine cases out of ten, the answer to the said question decisively affects the eventual outcome of the dispute.[2]

Under the provisions of the Arbitration Act, parties are free to determine the number of arbitrators, provided it is not an even number;[3] as well as the procedure for appointing them.[4] However, if the parties are unable to agree on the said procedure, or constitute the arbitral tribunal to their mutual satisfaction, they may resort to an appropriate remedy under Section 11 of the Arbitration Act, which provides detailed machinery for appointment of arbitrators through judicial intervention. In both international as well as domestic arbitrations, the said proceedings are considered to be of tremendous commercial significance as they ensure that any inadvertent or deliberate failure to agree on constitution of an arbitral tribunal does not delay the commencement of arbitral proceedings.

Section 11 of the Arbitration Act originally empowered the Chief Justice, or any person designated by it, to appoint arbitrators under the circumstances specified therein.[5] In the case of an international commercial arbitration,[6] this power was exercisable by the Chief Justice of India,[7] and in case of a non-international or domestic arbitration, this

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[1] The Arbitration & Conciliation Act, 1996, No. 26 of 1996, § 2(1)(e) & § 42, India Code (1996) ["Arbitration Act, 1996"].
[2] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 65 (2010).
[3] *Supra* note 1, at § 10 (1). However, the said provision has been held to not be mandatory in nature by a three-judge-bench of the Supreme Court of India in Narayan Prasad Lohia v. Nikunj Kumar Lohia & Ors., (2002) 3 S.C.C. 572 (India).
[4] *Id.* at § 11 (2).
[5] Hereafter, unless stated otherwise, a reference to the 'Chief Justice' will include the Chief Justice of the Supreme Court of India, the Chief Justice of the relevant High Court, as well as any person or institution designated by it, in terms of § 11 of the *Arbitration Act, 1996, id.*
[6] As defined in *Arbitration Act, 1996*, *id.* at §2 (1) (f).
[7] *Id.* at § 11 (12) (a).

power was exercisable by the Chief Justice of the High Court within whose local limits the court, as defined under Section 2(1)(e) of the Arbitration Act, is situated.[8] However, post the promulgation of the Arbitration & Conciliation (Amendment) Act, 2015 ["Amendment Act"], this power has now been transferred from the concerned Chief Justice to the Supreme Court of India in the case of international commercial arbitrations, and the concerned High Court in case of domestic arbitrations.[9] Yet, despite such a monumental change in the position of law, the provisions of the principal or un-amended enactment continue to hold great relevance.

As per Section 26 of the Amendment Act, subject to an agreement between the parties to the contrary, the above amendment shall apply only to the arbitral proceedings commenced in accordance with Section 21 of the principal Arbitration Act before the Amendment Act came into effect[10] on 23rd October, 2015.[11] In this regard, Section 21 of the Arbitration Act states that unless otherwise agreed by parties, arbitral proceedings in respect of a particular dispute shall commence "on the date on which a request for that dispute to be referred to arbitration is received by the respondent."[12] This implies that where a request for arbitration is received after 23rd October, 2015, the arbitration proceedings, and any litigation under the Arbitration Act incidental thereto, shall be conducted as per the amended provisions of the Arbitration Act. However, where such request is received prior to 23rd October, 2015, any subsequently initiated proceeding under the Arbitration Act, including under Section 11, shall continue to be governed by the principal or un-amended Arbitration Act, notwithstanding its actual date of filing. Thus, at present, there are two distinct arbitration regimes simultaneously operating in India. As detailed above, one is governed by the amended Arbitration Act, while the other remains subject to the principal enactment. It is the latter regime of arbitration law that I will focus upon herein, in particular, those proceedings governed by the un-amended Section 11 of the Arbitration Act.

The conferment of the power to appoint arbitrator(s) on the Chief Justice, or its designate, under the un-amended Arbitration Act posed several questions that continuously troubled the Indian judiciary. For instance, it took the Supreme Court of

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[8] *Id.* at § 11 (12) (b).
[9] The Arbitration & Conciliation (Amendment) Act, 2015, No. 3 of 2015, § 6, India Code (2015) ["Amendment Act, 2015"].
[10] *Id.* at § 26.
[11] *Id.* at § 1 (2).
[12] *Supra* note 1, at § 21.

India almost a decade, and four separate benches of varying strengths, to finally determine, incorrectly in my opinion,[13] that the proceedings under Section 11 of the Arbitration Act are judicial in nature, and the resultant order a judicial one.[14] However, the designation of an order for appointing an arbitrator under Section 11 of the Arbitration Act ["Section 11 Order"] as a judicial order has inadvertently created several concerns that are yet to receive a definite response from the Indian judiciary. It is one such concern relating to the maintainability of a review against a Section 11 Order that I will address herein, with primary emphasis on the proceedings catered to by the principal un-amended Arbitration Act.

On one hand, one may argue that since Section 11 involves the exercise of a judicial function, and a Section 11 Order is judicial in nature, it must be considered to be subject to a review by the Chief Justice who passed the order in the first place. On the other hand, it is conceivable that since neither the Arbitration Act, nor any other relevant statutory enactment, confers upon the Chief Justice the power to review its Section 11 Orders, the same cannot be considered to be permissible under the Indian law.

In the *second* part of this paper, I will begin by briefly outlining the nature of proceedings under Section 11 of the Arbitration Act, when juxtaposed against its corresponding provision under the UNCITRAL Model Law. In the *third* part, I will discuss the concept of review with references to the myriad judicial decisions on the issue. In the *fourth* part, I will evaluate the issue of maintainability of review against a Section 11 Order on the parameters discussed in the previous heads. Finally, in the *fifth* part, I will briefly review the possible implications of the recent amendments made to Section 11 of the Arbitration Act, before summarizing my conclusions in the *sixth* part.

## II. Section 11 of the Arbitration Act: Overview

The right to approach the Chief Justice of the Supreme Court, or an appropriate High Court, for appointment of an arbitrator is exercisable in the following circumstances:

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[13] For a detailed discussion on the nature of § 11 of *Arbitration Act, 1996*, *id.* and incorrectness of the decision in S.B.P. & Co. v. Patel Engineering Ltd., (2005) 8 S.C.C. 618 (India) [*Patel Engineering*], *see* Harshad Pathak & Pratyush Panjwani, *Assimilating the Negative Effect of Kompetenz-Kompetenz in India*, 2.2 INDIAN. J. OF ARB. L. 24 (2013).

[14] *Patel Engineering,* (2005) 8 S.C.C. 618 (India).

i. If the arbitral tribunal is to consist of three arbitrators, and either a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party, or the two appointed arbitrators are unable to appoint a third arbitrator, then Section 11(4) of the Arbitration Act empowers the Chief Justice to make the requisite appointment on an application made by either party;[15]

ii. In case of arbitration with a sole arbitrator, if the parties are unable to appoint their arbitrator mutually, then Section 11(5) of the Arbitration Act empowers the Chief Justice to appoint the sole arbitrator on an application made by either party;[16]

iii. In case of any departure from the appointment procedure agreed to by the parties, Section 11(6) of the Arbitration Act allows the Chief Justice to appoint arbitrators as a 'necessary measure' to commence the arbitration.[17]

As evident, Section 11 of the Arbitration Act caters to a range of circumstances where the parties are unable or unwilling to constitute an arbitral tribunal, notwithstanding the reasons behind the same. The ostensible purpose is to ensure that any difficulty in constituting the arbitral tribunal does not delay the commencement of the intended arbitral proceedings. The question whether the same constitutes a judicial or an administrative function, however, is no longer *res integra*.

### A. *Whether Judicial or Administrative?*

Section 11 of the Arbitration Act confers upon the Chief Justice the power to appoint arbitrators in certain select circumstances. The said provision corresponds to Article 11 of the UNCITRAL Model Law ["MLA"].[18] In fact, as stated in the Preamble to the Arbitration Act, the said legislation had been enacted "taking into account the

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[15] *Supra* note 1, at § 11 (4).
[16] *Id.* at § 11 (5).
[17] *See* HBHL-VKS (J.V.) v. Union of India & Ors., 2007 (1) ARB.L.R. 252 (Delhi) (India), at ¶ 26: "… The expression 'necessary measures' cannot be read so as to exclude from its ambit and scope, the power to pass an order appointing an arbitrator. There is nothing in the language of Section 11(6) which by specific language or by necessary implication requires exclusion of an order appointing an arbitrator. This expression needs to be construed liberally and in fact would take within its ambit an order appointing an arbitrator."
[18] P. C. MARKANDA ET AL., LAW RELATING TO ARBITRATION AND CONCILIATION 11 (8th ed., 2013).

aforesaid Model Law".[19] However, interestingly, Article 11, MLA, confers the power to appoint an arbitrator on a 'court', or any 'other authority specified in Article 6' of the MLA, and not particularly the Chief Justice.[20] Further, Article 6, MLA permits each country enacting the Model Law to specify the court(s), or another competent authority to appoint an arbitrator under Article 11.[21] The objective behind vesting such discretion with a State is discernible from the Analytical Commentary to the MLA, which states that "[t]he functions referred to in this article relate to the appointment of an arbitrator… To concentrate these arbitration-related functions in a specific Court is expected to result in the following advantages. It would help parties, in particular foreign ones, more easily to locate the competent court and obtain information on any relevant features of that "Court", including its policies adopted in previous decisions. Even more beneficial to the functioning of international commercial arbitration would be the expected specialization of that Court…"[22]

Mindful of the aforementioned objective, the Analytical Commentary proceeds to clarify that the Court designated under Article 6 need not necessarily be a full court at all. "It may well be, for example, the president of a court or the presiding judge of a chamber for those functions, *which are of a more administrative nature,* and where speed and finality are particularly desirable." [23] It continues "that a state may entrust *these administrative functions* even to a body outside its court system",[24] such as an arbitration commission or a specialized institution created to handle international disputes. Therefore, the MLA clearly envisages the function of appointment of arbitrators under Article 11 to be a mere administrative function, with absolutely no judicial overtones.

In India, the seeds of a departure from the position under the MLA were initially sown by the 176th Report of the Law Commission of India on The Arbitration and Conciliation (Amendment) Bill, 2001. The Law Commission began by noting that it had been cautioned, by several responses to the Consultation Paper[25], that it should not go by the "1940 Act mindset" but has to keep the UNICTRAL Model Law in mind. However,

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[19] *Supra* note 1, pmbl.
[20] 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. 11(3) & (4) (Dec. 11, 1985).
[21] *Id.* at art. 6.
[22] United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, U.N. Doc.A/CN.9/264 20 (1985).
[23] *Id.*
[24] *Id.*
[25] Law Commission of India, *Consultation Paper on review of the working of the Arbitration & Conciliation Act, 1996* (2001).

the Commission went on to opine that "while we should not have the '1940 Act mindset', that does not mean we should have a closed mind and not try to improve on the Model Law. Thus, for an objective consideration of what is best for the parties who seek arbitration, neither an undue adherence to the '1940 Act mindset' nor an unnecessary anxiety to maintain 'UNCITRAL mind set' in its totality is desirable."[26] After discussing the perceived benefits of classifying the function performed under Section 11 as a judicial function, the Law Commission "proposed that [Section 11] be appropriately amended by substituting the words 'Supreme Court' for the words 'Chief Justice of India' and the words 'High Court' for the words 'Chief Justice of the High Court'";[27] a proposal eventually given effect to by the Amendment Act in 2015.

Subsequently in 2005, a seven-judge-bench of the Supreme Court of India, in *S.B.P. & Co. v. Patel Engineering Ltd.*[28] ["*Patel Engineering*"], arrived at a conclusion contrary to the position under the MLA through a majority judgment of 6:1. The majority held, *inter alia*, that when a statute confers a power on the highest judicial authority, i.e. the Chief Justice of India or that of a High Court, that authority must necessarily act judicially, unless the statute provides otherwise. On such basis, the Supreme Court concluded that,

> "*(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power…*
>
> *(iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators…*
>
> *(vii) Since an order passed by the Chief Justice of the High Court or by the designated judge of that court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution of India to the Supreme Court…*

[26] Law Commission of India, *176th Report on the Arbitration and Conciliation (Amendment) Bill, 2001*,73 (2001) *available at* http://lawcommissionofindia.nic.in/arb.pdf.
[27] *Id.* at 77.
[28] *Patel Engineering, supra* note 13.

*(viii) There can be no appeal against an order of the Chief Justice of India or a judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.*"[29]

In arriving at its conclusions, the majority judgment, in *Patel Engineering,* overturned a long list of precedents set by lower benches of the Supreme Court in *Ador Samia Pvt. Ltd. v. Peekay Holdings Ltd.*[30], *Konkan Railway Corp. Ltd. v. Mehul Constructions*[31], and *Konkan Railway Corp. Ltd.* v. *Rani Constructions Pvt. Ltd.*[32], wherein Section 11 of the Arbitration Act was agreed to be administrative in nature. However, despite being criticized by scholars and practitioners alike, the law laid down in *Patel Engineering* continues to hold force for the arbitrations governed by the principal un-amended enactment.

B. *Scope of Proceedings*

As a corollary to its conclusion, the Supreme Court in *Patel Engineering* opined that before exercising its jurisdiction under Section 11 of the Arbitration Act, the Chief Justice must be satisfied as to the existence of certain preliminary conditions, or jurisdictional facts, which permit it to exercise jurisdiction in the first place. These include questions as to the territorial jurisdiction, existence of a valid arbitration agreement etc. Moreover, it was noted that the decision of the Chief Justice on such jurisdictional facts shall be binding upon the parties, as well as the arbitral tribunal, in so far that an arbitral tribunal shall not be competent to re-examine such issues, despite being competent to rule on its own jurisdiction under Section 16(1) of the Arbitration Act.[33]

The said findings in *Patel Engineering* were reiterated with more clarity by a two-judge-bench of the Supreme Court in *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.* [34] ["*Boghara Polyfab*"]. Therein, the Supreme Court laid down the following classification:

"*Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in*

[29] *Id.* at ¶ 46.
[30] Ador Samia Pvt. Ltd. v. Peekay Holdings Ltd., 1999 (8) S.C.C. 572 (India).
[31] Konkan Railway Corp. Ltd. v. Mehul Constructions, (2000) 7 S.C.C. 201 (India).
[32] Konkan Railway Corp. Ltd. v. Rani Constructions Pvt. Ltd., (2000) 8 S.C.C. 159 (India).
[33] *Patel Engineering, supra* note 13, at ¶ 11.
[34] National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd., (2009) 1 S.C.C. 267 (India).

*[Patel Engineering]. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.*

*22.1. The issues (first category) which the Chief Justice/his designate will have to decide are: (a) Whether the party making the application has approached the appropriate High Court; (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.*

*22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are: (a) Whether claim is a dead (long-barred) claim or a live claim; (b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.*

*22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are: (i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration); (ii) Merits or any claim involved in the arbitration.*"[35]

In 2013, the above classification prescribed in *Boghara Polyfab* was cited with approval by a three-judge-bench of the Supreme Court in *Chloro Controls India Pvt. Ltd. v. Seven Trent Water Purification Inc.*.[36] It was specifically noted that such classification was "very much in conformity with the judgment of the Constitution Bench in [*Patel Engineering*]."[37] Subsequently, a two-judge-bench of the Supreme Court, in *Arasmeta Captive Power Co. Pvt. Ltd. v. Lafarge India Pvt. Ltd.*,[38] while repelling a challenge to the correctness of *Boghara Polyfab* and *Chloro Controls*, affirmed that "the propositions set out in [*Patel Engineering*]… have been correctly understood by the two-judge-bench in [*Boghara*

[35] *Id.* at ¶ 22 (17).
[36] Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc., (2013) 1 S.C.C. 641 (India).
[37] *Id.* at ¶ 126.
[38] Arasmeta Captive Power Co. Pvt. Ltd. v. Lafarge India Pvt. Ltd., A.I.R. 2014 S.C. 525 (India).

*Polyfab*], and the same have been appositely approved by the three-judge-bench in [*Chloro Controls*]."[39]

A perusal of the above march of case law establishes that unlike the MLA, Section 11 of the Arbitration Act in India involves the exercise of a judicial function. Moreover, as already iterated above, prior to appointing an arbitrator under Section 11, the Chief Justice must first necessarily satisfy itself of the existence of certain jurisdictional facts such as the territorial jurisdiction, existence of a valid agreement to arbitrate, and a commonality of the intention of parties. Additionally, the Chief Justice may also decide further questions that have been iterated above. The underlying objective behind such classification appears to be an obstinate belief that the highest judicial authority of India cannot be expected to perform a mere administrative or mechanical function, and that the exercise of its power may eventually be rendered futile if an arbitral tribunal subsequently finds that there does not exist a valid arbitration agreement.

The implications of such a drastic departure from the position under the MLA, and an over-enthusiastic expansion of the jurisdiction of the Chief Justice under Section 11, have created several concerns, which were never contemplated by the Supreme Court in *Patel Engineering*. Presently, the broad scope of jurisdiction now vested with the Chief Justice under Section 11, the judicial nature of the resultant order, and that it is binding upon the parties, undoubtedly renders a Section 11 Order to be of great strategic significance for either of the two parties. In such a circumstance, the aggrieved party, more often than not, attempts to assail a Section 11 Order in the most expeditious manner possible, i.e. by filing a petition for review before the Chief Justice, who had pronounced the original order. It is in this context that the question of whether a Section 11 Order can be reviewed in the first place assumes crucial importance.

## III. The Concept of Review

Justice Oliver Wendell Holmes believed that the object of the study of law is prediction, the prediction of the incidence of public force through instrumentality of courts.[40] He emphasized that law is not something that merely exists on paper; rather, it is what is developed in courts and influenced by the individual experiences of the judges;

[39] *Id.* at ¶ 37.
[40] Oliver Wendell Holmes Jr., *The Path of the Law,* 110. Harv. L. Rev. 991 (1997).

hence, his statement - "the life of law has not been logic: it has been experience". In this context, the term 'experience' refers to the subconscious intuition of the judges, while 'logic' refers to an attempt to impose some consistency on such intuitively developed law.[41] Though Justice Holmes was never concerned with Arbitration law, and bearing the risk of over-simplification, I believe that his statements amply illustrate the need, and provide a logical justification for a body performing a judicial function to be always vested with the power to review the correctness of its earlier orders. However, even if that were to be true, it is still necessary to assess what is the precise nature and origin of the power of review, and in what circumstances can a judicial authority be considered to possess this power.

In 1970, a three-judge-bench of the Supreme Court in *Narshi Thakershi v. Pradyumansinghji*[42] ["*Narshi Thakershi*"] was required to determine whether a person acting as a mere delegate of a State Government had the power to review its earlier order. Answering this question in the negative, the Supreme Court explained that the power to review was not an inherent power, and must be conferred by law either specifically or by necessary implication. As such, since the power of review sought to be exercised by the delegate of the State Government could not be sourced to any legislative enactment, the Supreme Court denied its existence.[43]

Thereafter, in 1981, a two-judge-bench of the Supreme Court, in *Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal*,[44] ["*Grindlays Bank*"] while addressing a similar issue, clarified the position of law laid down in *Narshi Thakershi*, by drawing a pertinent distinction between the concepts of substantive review and procedural review of an order. The Supreme Court noted that:

> "… *[Narshi Thakershi] is an authority for the proposition that the power of review is not an inherent power, it must be conferred either specifically or by necessary implication… [However,] the question whether a party must be heard before it is proceeded against is one of procedure and not of power… The expression 'review' is used in two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a*

[41] *See* Brian Hawkins, *The Life of the Law: What Holmes Meant*, 33 WHITTIER L. REV. 323 (2012).
[42] Patel Narshi Thakershi v. Shri Pradyumansinghji Arjunsinghji, A.I.R. 1970 S.C. 1273 (India).
[43] *Id.* at ¶ 4; *See also* Anil Sood v. Presiding Officer, Labour Court II, (2001) 10 S.C.C. 534 (India); and Sangham Tape Co. v. Hans Raj, (2005) 9 S.C.C. 331 (India).
[44] Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal, A.I.R. 1981 S.C. 606 (India).

*misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the Court in Narshi Thakershi's case held that no review lies on merits unless a statu[te] specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justitiae to prevent the abuse of its process, and such power inheres in every court or Tribunal.*"[45]

The underlying rationale behind the above conclusion pertains to the very nature of the function being performed by a particular body. In *Grindlays Bank*, the Supreme Court relied upon "*a well-known rule of statutory construction that a Tribunal or a body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties… unless there is any indication in the statute to the contrary.*"[46] This implies that a body, as long as it is exercising a judicial function, will be considered to possess an inherent power to review its earlier orders on procedural grounds, irrespective of whether it can be categorized as a court or a tribunal. The assertion stands duly affirmed by the fact that the principle of inherent power has been recognized to extend even to an arbitral tribunal, which is merely a creation of a private contract.[47] The power to review the substance of such orders, however, must still be vested by an applicable statute.

This being the legal position, questions still remained as to what may be these procedural grounds on the basis of which a body may review its earlier judicial orders. This aspect was clarified in 2005 by a three-judge bench of the Supreme Court in *Kapra Mazdoor Ekta Union v. Management of Birla Cotton Spinning and Weaving Mills Ltd.*[48] Therein, the Supreme Court was required to assess whether a tribunal had the jurisdiction to recall its earlier order, which in its opinion, essentially constituted a review of the order. Interpreting the two decisions in *Narshi Thakershi* and *Grindlays Bank* in harmony, the Supreme Court reiterated the distinction between substantive and procedural review to conclude that:

"*Where a Court or quasi judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the Court or*

[45] *Id.* at ¶ 13.
[46] *Id.* at ¶ 6.
[47] Senbo Engineering Ltd. v. State of Bihar, A.I.R. 2004 Pat. 33 (India).
[48] Kapra Mazdoor Ekta Union v. Management of Birla Cotton Spinning and Weaving Mills Ltd., (2005) 13 S.C.C. 777 (India).

> *the quasi judicial authority is vested with power of review by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the Court or quasi judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein.* Cases where a decision is rendered by the Court or quasi judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. In such a case, the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the Court or the quasi judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein… *The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding.*"[49]

Accordingly, the concept of review can be understood either as a review of the merits of a judicial order, or a review of the procedure followed in rendering the same. While the latter is a power inherent in a court or any judicial authority to set aside a palpably erroneous order passed by it under a misapprehension, the former is a power of law that involves correction of an error apparent on the face of the record.[50] The said distinction has immense bearing on the issue pertaining to the maintainability of a review against a Section 11 Order; the implication being that the power of a Chief Justice to review the merits of its earlier orders for appointment of arbitrators must necessarily be sourced to a provision under the Arbitration Act or another applicable statute. In the absence of the same, it is likely that a Section 11 Order passed by a Chief Justice may only be amenable to a review on procedural grounds.

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[49] *Id.* at ¶ 19.
[50] Food Corporation of India v. Regional Provident Fund Commissioner, W.P. (C) 5678/2013, March 11, 2015 (India), at ¶ 18.

## IV. Maintainability of Review against a Section 11 Order

A. *Substantive Review/ Review on Substantive Grounds*

In India, it is settled that the power of a judicial authority to review its earlier orders will exist *only* if it is provided for, either specifically or by implication, by a statutory enactment. Therefore, for a Chief Justice to review its Section 11 Orders, the power to do so must be sourced to a provision in a relevant legislative enactment, such as the Arbitration Act or the Code of Civil Procedure, 1908 or even the Constitution of India since it contains the provisions concerning the establishment, jurisdiction and the powers of the Supreme Court. Accordingly, the subsequent analysis is conducted under the following three heads:

### i. Arbitration & Conciliation Act, 1996

The Arbitration Act is a special enactment that integrates various laws relating to arbitration in India, earlier governed by three separate legislations, viz. the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937, as well as the Foreign Awards (Recognition and Enforcement) Act, 1961. The same is evident from a bare perusal of the Statement of Objects and Reasons of the Act, which acknowledges that the Act had been introduced "to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards",[51] and "to comprehensively cover international commercial arbitration… as also domestic arbitration."[52] Therefore, the Arbitration Act is rightly considered to lay down a holistic set of rules for governing various aspects concerning arbitration in India, including a mechanism for appointment of arbitrators. However, despite being a holistic self-contained code, the said Act nowhere confers upon the Chief Justice a power to review its earlier Orders under Section 11.

Considering the fact that the Arbitration Act was intended to comprehensively cover the various aspects concerning both international and domestic commercial arbitration in India, the absence of any provision expressly conferring upon the Chief Justice the power to review its earlier Section 11 Orders is crucial. One may infer that since the Arbitration Act is a self-contained special code, it impliedly excludes the applicability of the general procedural law. Thus, where the special Act does not provide

[51] *Supra* note 1, Statement of Objects and Reasons.
[52] *Id.*

the Chief Justice with a power to review its Section 11 Order, the legislative intent behind such non-conferment must be acknowledged.

In *Sanjay Gupta v. KSIDC*,[53] T.B. Radhakrishnan, J. of the Kerala High Court arrived at a similar conclusion, when he opined that "the [Arbitration Act] is a comprehensive one and is not one which confers power on the High Court to pass any order under Section 11… unless a power of review is expressly conferred under the Act itself, the general power of review as may be available to the High Court under other jurisdictions; civil, criminal or writ; cannot be extended to review the earlier order issued by Chief Justice or his nominee."[54] Likewise, in *Amber Enterprises v. TVS Electronics Ltd.*,[55] Surjit Singh, J. of the High Court of Himachal Pradesh relied on the decision in *Patel Engineering* to note that "there is no provision of review of an order passed, under Section 11 of the Arbitration and Conciliation Act, 1996, by the Chief Justice of the High Court or the Judge designated by him"[56], and therefore, the only remedy that is available to an aggrieved person is to assail a Section 11 Order of the Chief Justice of a High Court before the Supreme Court by way of a Special Leave Petition under Article 136 of the Constitution of India.

The rationale behind the aforementioned assertion may be further elucidated by drawing an analogy with the decision rendered by the Supreme Court of India in *Fuerst Day Lawson Ltd. v Jindal Exports Ltd.*[57] ["*Fuerst Day Lawson*"]. In *Fuerst Day Lawson*, a two-judge-bench of the Supreme Court was required to assess whether an order, if not appealable under Section 50 of the Arbitration Act, could be subject to an appeal under the Letters Patent of the High Court. "In other words, even though the Arbitration Act does not envisage or permit an appeal from the order, [whether] the party aggrieved by it can still have his way, by-passing the Act and taking recourse to another jurisdiction?"[58] Answering this question in the negative, the Supreme Court reasoned that:

> "… *Arbitration Act 1940, from its inception and right through 2004 was held to be a self-contained code. Now, if Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration the Arbitration and Conciliation Act,*

[53] Sanjay Gupta v. Kerala State Industrial Development Corporation, 2009 (4) K.L.T. 147 (India).
[54] *Id.* at ¶ 1.
[55] Amber Enterprises v. TVS Electronics Ltd., OMP No. 22/2010 in Arb. Case No. 28 of 2009 (India).
[56] *Id.* at ¶ 2.
[57] Fuerst Day Lawson Ltd. v Jindal Exports Ltd., (2011) 8 S.C.C. 333 (India).
[58] *Id.* at ¶ 2.

*1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held… that it carries with it a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done. In other words, a Letters Patent Appeal would be excluded by application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded.*"[59]

Undeniably, the reasoning enunciated by the Supreme Court in *Fuerst Day Lawson* may very well be extended to negate the existence of the Chief Justice's power to review its Section 11 Order. However, it is equally possible to differentiate the decision in *Fuerst Day Lawson* on the basis of the context in which the ratio was laid down, i.e. to emphasize that the appellate remedies under the Arbitration Act are exhaustive in nature. Accordingly, the proposition that the Arbitration Act completely ousts the application of the general procedural law, including the Code of Civil Procedure, 1908 ["CPC"] and the Constitution of India ["Constitution"], is itself dubious. In fact, the Supreme Court of India in *Hakam Singh v. Gammon (India) Ltd.*, by relying on Section 41 of the Arbitration Act of 1940, had clarified that the Code of Civil Procedure applies to proceedings under the said enactment,[60] with the principle being followed in context of the Arbitration Act as well.[61] Thus, even though the power to review a Section 11 Order cannot be sourced to a provision under the Arbitration Act, it shall be appropriate to ascertain whether such power may still emanate from a provision outside the purview of the Arbitration Act.

### ii. Constitution of India

The Supreme Court derives its power to review its judgments or orders from Article 137 of the Constitution. Article 137, titled as "Review of judgments or orders by

[59] *Id.* at ¶ 72.
[60] Hakam Singh v. Gammon (India) Ltd., (1971) 1 S.C.C. 286 (India), at ¶ 3.
[61] ITI Ltd. v. Siemens Public Communications Network Ltd., (2002) 5 S.C.C. 510, at ¶ 10 "… It is true in the present Act application of the Code is not specifically provided for but what is to be noted is: Is there an express prohibition against the application of the Code to a proceeding arising out of the Act before a civil court? We find no such specific exclusion of the Code in the present Act. When there is no express exclusion, we cannot by inference hold that the Code is not applicable."

the Supreme Court", states that "[s]ubject to the provisions of any law made by Parliament or any rules made under Article 145, *the Supreme Court shall have power to review any judgment pronounced or order made by it*."[62] The question then becomes that whether Article 137 can be relied upon to assert that the Chief Justice of India has been empowered to review its earlier orders under Section 11 of the Arbitration Act. Thakker, J., erstwhile Justice of the Supreme Court, clearly seemed to think so.

In *Jain Studios Ltd. v. Shin Satellite Public Co. Ltd.*,[63] ["*Jain Studios*"] Thakker, J. was faced with a review petition filed against his earlier order passed under Section 11 of the Arbitration Act. Therein, a question was raised as to the maintainability of the review petition on the ground that the Chief Justice of India is not competent to review its Section 11 Order. However, placing reliance on Article 137 of the Constitution to assert his jurisdiction, Thakker, J. held that:

> "*So far as the maintainability of review petition is concerned, in my opinion, the preliminary objection raised by the learned Counsel for the respondent is not well founded. In Patel Engineering Ltd. this Court by majority of 6:1 held the function performed by the Chief Justice of a High Court or his nominee or by the Chief Justice of India or his nominee to be a 'judicial' one. Once the function performed by the Chief Justice of India or his nominee is held to be judicial, it cannot be contended that an application for review of an order passed by the Chief Justice of India or his nominee is not maintainable. In my opinion, the learned Counsel for the applicant is right in relying upon Article 137 of the Constitution… An order passed by the Chief Justice of India or his nominee under Section 11(6) of the Act is indeed an 'order' within the meaning of Article 137 of the Constitution and is subject to review under the aforesaid provision. I accordingly hold the review petition to be maintainable and proceed to consider it on merits.*"[64]

*Prima facie*, the cited decision appears to be sound. However, a careful consideration of the reasoning adopted by Thakker, J. reveals that it suffers from two fatal infirmities.

*First*, an appropriate construction of Article 137 makes it abundantly clear that the said provision confers a power to review any judgment or order only upon the

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[62] INDIA CONST., art. 137.
[63] Jain Studios Ltd. Through Its President v. Shin Satellite Public Co. Ltd., (2006) 5 S.C.C. 501 (India).
[64] *Id.* at ¶ 6.

Supreme Court, and not the Chief Justice of India – a key distinction that was never brought to the attention of Thakker, J. in *Jain Studios*. As such, by placing reliance on Article 137 of the Constitution, Thakker, J. negated the fact that the power under Section 11 to appoint an arbitrator has been conferred upon the Chief Justice of India in context of international commercial arbitrations, and not the Supreme Court. The distinction, which had been previously highlighted by the Law Commission of India in its 176th Report, was reaffirmed by the Commission in its 246th Report on Amendments to the Arbitration and Conciliation Act 1996, published in August 2014, where the Commission proposed that:

> "*… it is observed that a lot of time is spent for appointment of arbitrators at the very threshold of arbitration proceedings as applications under section 11 are kept pending for many years... The Commission has proposed changing the existing scheme of the power of appointment being vested in the "Chief Justice" to the "High Court" and the "Supreme Court" and has expressly clarified that delegation of the power of "appointment" (as opposed to a finding regarding the existence/nullity of the arbitration agreement) shall not be regarded as a judicial act. This would rationalize the law and provide greater incentive for the High Court and/or Supreme Court to delegate the power of appointment (being a non-judicial act) to specialized, external persons or institutions*."[65]

As such, it is abundantly clear that notwithstanding the judicial nature of the proceedings under Section 11 of the Arbitration Act, the Legislature has deliberately conferred the power to appoint arbitrators upon the Chief Justice of India in case of an international commercial arbitration, and not the Supreme Court. Consequently, it is evident that provisions governing the powers and procedure of the Supreme Court of India, including its power to review, are distinct from those that may apply to the functions performed by the Chief Justice of India.

Interestingly, the aforementioned aspect had already been clarified by B.N. Srikrishna, J. in *Rodemadan India Ltd. v. Int'l Trade Expo Center Ltd.*,[66] ["*Rodemadan India*"] around three months prior to the decision in *Jain Studios*. In *Rodemadan India*, B.N. Srikrishna, J. was faced with a peculiar question - if Section 11 of the Arbitration Act

[65] Law Commission of India, *246th Report on Amendments to the Arbitration and Conciliation Act 1996*, 16 (2014), *available at* http://lawcommissionofindia.nic.in/reports/Report246.pdf.
[66] Rodemadan India Ltd. v. International Trade Expo Center Ltd., (2006) 11 S.C.C. 651 (India).

entails a judicial function, and Order VII Rule 1 of the Supreme Court Rules of 1966 requires every cause, appeal or matter to be heard by a Bench consisting of not less than two Judges of the Supreme Court, then whether a Section 11 Petition before the Chief Justice of India must necessarily be heard by a two-judge Bench of the Supreme Court. Labeling it as a misconceived contention, and relying upon the decision in *Patel Engineering*, B.N. Srikrishna, J. held that the power under Section 11(6) is the power of a designate referred to under the Section, and not that of the Supreme Court, even if it has now been held to have judicial characteristics. Accordingly, since it is the power of the Chief Justice and not the power of the Supreme Court, the specifications in Order VII Rule 1 of the Rules as to minimum number of Judges, would have no application thereto.[67] However, the said decision was never taken into consideration by Thakker, J. while arriving at his conclusions.

More recently, in 2014, a three-judge-bench of the Supreme Court of India in *Associated Contractors v. State of West Bengal*,[68] ["*Associated Contractors*"] arrived at an identical conclusion, albeit in a different context, to opine that the "*decision of the Chief Justice or his designate, not being the decision of the Supreme Court or High Court, as the case may be, has no precedential value.*"[69] In this light, a conjoined reading of *Rodemadan India* and *Associated Contractors* precludes a possibility of extending the power of review conferred upon the Supreme Court under Article 137 to the Chief Justice of India, when acting under Section 11 of the Arbitration Act.

*Second,* Thakker, J. failed to note that the Supreme Court in *Patel Engineering* had already clarified the limited recourses available to any party aggrieved by an order under Section 11 of the Arbitration Act. What renders this failure all the more surprising is that it was Thakker, J. who had penned the beautifully worded dissenting opinion in *Patel Engineering*. In *Patel Engineering*, while the Supreme Court had concluded that Section 11 of the Arbitration Act entails a judicial function, the majority judgment had clarified the limitations on remedies available to a party aggrieved by such an order. Even though misguided, the Supreme Court had categorically noted that:

> "*Once we arrive at the conclusion that the proceeding before the Chief Justice while entertaining an application under Section 11(6) of the Act is adjudicatory, then*

[67] *Id.* at ¶ 6.
[68] Associated Contractors v. State of West Bengal, Civil Appeal No. 6691 of 2005, September 10, 2014 (India).
[69] *Id.* at ¶ 14.

*obviously, the outcome of that adjudication is a judicial order. Once it is a judicial order, the same, as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach to the Supreme Court under Article 136 of the Constitution of India. If it were an order by the Chief Justice of India, the party will not have any further remedy in respect of the matters covered by the order of the Chief Justice of India or the Judge of the Supreme Court designated by him and he will have to participate in the arbitration before the Tribunal only on the merits of the claim…. that this conclusion of ours would really be in aid of quick disposal of arbitration claims and would avoid considerable delay in the process, an object that is sought to be achieved by the Act*."[70]

As evident, the decision in *Jain Studios* runs contrary to the conclusion arrived at by the majority in *Patel Engineering* to the effect that a party will not have any further remedies in respect of a Section 11 Order pronounced by the Chief Justice of India. Accordingly, it will not be incorrect to state that the decision in *Jain Studios* is *per incuriam* as it is inconsistent with the binding law already laid down by the Supreme Court in *Patel Engineering* as well as *Rodemadan India*.

The above assertion stands further fortified by the observations of Hrishikesh Roy, J. of the Gauhati High Court in *Siemens Ltd. v. Skylab (Assam) Pvt. Ltd.*[71]["*Siemens Ltd.*"]. In *Siemens Ltd.*, when faced with a question as to the maintainability of a review against a Section 11 Order of the Chief Justice of a High Court, and the decision in *Jain Studios*, Hrishikesh Roy, J. noted that:

"*While declaring that the order passed by the Chief Justice of India is reviewable, in Jain Studios Ltd. (supra), the Supreme Court construed that such orders are covered by Article 137 of Constitution which confers review power on the Supreme Court. But in this decision, the earlier judgment in Rodemadan India Ltd. (supra) was ignored. Moreover, the Court's attention was not drawn to the fact that exercise of power by the Chief Justice of India or the Chief Justice of a High Court is not that of a Court. In Rodemadan India Ltd. (supra) it was held specifically that the power exercised under Section 11(6) of the Arbitration Act is not the power of the Supreme Court or of the High Court but this is a special power conferred on the Chief Justice to nominate arbitrator. But the Arbitration Act nowhere provide[s] for review of order passed*

[70] *Patel Engineering, supra* note 13, at ¶ 43.
[71] Siemens Ltd. v. Skylab (Assam) Pvt. Ltd., 2014 (1) GAU. L.R. 744 (India).

*under this section… In the backdrop of the earlier view in Rodemadan India Ltd. (supra), it is obvious that in Jain Studios Ltd. (supra), the designated Judge made his declaration without reference to the previous decision of a coordinate authority and therefore the later decision in consequence is a per incuriam judgment.*"[72]

Accordingly, notwithstanding the inappropriateness of a High Court Judge categorizing a decision rendered by a Justice of the Supreme Court of India as *per incuriam*, the inescapable conclusion that flows from the above discussion is that Section 11 of the Arbitration Act empowers the Chief Justice, and not Supreme Court, to appoint an arbitrator. It naturally follows that the Chief Justice of India, not being equivalent to the Supreme Court, cannot derive the power to review its Section 11 Orders from Article 137 of the Constitution, which only applies to the Supreme Court.

### iii. Code of Civil Procedure, 1908

In any event, Article 137 of the Constitution is limited to the power of the Supreme Court to review its earlier judgments or orders, and does not apply to the High Courts. The High Courts, instead, derive their power of review from Section 114 and Order XLVII of the CPC. As such, it still remains to be seen whether the Chief Justice of a High Court, in the context of domestic arbitrations, can derive its power to review a Section 11 Order from the above provisions under the CPC.

Section 114, CPC states that "any person considering himself aggrieved – (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred; (b) by a decree or order from which no appeal is allowed by this Code; or (c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."[73]

Order XLVII, Rule 1, CPC also provides that any person considering himself aggrieved by any of the above described decrees or orders, "and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree

[72] *Id.* at ¶ 9-11.
[73] INDIAN CODE CIV. PROC., No. 5 of 1908 (India), § 114.

passed or order made against him may apply for a review of judgment to the Court which passed the decree or made the order."[74] In this regard, the expression 'sufficient reason' is of sufficiently wide import to include any kind of misconception of fact or law by a Court or even by an advocate.[75]

It is pertinent to note that notwithstanding its criticism, the decision rendered by Thakker, J. in *Jain Studios* continues to be cited with tremendous vigor before various High Courts to assert the existence of the power of review vis-à-vis a Section 11 Order. It is often contended that though a High Court derives its power of review from Section 114 and Order XLVII of CPC, and not Article 137 of the Constitution, a Chief Justice of a High Court, just like the Chief Justice of India, can still review its orders under Section 11 of the Arbitration Act. Fortunately, time and again, different High Courts have repelled such misplaced contentions and refused to blindly follow the decision laid down in *Jain Studios*.

For instance, in *N. S. Atwal v. Jindal Steel and Power Ltd.*,[76] a Division Bench of the Delhi High Court aptly differentiated the decision in *Jain Studios* by reasoning that it pertains to Article 137, which applies only to the Supreme Court, and not to the High Courts. On this basis, the Division Bench rightly concluded that *Jain Studios* cannot be regarded as an authority for the proposition that a review petition is maintainable against a Section 11 Order passed by a Chief Justice of a High Court.[77] Similarly, A.K. Ganguly, C.J. of the Orissa High Court in *Narendra Nath Panda & Co. v. Union of India*,[78] in his succinctly worded judgment, opined that:

> "*… in so far as the High Court is concerned, Article 137 is not applicable. The review power available to the High Court normally flows from the Code of Civil Procedure under Order 47 and Section 114 thereof. The Constitution does not vest the High Court with any power of review. In so far as Supreme Court is concerned it enjoys a constitutional power of Review which is very special power and is part of Chapter IV of the Constitution. Supreme Court's powers under Article 141, 142 are also part of that Chapter. Therefore, the ratio in the case of Jain Studios is applicable only in the case of an order passed by the Hon'ble Chief Justice of India or the*

[74] *Id.* at order XLVII, r. 1.
[75] Board of Control for Cricket in India v. Netaji Cricket Club, A.I.R. 2005 S.C. 592 (India).
[76] N S Atwal v. Jindal Steel and Power Ltd., 178 (2011) D.L.T. 454 (India).
[77] *Id.* at ¶ 10.
[78] Narendra Nath Panda & Co. & Anr. v. Union of India & Ors., 2007 (Supp.) O.L.R. 141 (India).

*nominated Judge appointed by the Hon'ble Chief Justice of India but the same is not attracted to the orders passed by the Hon'ble Chief Justice of a High Court or his nominee. The ratio in the case of Jain Studios is therefore not attracted to the order passed by the Hon'ble Chief Justice of a High Court or his nominee in respect of an order under Section 11(6) of [the Arbitration Act].*"[79]

On the other hand, having differentiated the applicability of the decision in *Jain Studios*, numerous High Courts have continuously denied the maintainability of review against a Section 11 Order by relying upon the observations of the Supreme Court in *Patel Engineering*, which have already been extracted above. Such decisions portray a far more nuanced understanding of not only the import of Section 11 of the Arbitration Act, but also of the object of minimum judicial intervention as codified in Section 5 of the said Act. The decisions to this effect are in plenty.

In 2008, B.D. Ahmed, J., in *Shivraj Gupta v. Deshraj Gupta*,[80] opined that after reading the ratio laid down by the Supreme Court in *Patel Engineering*, "it immediately becomes clear that the power under Section 11(6) of the said Act is not conferred on the High Court but is conferred on the Chief Justice of the High Court… the power that is exercised under Section 11(6) by the Chief Justice or his designate is not a power which is exercised by them as a Court and, therefore, would not be governed by the normal procedure of that court which includes the right of appeal as well as the power of review, revision etc."[81]

In a 2010 decision titled *Shivhare Builders v. Executive Engineer, PWD*,[82] F.I. Rebello, then C.J. of the Allahabad High Court also held that "on a conjoint reading of the scheme of the Act and the power traceable in the Chief Justice… the Chief Justice is not a Court who (sic) can exercise the power of substantive review as it has not been specifically conferred. At the highest, what would be the inherent would be only the power of procedural review. In the instant case, the review is not sought on the ground that the application was dismissed *ex parte* or in the absence of the Petitioner or his counsel. Section 5 of the Act shall also be read in that context, namely, that the judicial

[79] *Id.* at ¶ 13; *See also* the decision rendered by R.B. Mishra, J. of Himachal Pradesh High Court in Amit Singla v. HP Agro Industries Corp. Ltd. & Anr., A.I.R. 2010 H.P. 85 (India), at ¶ 13.
[80] Shivraj Gupta & Anr. v. Deshraj Gupta & Ors., R.P. No. 445/2007 in ARB. P. 101/2005, February 2, 2008 (India).
[81] *Id.* at ¶ 5; Cited verbatim by Ajit Gunjal, J. of Karnataka High Court in Future Metals Pvt. Ltd. v. STCL Ltd., Review Petition No. 8/2010 in C.M.P. Nos. 40 and 41/2009 (India).
[82] Shivhare Builders v. Executive Engineer, PWD, 2011 (3) A.D.J. 414 (India).

authority will only exercise powers conferred upon it."[83] Similarly, in 2011, V. Gopala Gowda, the then C.J. of the Orissa High Court in *G. C. Kanungo v. Rourkela Steel Plant & Anr.*,[84] held that "[r]eview is in the nature of a remedy and is a substantive part. Therefore, when the Legislature has consciously given, under Section 11(7) of the Act, finality to a decision of the Chief Justice or his designate under Section 11(6) of the Act, and has not provided for review, then to read a right of review in such provisions by an interpretation process would, amount to amending the statute by reading something into it which is clearly not there. Such an interpretation would fall foul of Section 5 of the Act."[85]

Therefore, a consideration of the provisions contained in the Constitution, as well as the CPC, conclusively affirms that notwithstanding the decision in *Jain Studios*, the Chief Justice of India or that of a High Court is not competent to review the merits or substance of its earlier Section 11 Orders as it has not been conferred with any such power either under the Arbitration Act or any other applicable enactment in this regard.

### *B. Procedural Review/ Review on Procedural Grounds*

As discussed above, the power of procedural review is an inherent power of anybody that exercises a judicial function, irrespective of whether such power has been provided for by an applicable statutory enactment. Accordingly, the question of maintainability of a procedural review against a Section 11 Order stands at a different footing than that of a substantive review. In other words, the question as to the Chief Justice's power to review its orders under Section 11 of the Arbitration Act on procedural grounds has a relatively straightforward answer if one considers that such proceedings are now considered to be judicial in nature.

In 2007, A.K. Ganguly, then C.J. of the Orissa High Court, in *Kishore Kumar Sahoo v. Lafarge India Pvt. Ltd.*,[86] was required to determine whether the Chief Justice of a High Court possessed the power to recall its Section 11 Order on grounds of procedural infirmities even when no such power has been conferred on it under any applicable statute. In response, noting that the power to recall orders is akin to a procedural review, A.K. Ganguly, C.J. held that "there is a distinction between review of an order and the

[83] *Id.* at ¶ 11.
[84] G C Kanungo v. Rourkela Steel Plant & Anr., 2012 (1) I.L.R. (Cut.) 1 (India).
[85] *Id.* at ¶ 26.
[86] Kishore Kumar Sahoo v. Lafarge India Pvt. Ltd. & Anr., 2007 (Supp. 2) O.L.R. 778 (India).

recalling of an order which has been passed without hearing the other side. It is not disputed that when the order was passed by me under Section 11, there was no representation by the company despite notice being served on it… [thus,] even if the power under Section 11 of the said Act is not a power given to a Court, but is a power given to the Chief Justice, the Chief Justice, being the highest judicial authority of the State, has the inherent power of doing justice and in a given case, the power of recall of an order passed by him previously, which is a judicial one, is incidental to such inherent power of the Chief Justice."[87]

This question was again answered in 2008 by H.L. Gokhale, then C.J. of the Allahabad High Court, in *Manish Engineering Enterprises v. The Managing Director*,[88] ["*Manish Engg.*"] who reiterated the distinction between procedural and substantive review vis-à-vis a Section 11 Order. H.L. Gokhale, C.J. held that:

> "…As far as the review on merits is concerned, it has got to be either specifically provided or will have to be read into the provision by necessary implication. As far as the procedural review is concerned, the applicant must establish that the procedure followed by the court or the quasi-judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein such as that the party concerned was not heard for no fault of the party… *the Chief Justice while functioning under Section 11 of this Act is functioning as the specified authority and not as a Civil Court in the strict sense of the term… Thus, under the scheme of the Act only in the event there is a procedural irregularity, which vitiates the proceedings, the order could be reviewed, but a substantive review would not be available*."[89]

It is noteworthy that the decision in *Manish Engg.* has been repeatedly cited with approval in a plethora of cases, such as *Rosy Blue (India) Pvt. Ltd. v. Orbit Corporation Ltd.*,[90] and *Chandra Dikshit v. Smart Builders*[91]. Consequently, it can be stated with sufficient certainty that since the Chief Justice of India or a High Court performs a judicial function under Section 11 of the Arbitration Act, it also has a power to review its Section

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[87] *Id.* at ¶ 7-9.
[88] Manish Engineering Enterprises v. The Managing Director, Indian Farmers Fertilizer Cooperative Ltd., A.I.R. 2008 All. 56 (India).
[89] *Id.* at ¶ 18-24.
[90] Rosy Blue (India) Pvt. Ltd. v. Orbit Corporation Ltd., Chamber Summons No. 714 of 2012 in Arb. App. No. 112 of 2011, February 27, 2013 (India).
[91] Chandra Dikshit v. Smart Builders, A.I.R. 2008 All. 95 (India).

11 Order in case it suffers from any procedural irregularity. The same is notwithstanding the fact that the Chief Justice is neither equivalent to the Supreme Court or any High Court, as the power of procedural review is attached to the judicial nature of the function performed by a body, irrespective of whether it can be classified as a court or a tribunal.

## V. The Impact of The Arbitration & Conciliation (Amendment) Act, 2015

The Amendment Act of 2015 has altered the entire scheme of Section 11 of the Arbitration Act drastically as an attempt to minimize judicial intervention at the pre-arbitration stage. In particular, the power to appoint arbitrator(s) has been transferred from the Chief Justice to the Supreme Court of India, and the concerned High Court as the case may be. The fact that the said amendment shall apply "notwithstanding any judgment, decree or order of any Court"[92] indicates the legislative intent to overrule the rather expansive interpretation preferred by the Supreme Court of India in *Patel Engineering*.

Since the power to appoint arbitrator(s) is now vested with the Supreme Court of India and the High Court, it may follow that the resultant Section 11 Order shall be judicial in nature. However, transferring the said power from one authority to another is not the only change introduced by the Amendment Act. The newly introduced Section 11(6B) of the amended Act states that "[t]he designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this Section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court."[93] On a bare reading, this implies that if the power to appoint arbitrator(s) under Section 11 is exercised by the Supreme Court or the High Court, the same is judicial in nature. However, where it is delegated to another person or institution, it shall not entail the exercise of a judicial function. Undoubtedly, the reasoning behind such distinction remains unclear. Further, one may even construe the said provision as indicating the nature of this power to appoint arbitrator(s), irrespective of who it is exercised by. Notwithstanding the myriad ways in which the amended Section 11 may be interpreted in the near future, the ostensible intention behind the recent amendments appears to not focus on the administrative-judicial debate initiated in the judicial corridors of India, but on limiting the scope of intervention under Section 11. Indeed,

[92] *Supra* note 9, at § 6 (ii).
[93] *Id.*

such an approach would be in line with the observations made by the Law Commission of India in its 246th Report, wherein it noted that "[u]nfortunately… the question before the Supreme Court was framed in terms of whether such a power is a judicial or an administrative power, which obfuscates the real issue underlying such nomenclature/ description…"[94]

Another significant alternation made by the Amendment Act pertains to Section 11(7) of the Arbitration Act. Earlier, Section 11(7) provided that "[a] decision on a matter entrusted by [Sections 11(4), 11(5) or 11(6)] to the Chief Justice or the person or institution designated by him is final."[95] However, the amended provision not only makes any similar decision taken by the Supreme Court of India, or the concerned High Court final, but expressly states that "no appeal including Letters Patent Appeal shall lie against such decision."[96] The arrayed amendments raise three significant aspects concerning the maintainability of review against a Section 11 Order, as discussed in context of the un-amended Arbitration Act.

*First,* the transfer of the power to appoint arbitrator(s) to the Supreme Court of India, and the concerned High Courts, allows the said courts to rely on their respective powers to review their earlier orders. In other words, the Supreme Court and the High Courts can now source their power to review a Section 11 Order from Article 137 of the Constitution of India, and Section 114 of CPC respectively; something that was beyond the purview of a Chief Justice. After all, the conferment of such power on the Chief Justice, and not the High Courts, was the dominant concern raised in most decisions highlighted above, which now stands remedied by the recent amendments.

*Second*, in stark contrast, when the power under Section 11 is delegated to an institution or any person, such person, not being the Supreme Court or the High Court, will not be able to derive his or her power to review from the Indian Constitution or the CPC as the case may be. In fact, Section 11(6B) of the Arbitration Act expressly clarifies that such delegation shall not be regarded as delegation of a judicial power. As such, owing to the administrative nature of the delegation, an institution or person entrusted with the task of appointing an arbitrator(s) will not possess the inherent power to review its earlier Section 11 Orders even on procedural grounds.

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[94] *Supra* note 65, at 18.
[95] *Supra* note 1, at § 11 (7).
[96] *Supra* note 9, at § 6(iii).

*Finally*, as stated above, Section 11(7) of the amended Arbitration Act expressly excludes the possibility of filing an appeal, including Letters Patent Appeal against a Section 11 Order. If read in conjunction with Section 5 of the Arbitration Act, one may construe this provision as prohibiting the review procedure as well. However, as tempting as it may be, a review is distinct from an appellate proceeding. On the face of it, while the latter is preferred against an appellate court situated higher in the judicial hierarchy, the former is filed before the same judicial authority that had passed the order now sought to be assailed. Nonetheless, this new insertion in Section 11(7) allows the Indian courts an opportunity to attach a more rigid sense of finality to a Section 11 Order, in line with Section 5 of the enactment.

## VI. Conclusion

The ostensible object behind the decision in *Patel Engineering*, which recognized Section 11 Orders to be judicial in nature, was to limit the remedies available to an aggrieved party against the Order of the Chief Justice. This is precisely why the majority judgment had amply clarified that an aggrieved party can assail a Section 11 Order only by way of a Special Leave Petition under Article 136 of the Constitution. However, in the event the Section 11 Order is rendered by the Chief Justice of India in context of an international commercial arbitration, even this remedy ceases to exist. It is this very objective that stands completely nullified if a Chief Justice is considered to be competent to review its earlier Section 11 Orders on both substantive and procedural grounds.

Admittedly, the power of procedural review of a judicial order is an inherent power of each body that exercises a judicial function, and as such, will also include the Chief Justice of India, or a High Court, acting under Section 11 of the Arbitration Act. However, it is equally true that no such power has been conferred upon the said Chief Justice under any applicable law in case a review is sought on the substance of an earlier Section 11 Order. To this extent, I am in agreement with the view taken by various High Courts in permitting a procedural review of a Section 11 Order, but dismissing all applications seeking to review the substance or merits of such order. However, the anomalous decision by Thakker, J. in *Jain Studios* has created a bizarre situation that warrants rectification for the simple reason that it creates an artificial distinction between an international commercial arbitration, and a non-international or domestic arbitration. Presently, if an order is passed by the Chief Justice of India under Section 11 of the Arbitration Act in relation to an international commercial arbitration, then such order

may be reviewed by the Chief Justice on both procedural and substantive grounds as per the decision in *Jain Studios*. However, where a Section 11 Order emanates from the Chief Justice of a High Court in context of a non-international commercial arbitration, then it can only be reviewed to correct a procedural irregularity and not on its substance.

Interestingly, the above-described inconsistency may already have been mitigated by the decision of a three-judge-bench of the Supreme Court of India in *Associated Contractors*. It is pertinent to take note that the decision in *Jain Studios* is essentially an order of a Chief Justice's designate reviewing its earlier order under Section 11 of the Arbitration Act, and not a judgment given by the Supreme Court. In this regard, Article 141 of the Constitution, which prescribes the law *declared by the Supreme Court of India* to be binding on all courts within territory of India, does not appear to render any binding force or precedential value to any Section 11 Order of the Chief Justice of India, including the decision in *Jain Studios*. Thus, in light of the observations of the Supreme Court in *Associated Contractor* that a Section 11 Order, not being an order of the Supreme Court or the High Court, has no precedential value, there is sufficient room to argue that the decision given in *Jain Studios* is not a binding precedent to be followed by other courts in India.

Such an argument would certainly not be unprecedented. For instance, in *N S Atwal*, the Division Bench of the High Court of Delhi had noted that "…*power under Section 11(6) is the power of a designate referred to under the section and not that of the Supreme Court, albeit that it has now been held to have judicial characteristics. Since this is the power of the Chief Justice and not the power of the Supreme Court, the specification in Order VII Rule 1 of the Supreme Court Rules, 1966 prescribing the minimum number of Judges, would have no application thereto. It necessarily follows that a chamber decision does not have the trappings of a binding precedent for this very same reason.*"[97]

Recently, in *Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd.*,[98] the Counsel appearing for the Respondent, had submitted before the Division Bench of the High Court of Madhya Pradesh (Jabalpur Bench) that "*[e]ven though the order passed in [a Section 11 proceeding] is subject to judicial review under Article 226 and 227 of the Constitution, but the proceedings are not before a Court and once the order passed in a proceeding under Section 11 is not*

[97] *Supra* note 76, at ¶ 11.
[98] Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd., First Appeal No. 310/2015 (India).

*by a Court, it will not have the effect of law, laid down by the Supreme Court as envisaged under Article 141 of the Constitution.*"[99] Unfortunately though, the Division Bench did not consider it necessary to "*go into all these questions*."[100]

Nonetheless, it must not be overlooked that the artificial distinction created between an international and a non-international commercial arbitration vis-à-vis the legal treatment of a Section 11 Order is completely erroneous and devoid of any merit. As such, the compelling need to rectify the same cannot be overstated. In fact, the Supreme Court of India has been afforded such an opportunity vide the Special Leave Petition filed against the judgment pronounced by F.I. Rebello, then C.J. of the Allahabad High Court, in *Shivhare Builders*.[101]

Lastly, the impact of the various amendments made by the Amendment Act of 2015 is quite severe, largely reversing the position of law as regards maintainability of review against a Section 11 Order under the previous enactment. Considering that these amendments make it easier for the aggrieved parties to file a review petition against a Section 11 Order, it adds a further obstruction for those hoping for minimized pre-arbitration judicial intervention. The coming years should clarify the precise scope of operation of the said amendments. However, since the two arbitration regimes are likely to operate simultaneously for a significant period of time, what is clear is that the Indian judiciary is bound to face more questions than answers in the coming years. One prays, literally so, that the Indian judiciary is able to add the desired clarity on the controversies surrounding the present question.

[99] *Id.*, at ¶ 19.
[100] *Id.*, at ¶ 54.
[101] M/s Shiv Hare Builders v. Executive Engineer & Ors., S.L.P. (Civil) 6088/2011 (India).

Note

# DISPUTE RESOLUTION IN CIVIL-LAW AFRICAN JURISDICTIONS: OPTIONS FOR INDIAN INVESTORS

*Delphine Constantin**

## I. Introduction

Indian investments into Africa, which have been growing at an exponential rate, have until now largely focused on the eastern and southern, English-speaking countries of the continent. A number of reasons have been cited for this, including linguistic affinities, historical connections, and a legal system similar to India, based on English Common Law.

The Third India-Africa Summit in Delhi on October 29-30, 2015, with invitations sent to 54 heads of State, was a reminder of India's strategic interests in Africa and highlighted the Indian government's renewed priorities on the African continent.[1] This is exemplified by India's expanding Africa strategy in North, West and Central Africa – regions which are largely French-speaking (along with other official languages which include Arabic, Portuguese and Spanish) and primarily governed by civil-law systems. For this, India already has in place a number of programs to facilitate investments and encourage bilateral economic development. These include ITEC,[2] the PanAfrica E-Network,[3] Focus Africa[4] and Team-9[5]- the latter two with a Sub-Saharan

* Senior Consultant, Cyril Amarchand Mangaldas (neither the author, nor Cyril Amarchand Mangaldas shall be liable for any losses incurred by any person from any use of this article or its contents. This article does not constitute legal or any other form of advice from the author or from Cyril Amarchand Mangaldas).

1 *Reaching out to Africa*, THE HINDU, Oct. 31, 2015, http://www.thehindu.com/opinion/editorial/indiaafrica-forum-summit-reaching-out-to-africa/article7823807.ece; *India-Africa Summit: 50 African leaders set to attend,* BUSINESS STANDARD, Aug. 20, 2015, http://www.business-standard.com/article/news-ians/india-africa-summit-50-african-leaders-set-to-attend-115082000552_1.html. More recently, the Fourth India-Africa Hydrocarbons Conference, held in Delhi, on January 21-22, 2016, with 21 African participating countries, has focused on sector-specific opportunities for Indian and African stakeholders. See: *4th India Africa Hydrocarbons conference ends; paves the way for strengthening India Africa relations*, BUSINESS STANDARD, January 22, 2016, http://www.business-standard.com/article/government-press-release/4th-india-africa-hydrocarbons-conference-ends-paves-the-way-for-strengthening-116012201533_1.html.

2 Indian Technical & Economic Cooperation Programme (ITEC), http://itec.mea.gov.in. ITEC, which is sponsored by the Indian Government, covers 158 developing countries, including in Africa, and funds training programs in a range of sectors.

3 Pan Africa E-Network, http://www.panafricanenetwork.com. The PanAfrica E-Network program is a USD 117 million joint India-African Union initiative launched in 2006 to provide an optical fibre and satellite network among 53 African countries and India to facilitate tele-education and tele-medicine programs between Indian and African universities and hospitals – including, in French-speaking Africa,

scope. Seven of the eight African participants in Team-9 are civil-law jurisdictions and (except for Guinea-Bissau) are French-speaking. Focus Africa includes the French-speaking nations of Côte d'Ivoire and Senegal. Senegal is also a key partner under the PanAfrica E-Network program – which includes a 14,000 km undersea cable between Chennai and Dakar, Senegal's capital city and the program's satellite hub earth station on the African continent. Finally, India has implemented a Duty Free Tariff Preference ["DFTP"] Scheme for Least Developed Countries ["LDCs"] in 2008[6], which provides duty free and preferential market access on a range of exports from selected African LDCs – including a number of French-speaking countries.

As India's investments in the region expand, a clear understanding by Indian investors of the legal environment is necessary. The majority of jurisdictions in North, Central and West Africa tend to follow a civil law system – thus distinct from the Common Law known in India, and in most English-speaking countries of Africa. It is also critical for Indian investors to build reasonable expectations as to the mechanisms available to address potential disputes with their local partners, or with host States. Dispute resolution clauses, in particular, will need specific attention.

This note focuses on dispute resolution issues for Indian investors in a representative group of Western and Central African States – all members of OHADA, an organization of African civil law countries which provides for a unified legislation in areas of interest to foreign investors – including for the resolution of commercial disputes.

## II. OHADA as an Economic Regional Organization

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with the University of Yaounde (Cameroon), Brazzaville Hospital (Republic of the Congo), and Dakar's Fann Hospital (Senegal). The project is funded and implemented by the Government of India, with Indian ICT equipment and Indian services providers.

[4] Focus Africa, http://focusafrica.gov.in/focus_africa_Programme.html. The Focus Africa program, launched in 2002, now includes 24 African States, including, among civil-law jurisdictions, Côte d'Ivoire, Madagascar, Mauritius, Senegal and Seychelles (French-speaking), Algeria, Morocco, and Tunisia (Arabic-speaking, with French widely used for business), as well as Angola and Mozambique (Portuguese-speaking). The program targets specific sectors of interest to India trade and makes available government credit lines for Indian exports.

[5] The Techno-Economic Approach for Africa India Movement (TEAM-9) brings together India and eight West African countries - including seven civil-law jurisdictions (French-speaking Burkina Faso, Chad, Côte d'Ivoire, Equatorial Guinea, Mali and Senegal) and Portuguese-speaking Guinea-Bissau. Ghana, a neighbouring country, which is English-speaking and follows a Common Law system, is also a member. A key component is a US$500M Indian government line of credit to finance local projects which involve Indian companies and/or which contribute to further bilateral trade with India.

[6] *India's Duty Free Tariff Preference (DFTP) Scheme for Least Developed Countries (LDCs)*, http://commerce.nic.in/trade/international_tpp_DFTP.pdf.

OHADA is a group of now 17 African nations, namely, Benin, Burkina Faso, Cameroon, Central African Republic, Chad, the Comoros, Côte d'Ivoire, the Democratic Republic of the Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, the Republic of the Congo, Senegal and Togo. The OHADA zone has a combined population of approximately 236 million people (roughly a quarter of the population of Sub-Saharan Africa) and an aggregate GDP of US$228 billion.[7].

All OHADA member States (except the Comoros, the Democratic Republic of the Congo and Guinea) use the CFA Franc – which is pegged to the Euro and guaranteed by the French Treasury. Each is also a member of a customs and economic union, being either the West African Economic and Monetary Union (known as "UEMOA", for *Union Economique et Monétaire Ouest-Africaine*)[8] or the Economic and Monetary Community of Central Africa ('CEMAC', for *Communauté Économique et Monétaire de l'Afrique Centrale*).[9]

Finally, OHADA States all have French as an official language (except for Portuguese-speaking Guinea-Bissau)[10] and use civil law concepts as a foundation of their legal system,[11] with Cameroon having a mixed civil-law and Common Law system.[12]

OHADA, the French acronym for *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (Organisation for the Harmonization of Business Law in Africa), was created by the eponymous treaty, signed on October 17, 1993 in Port-Louis (Mauritius) (the "OHADA Treaty")[13]. Its avowed objective then and today is to encourage and

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[7] World Bank country figures (2014), www.worldbank.org/en/country.

[8] Benin, Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo.

[9] Cameroon, the Central African Republic, Chad, the Republic of the Congo, Equatorial Guinea and Gabon.

[10] Three OHADA countries are bilingual, namely Chad (Arabic and French), Cameroon (English and French) and the Central African Republic (Sango and French). Two are officially trilingual, Comoros (Comorian, Arabic and French) and Equatorial Guinea (Spanish, Portuguese and French).

[11] In addition to Islamic and/or customary laws, in specific instances.

[12] A number of other African countries which either have French as an official language or where French is frequently used in commercial relations are not OHADA members (ie. Algeria, Burundi, Djibouti, Madagascar, Mauritania, Mauritius, Morocco, Rwanda, Seychelles and Tunisia) ; like OHADA States, each of these has a civil-law based system (except for Mauritius and the Seychelles, which use a mixed Common Law/civil-law system, and Rwanda, which is transitioning to Common Law), as do the Portuguese-speaking nations of Angola, Cabo Verde, Mozambique and Sao Tome & Principe. Incidentally, two of Africa's three largest economies, are also civil-law-based: South Africa has a dual Dutch (civil law) and Common Law system, while Egypt's Civil Code was originally inspired by the Napoleonic (French) Civil Code.

[13] *Traité Relatif à l'Harmonisation en Afrique du Droit des Affaires* (Treaty on the Harmonization of Business Law in Africa) ["OHADA Treaty"], *signed on October 17, 1993 (as amended on October 17, 2008)* http://ohada.org/traite-ohada-consolide-traites-1993-et-2008-combines.html.

facilitate foreign and cross-border investments[14] in the region.[15] This effort is two-pronged. First, a set of common legislation (known as "Uniform Acts") was adopted by OHADA member States – with a focus on business law. Second, common institutions were established: the Conference of Chiefs of States and Governments; the Council of Justice and Finance Ministers; a Permanent Secretariat (based in Yaounde, Cameroon); the Common Court of Justice and Arbitration ("CCJA", for *Cour Commune de Justice et d'Arbitrage*) (based in Abidjan, Côte d'Ivoire); and the Higher Regional School of Magistracy ('ERSUMA', for *Ecole Régionale Supérieure de la Magistrature*) (based in Porto Novo, Benin). These institutions administer and oversee the implementation of the nine Uniform Acts adopted to date, which are all directly applicable in each OHADA Member State:[16]

(i) 'Uniform Act Relating to General Commercial Law';

(ii) 'Uniform Act Relating to Commercial Companies and Economic Interest Groups';

(iii) 'Uniform Act Relating to Cooperative Companies';

(iv) 'Uniform Act Organizing Securities';

(v) 'Uniform Act Organizing Collective Proceedings for Wiping-Off Debts';

(vi) 'Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution';

(vii) 'Uniform Act Organizing and Harmonizing Undertakings' Accounting Systems';

(viii) 'Uniform Act Relating to Contracts for the Transportation of Goods on Land'; and

(ix) 'Uniform Act on Arbitration'.

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[14] *Id.* at art. 1. Article 1 of the OHADA Treaty states that '[t]he objective of the [OHADA] Treaty is the harmonisation of business laws in the [OHADA] Contracting States by the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures, and by encouraging arbitration for the settlement of contractual disputes".

[15] *Id.* at art. 42. Under Article 42 of the OHADA Treaty, French is the sole working language of the organization. All translations of OHADA texts herein are based on the unofficial English versions available at www.ohada.com, as reviewed, amended and supplemented by the author, where appropriate.

[16] *Id.* at art. 10. Article 10 states that "Uniform Acts are directly applicable and obligatory in the Contracting States notwithstanding any provision of national law enacted either prior or subsequently [to the OHADA Treaty]".

## III. Investor-State Disputes: ICSID and BITs.

All OHADA States, except Equatorial Guinea, are now signatories to the 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States' ["ICSID Convention"],[17] which entered into force on October 16, 1966. Conversely, India is not – and has, as of today, indicated no intention to become one. The ICSID Convention allows for the establishment of the International Centre for the Settlement of Investment Disputes ["ICSID Centre"][18] ("a forum for foreign investors to settle investment disputes with their host States (and with any local State agency, authority or subnational entity)"].

ICSID has become a favoured route for foreign investors to address disputes and Sub-Saharan African States have until now constituted the third largest group of State respondents in ICSID-administered cases.[19] Among them, 45 ICSID cases have involved OHADA States – that is close to 10% of all ICSID cases and more than the 41 cases involving all other, non-OHADA, Sub-Saharan African States. Unsurprisingly, roughly a third of OHADA cases to date are related to investments in the oil and gas sectors.[20]

For Indian investors, the ICSID Convention contains one significant restriction. Per Article 25 of the Convention, "[t]he jurisdiction of the [ICSID Centre] shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the [ICSID Centre] by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the [ICSID Centre] [...]."[21] To the extent they are not nationals of a contracting State, or incorporated in a contracting State, Indian

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[17] International Centre for the Settlement of International Disputes, Database of Member States, https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.bak.aspx.

[18] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States [hereinafter *ICSID Convention*], entered into force on October 14, 1966, as amended on April 10, 2006 https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%20Convention%20English.pdf. Article 1 of the ICSID Convention states that "(1) [i]t is hereby established the Center for the Settlement of Investment Disputes (hereinafter the [ICSID] Center); (2) [t]he purpose of the Center shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of [the][ICSID] Convention".

[19] International Centre for the Settlement of International Disputes, *The ICSID Caseload – Statistics* (Issue 2015-2), https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-2%20(English).pdf.

[20] ICSID cases database, https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx (as at October 1, 2015).

[21] *Supra,* note 18, at art. 25.

investors will thus not be in a position to avail of the ICSID conventional dispute settlement mechanisms in the event of a dispute with and in an OHADA Member State.

An alternate route for Indian investors however remains under the ICSID Centre's Additional Facility Rules.[22] These allow for an optional ICSID-administered conciliation or arbitration process[23] for parties which do not meet the personal jurisdictional requirements under the ICSID Convention.[24] Two considerations substantially mitigate the relevance of the Additional Facility for any investor. First, the consent of the host State is required in order to submit any dispute under the Additional Facility Rules (as will the approval of the ICSID Centre's Secretary-General)[25] – which is by implication highly hypothetical. Second, unlike ICSID Convention awards[26], an award rendered under the Additional Facility Rules is not directly enforceable in ICSID Convention Contracting States; rather, as for awards issued under any other institutional rules, they are subject to external review and enforcement mechanisms in local courts.

On a related note, it should be reminded at this stage that India has to date entered into Bilateral Investment Treaties ("BITs") with only two of the 17 OHADA States. BITs typically provide for institutional or *ad hoc* arbitration in the event of a dispute between an investor and the host State on grounds of alleged breaches of, or interference with, the terms of the BIT by the host State (or any local State agency, authority or subnational entity).

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[22] *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes* [hereinafter *Additional Facility Rules*], adopted on September 27, 1978, as amended with effect on January 1, 2003 and April 10, 2006, https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR_English-final.pdf.

[23] *Id.* at art. 2. Article 2 of the Additional Facility Rules states that "[t]he Secretariat of the [ICSID] Centre is hereby authorized to administer, subject to and in accordance with these [Additional Facility] Rules, proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, falling within the following categories: (a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the [ICSID] Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State; (b) conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the [ICSID] Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State; [...]".

[24] *Supra,* note 18, at art. 25, and note 21 above.

[25] *Supra,* note 22, at art.4 (1). Article 4(1) of the Additional Facility Rules states that "[a]ny agreement providing for conciliation or arbitration proceedings under the Additional Facility in respect of existing or future disputes requires the approval of the Secretary-General [...]".

[26] *Supra,* note 18, at art. 54. Article 54 of the ICSID Convention states that "(1) [e]ach Contracting State shall recognize an award rendered pursuant to [the] [ICSID] Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent State. [...]".

The 'Agreement for the Promotion and Protection of Investments' entered into between India and Senegal on July 3, 2008 (the "India-Senegal Agreement")[27] provides for such a dispute resolution mechanism in its Article 9 ('Settlement of Disputes Between an investor and a Contracting Party'). Under Article 9(3)-(4), disputes between an investor (from a contracting State) and one of the contracting States must be resolved by arbitration (where no resolution may be reached amicably or by way of conciliation in accordance with paragraphs (1) and (2) of Article 9). Arbitration under the India-Senegal Agreement is available under three alternate options. The first is an ICSID arbitration,[28] which, as discussed earlier, is not a possibility for Indian investors. A second option is to submit to arbitration under the ICSID Additional Facility Rules[29] – which, as also discussed, is hypothetical. A third, and default option, is for the parties to initiate *ad hoc* arbitration under the UNCITRAL Rules, with a three-arbitrator panel.[30]

India has also recently entered into an investment treaty with the Democratic Republic of the Congo on April 13, 2010 – which, as of today, has yet to come into force[31]. The text of this treaty is not currently publicly available.

In the absence of a BIT or similar 'investment protection and promotion agreement', the default option for Indian investors in the case of an investment dispute in most OHADA jurisdictions will rest on an arbitration clause in their respective investment or partnership agreements – and, failing that, on the jurisdiction of local courts.[32]

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[27] *Agreement between the Government of the Republic of India and the Government of the Republic of Senegal for the Promotion and Protection* of Investments, http://finmin.nic.in/bipa/Senegal.pdf.
[28] *Id,* at art. 9(3)(a).
[29] *Id,* at art. 9(3)(b).
[30] *Id,* at art. 9(3)(c).
[31] Ministry of Finance, Government of India, *Bilateral Investment Promotion and Protection Agreements*, http://finmin.nic.in/bipa/bipa_index.asp?pageid=3.
[32] India has entered into BITs (or investment protection and promotion agreements) with a number of other civil-law jurisdictions in Africa, including (partly) French-speaking countries - eg. Mauritius (4 September 1998) and Morocco (13 February 1999), and with Portuguese-speaking Mozambique (19 February 2009). Each provides for dispute resolution clauses with, *mutatis mutandis*, similar arbitration options for investors as otherwise provided for in the India-Senegal Agreement. See: http://finmin.nic.in/bipa/bipa_index.asp?pageid=3. India has also entered into Trade Agreements with the following OHADA States: Cameroon (22 February 1968), Côte d'Ivoire (17 February 1993), Senegal (22 May 1974) and Zaire (now the Democratic Republic of the Congo) (11 November 1988). None of these Trade Agreements provides for a dispute resolution process. See: http://commerce.nic.in/trade/international_ta_indaf.asp.

## IV. Institutional Arbitration: Offshore Seats

The larger arbitration institutions are ubiquitous in arbitration clauses involving African parties or Africa-based projects. These include London's LCIA, the Swiss Chamber of Commerce ["SCC"] and the International Chamber of Commerce ["ICC"] – the latter being a preferred choice for OHADA parties. Arbitration clauses providing for disputes to be resolved under the rules of any of these institutions will typically (but not always) provide for a seat in either Paris, London, Zurich or Geneva. A seat in an OHADA State is in theory a possibility under any of the ICC, LCIA and SCC rules, as is a seat in India, for instance.

One of the key concerns for the parties (and for Indian investors) when drafting an arbitration clause, and choosing a seat, will be to pre-empt eventual enforcement issues of an award. Enforcement of an award rendered by a foreign-seated tribunal in one of the 17 OHADA jurisdictions will be subject to local exequatur proceedings, to the extent the relevant OHADA State is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the "New York Convention")[33](or to any bilateral agreement). Enforcement will also be subject to any reservations that the OHADA State may have made under the New York Convention.

Two OHADA States, namely the Central African Republic and the Democratic Republic of the Congo, have made two standard reservations providing for enforcement under the New York Convention to be subject to (i) reciprocity (i.e. enforcement is limited to awards rendered by an arbitral tribunal with a seat in another New York Convention contracting State), and (ii) commerciality (i.e. the subject-matter dispute must be of a commercial nature under national laws).[34] The Democratic Republic of the Congo has made an important additional reservation providing that the New York Convention does not apply to disputes related to immovable property[35] (which, per

[33] Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter the New York Convention], adopted on June 10, 1958, entered into force on June 7, 1959, http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf.
[34] New York Convention - Status, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. See also: Law of the Democratic Republic of the Congo No. 13/03 of June 26, 2013 authorizing RDC's accession to the New York Convention (in: *Journal Officiel de la République Démocratique du Congo, Recueil de textes sur l'amélioration du climat des affaires et des investissements, Numéro spécial,* 14 May 2015).
[35] *Id.*

Article 3 of the Democratic Republic of the Congo's Mining Code, includes the country's significant mining rights).[36]

It is also worth noting that, as of today, five OHADA States have not acceded to the New York Convention.[37] The enforcement of an international award in those States will in principle be possible solely on the basis of bilateral agreements with the concerned States and the respective OHADA State's local laws. The same will be true, by default, for an international award covered by a reservation made by an OHADA State which is otherwise party to the New York Convention.

It is thus critical for Indian investors to anticipate the full range of enforcement issues, and the possible alternate options, in light of their individual situations. Where, for instance, enforcement of an international award under the New York Convention is not available in an OHADA State on any ground, parties may consider whether offshore assets may be seized in another jurisdiction.

## V. Regional Institutions and Local *Fora*: An Overview

Increasingly, offshore seats are being challenged by African parties during negotiations of arbitration clauses. This is particularly the case where State or subnational entities are involved in the proposed transaction. It is more specifically the case in sectors involving sovereign assets or extractive industries, including natural resources (such as oil and gas) and mining rights. African arbitration seats are an option under the rules of any of the larger institutions, such as the ICC, the LCIA or the SCC. Where the seat is not in Africa, the parties do have the option to choose an alternate location, in Africa, as the venue for the actual arbitration hearings. A venue in Africa is often agreed for reasons of practicality, for instance where the witnesses are based locally.

Regional arbitration institutions have also been gaining prominence. In Africa, these regional institutions include the LCIA's Mauritius branch ("LCIA-MIAC") and the Arbitration Foundation of Southern Africa ("AFSA") – although the latter two would be unlikely choices for disputes subject to the substantive law of a civil law jurisdiction.

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[36] Law of the Democratic Republic of the Congo No. 007/2002 of 11 July 2002 providing for the Mining Code, http://droit-afrique.com/upload/doc/rdc/RDC-Code-2002-minier.pdf.

[37] Chad, Equatorial Guinea, Guinea-Bissau, the Republic of the Congo and Togo. *See* United Nations Commission on International Trade Law, *Status, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

Here again, enforcement issues will be a determinant factor in opting for a local forum or for regional institutional rules (which, in practice, implies the choice of a regional seat). Regional judicial agreements may contribute to mitigate enforcement issues in certain jurisdictions. By way of example, the Arab Convention on Judicial Co-operation (the "Riyadh Convention") adopted by the Arab League on April 6, 1983 provides for facilitated enforcement of judicial decisions and awards among member States. In Africa, Arab League members include the Comoros (also an OHADA member), as well as Morocco, Algeria, Tunisia and Egypt, all civil law jurisdictions. Facilitated enforcement under the Riyadh Convention of course assumes that the seat of arbitration is in an Arab League State, with Dubai often a preferred choice by the parties. The Dubai International Arbitration Centre ["DIAC"] or the Dubai International Financial Centre-London Court of International Arbitration ["DIFC-LCIA"] Arbitration Centre may thus be, in certain instances, specifically relevant for foreign investors in Africa.

A second issue to be considered by the parties, while considering an African seat in an arbitration clause, is the local courts' role in supervising the arbitration process – whether in the event of a jurisdictional challenge, for purposes of interim relief or for the appointment of arbitrators. In this respect, the OHADA court, known as the CCJA, stands as the most comprehensive regional institutional system on the African continent. Like the LCIA-MIAC, the CCJA, which is based in Abidjan (Côte d'Ivoire), provides a regional institutional forum, with its own rules and a supporting administration. The CCJA however goes further than other regional (or international) arbitration institutions, in at least two respects. First, the CCJA concurrently exercises supervisory jurisdiction for any arbitration conducted in OHADA States. Second, an award rendered under the CCJA rules of arbitration will be directly enforceable in all OHADA member States – as would the judgments of local courts.

## VI. OHADA'S Court as a Hybrid Institution

The CCJA, established under the OHADA Treaty, is thus a unique hybrid judicial institution.

First, it provides advice to national governments and jurisdictions on the interpretation of the OHADA Treaty and the Uniform Acts– as would the constitutional

council or the Supreme Court, in other jurisdictions.[38] Second, it is the jurisdiction of last resort for all judicial proceedings within the scope of the Uniform Acts – as would a court of *cassation*, in civil law systems.[39] Third, it acts as an arbitration institution for all arbitrations conducted under Title IV (Arbitration) of the OHADA Treaty and under the rules of arbitration of the CCJA (the "CCJA Arbitration Rules")[40] - as would major arbitration institutions such as the ICC, the LCIA or the SCC; it may, as such, supplement the parties for the appointment of arbitrators[41] and take any urgent action necessary to the conduct of the arbitration proceedings.[42] Fourth, the CCJA grants the exequatur certification for purposes of enforcement of a CCJA Arbitration Rules award within OHADA member States.[43]

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[38] *Supra*, note 13*,* at art. 13 and 14. Article 14 of the OHADA Treaty states that, "the [CCJA] ensures a common interpretation and application of the [OHADA] Treaty, of any regulation passed for its implementation, of the Uniform Acts and of any decisions" (par. 1); "[t]he [CCJA] may be consulted by any [OHADA] contracting State or by the [OHADA] Council of Ministers on any matter within the scope of [the matters given in paragraph 1]. The same right is recognized to the national courts where Article 13 [of the OHADA Treaty] applies" (par. 2). Article 13 of the OHADA Treaty states that "[l]itigation regarding the implementation of Uniform Acts is settled in the first instance and on appeal by the courts of the [OHADA] contracting States".

[39] *Id.* at art. 14. Article 14 of the OHADA Treaty states that "[b]y way of appeal, the [CCJA] shall rule on the decisions pronounced by the appellate courts of [OHADA] Contracting States in all business issues raising questions pertaining to the application of Uniform Acts and to the Regulations provided for in the [OHADA] Treaty, save decisions regarding penal sanctions pronounced by the appellate courts" (par. 3) ; "[t]he [CCJA] will rule as above with regard to non-appeallable decisions delivered by any national court of the [OHADA] Contracting States which pertains to those matters brought to the attention of the [CCJA] by virtue of the above paragraphs" (par. 4);."[w]hile sitting as a court of final appeal, the [CCJA] can hear and decide on the merits of the case (par. 5)".

[40] Arbitration Rules of the Common Court of Justice and Arbitration [hereinafter *CCJA Arbitration Rules*], adopted by the OHADA Council of Ministers on March 11, 1999 (*Journal Officiel de l'OHADA*, No. 8, May 15, 1999), http://www.ohada.com/reglements/666/arbitration-rules-of-the-common-court-of-justice-and-arbitration.html.

[41] *Id.* at art. 3.1. Article 3.1 (par. 2) of the CCJA Arbitration Rules states that "[w]hen the parties have agreed that the dispute shall be settled by a sole arbitrator, they may appoint him/her by mutual agreement for confirmation by the [CCJA]. If the parties fail to agree within thirty (30) days of notification of the request for arbitration by the other party, the arbitrator shall be appointed by the [CCJA]".

[42] *Id.* at art. 2.5. Article 2.5 of the CCJA Arbitration Rules states that "[i]n urgent cases, the President of the [CCJA] may take decisions necessary for the organization and proper functioning of arbitral proceedings, subject to informing the [CCJA] in the next meeting, to the exclusion of decisions requiring an order of the [CCJA]. [...]".

[43] *Id.* at art. 30.2. Article 30.2 of the CCJA Arbitration Rules states that the "[t]he exequatur is granted by order of the President of the [CCJA] or of the judge delegated for this purpose and shall make the award enforceable in all the [OHADA] members States. [...]".

At this stage, it is useful to review in some details the specific alternatives available under OHADA law for Indian (and other foreign) investors where it comes to the choice of both seat and rules of arbitration in drafting a dispute resolution clause. As discussed, parties may of course provide for international, foreign-seated arbitration under the rules of an international arbitration institution (such as the ICC or LCIA).

Whether for political, logistical or commercial reasons, parties may however decide to provide for a seat of arbitration in an OHADA State. In the context of the OHADA Treaty, this implies two mutually exclusive sets of procedural rules – and options. The first is institutional arbitration under the CCJA Arbitration Rules (and Part IV of the OHADA Treaty). The second, and default option, is an *ad hoc* arbitration under the OHADA's Uniform Act on Arbitration. A third option, providing for an OHADA-seated arbitration under the rules of a foreign-based institution (such as the ICC), is a theoretical, but in practice only distant, possibility.

Indian parties may submit a dispute to the CCJA under the CCJA Arbitration Rules provided that they (or another party to the dispute) are domiciled in an OHADA State, or that the contract is to be performed, in all or in part, in an OHADA member State.[44] The CCJA Arbitration Rules largely draw on the rules of the ICC[45] – and civil law procedural traditions. As another key factor for foreign parties to consider, and as already mentioned, an award rendered under the CCJA Arbitration Rules will be enforceable in all OHADA member States, with *res judicata* effect, as would a judgment from a local

[44] *Id.* at art. 2.1. Under Article 2.1 of the CCJA Arbitration Rules which reflects Article 21 of the OHADA Treaty (*OHADA Treaty*, supra note 13), "[t]he mission of the [CCJA] shall be to procure, in conformity with these [CCJA Arbitration Rules], an arbitral solution when a dispute is of a contractual nature, in application of an arbitration clause or an arbitration agreement submitted to it by any party to a contract either when one of the parties is domiciled or normally resides in one of the [OHADA] member States, or, when the contract has been performed or is to be performed, wholly or partially, on the territory of one or several [OHADA] member States.

[45] *Id.* at art. 15.2. Including by providing for "terms of reference" (*procès-verbal*) to be agreed among the parties at the outset of the proceedings.

court.[46] Enforcement across OHADA jurisdictions is thus subject only to an exequatur being granted by the CCJA.[47]

The foregoing thus distinguishes from proceedings conducted under the Uniform Act on Arbitration, which are subject to the supervision of the local courts in each OHADA member State – with exequatur being granted by the courts of the relevant State.[48] Uniformity in interpretation across OHADA jurisdictions is however here again ensured since appeals to the CCJA are available (by way of *cassation*) against any local OHADA court's decision to refuse an exequatur,[49] or against a local court's ruling on a petition for annulment of an award.[50]

The Uniform Act on Arbitration, based on the UNCITRAL Model Law, is in effect intended to constitute the OHADA member States' internal arbitration law.[51] By default, it applies to all and any arbitration with a seat in an OHADA member State, where the parties have not elected to submit to the CCJA Arbitration Rules.[52] It also

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[46] *Id.* at art. 27. Article 27 of the CCJA Arbitration Rules states that "[a]wards made in conformity with the provisions of these [CCJA Arbitration Rules] have res judicata effect on the territory of each [OHADA] member State, as would decisions of the courts of [OHADA] member States [...]".

[47] *Id.* at art. 30. Article 30 of the CCJA Arbitration Rules states that "[t]he exequatur is requested by petition addressed to the [CCJA]" (par. 30.1); "[t]he exequatur is granted by order of the President of the [CCJA] or judge delegated for this purpose and shall confer on the award an enforceable character in all the [OHADA] members States" (par. 30.2).

[48] Uniform Act on Arbitration, adopted by the OHADA Council of Ministers on March 11, 1999 (*Journal Officiel de l'OHADA,* No. 8, May 15, 1999) http://www.ohada.com/actes-uniformes/658/uniform-act-on-arbitration.html. Article 30 of the Uniform Act on Arbitration states that "[t]he award can only be enforced subject to an exequatur granted by the judge having jurisdiction in the relevant [OHADA] member State".

[49] *Id.* at art. 32. Article 32 of the Uniform Act on Arbitration states that "[t]he decision [of the court of an OHADA member State] denying the exequatur may only be appealed by way of *cassation* to the [CCJA][...]".

[50] *Id.* at art. 25. Article 25 of the Uniform Act on Arbitration states that "[t]he award may not be challenged by way of opposition, appeal or an application for *cassation.* It may be subject to a petition for nullity, which must be filed with the judge having jurisdiction in the relevant [OHADA] member State. The decision of the judge having jurisdiction in the relevant [OHADA] member State may only be set aside by way of *cassation* by the [CCJA][...]".

[51] *Id.* at art. 35. Article 35 of the Uniform Act on Arbitration states that "[t]his Uniform Act [on Arbitration] shall be the law governing arbitration in the [OHADA] member States [...]".

[52] *Id.* at art. 1. Article 1 of the Uniform Act on Arbitration states that "[t]his Uniform Act [on Arbitration] shall apply to any arbitration when the seat of the arbitral tribunal is in one of the [OHADA] member States".

applies to the recognition and enforcement of awards issued by tribunals seated in a non-OHADA jurisdiction, where individual States have not provided otherwise.[53] This suggests that foreign investor seeking to enforce a non-OHADA award (including, hypothetically, an award under the ICSID Additional Facility Rules) in an OHADA State which is otherwise not a party to the New York Convention (or to a bilateral agreement) may be able to do so on the basis of the Uniform Act on Arbitration.

Under OHADA law, an award may only be challenged[54] and an exequatur may only be refused[55] if the tribunal's decision is found to be contrary to the "international public policy" of OHADA member States. Due process is, by implication, an additional ground for challenging the CCJA's exequatur under the CCJA Arbitration Rules[56] and a separate ground for annulment of an award under the Uniform Act on Arbitration.[57] OHADA law does however not reflect Article 5.1(e) of the New York Convention, for instance, which allows for recognition and enforcement to be refused where the award "has been set aside by a competent authority of the country in which, or under the law of

[53] *Id.* at art. 34. Article 34 of the Uniform Act on Arbitration states that "[a]wards made on the basis of rules different from those provided in this Uniform Act [on Arbitration] shall be recognized in the [OHADA] member States, subject to the conditions provided by any international agreements which may be applicable and, by default, subject to the same conditions as provided in this Uniform Act [on Arbitration]".

[54] *Id.* at art. 26. Article 26 of the Uniform Act on Arbitration states that "[r]ecourse for nullity is only admissible in the following cases: [...] - if the arbitral Tribunal has violated an international public policy rule of the States signatories to the [OHADA] Treaty; [...]".

[55] *Id.* at art. 31 Article 31 of the Uniform Act on Arbitration states that "[...] [t]he recognition and exequatur of the award shall be refused where the award is manifestly contrary to the international public policy of the [OHADA] member States." *Supra,* note 40, at art. 30.6. Article 30.6 of the CCJA Arbitration Rules (*supra*, note 39) states that "[t]he exequatur may only be refused and opposition to the exequatur may only be initiated in the following cases: [...] 4 - if the award is contrary to international public policy".

[56] *Supra,* note 40. Article 30.6 of the CCJA Arbitration Rules states that "[t]he exequatur may only be refused and opposition to the exequatur may only be initiated in the following cases: 1 - if the arbitrator has ruled without an arbitration agreement or on the basis of an agreement which is void or which has expired; 2 - if the arbitrator has ruled without conforming to the mission assigned; 3 - when the principle of adversary procedure has not been respected; [...]".

[57] *Supra,* note 48, at art. 26. Article 26 of the Uniform Act on Arbitration states that "[r]ecourse for nullity is only admissible in the following cases: - if the arbitral tribunal has ruled without an arbitration agreement or on the basis of an agreement which is void or which has expired; - if the arbitral Tribunal was irregularly composed or if the sole arbitrator was irregularly appointed; - if the arbitral Tribunal has ruled without conforming to the mission assigned; - if the principle of adversary procedure has not been respected; [...]; - if no reasons are given for the award".

which, [the] award was made". In that, and as a final note, it is interesting that OHADA law (as other civil-law systems on the African continent) goes further than the New York Convention in facilitating the enforcement of international awards.

## VII. Conclusion

The OHADA sub-region offers a unique common legal framework for Indian (and other international) investors in Africa. This is complemented by the use of the common CFA franc, and of French as a common language in the majority of OHADA member States. These have been essential in facilitating trade and investments across West and Central Africa.

A thorough grasp by Indian investors, and by Indian counsels, of the specificities of civil law, as it is practiced on the African continent, will however also be indispensable – as will an understanding of the local context. It will in particular be critical for Indian investors to anticipate any disputes with their local or international partners – and to identify the procedural and enforcement issues associated with their respective, specific situations as they elect an arbitral seat and procedural rules.

Possible difficulties in enforcing an arbitral award in the context of transactions with State-owned entities, or in sectors associated with sovereign assets (including extractive industries), will in particular require close attention. The extent of local sovereign immunities may need to be tested in the local courts of individual OHADA member State for purposes of enforcement of an award.

On that backdrop, and in this context, an offshore arbitration seat (usually coupled with the choice of ICC or LCIA arbitration rules) will more often than not continue to be a preferred route for international investors in Africa – although one which may be commercially and politically difficult to engage State counterparts on.

# BLESSED UNIONS IN ARBITRATION- AN INTRODUCTION TO JOINDER AND CONSOLIDATION IN INSTITUTIONAL ARBITRATION

*Arjun Gupta‡, Sahil Kanuga† & Vyapak Desai**

Arbitration is born out of an arbitration agreement. The scope and ambit of the power of an arbitral tribunal emanates from the arbitration agreement. The arbitral tribunal is a creature of contract. The privity of contract normally implies that only parties to the contract are allowed to participate in arbitral proceedings. This is fast changing and now, it is not unusual to see '*non-signatories*' being dragged into arbitration proceedings.

In today's commercial world, contractual arrangements are rarely simple. It is not uncommon to see (i) back-to-back contracts between numerous, sometimes unconnected parties; or (ii) multiple independent contracts between related parties, being part of a composite transaction.[1] Claims may also arise by or against third parties, who may not be signatories to any of the agreements, but are somehow involved in the same transaction. While these situations are materially different, they throw up common issues in arbitration proceedings. These situations are becoming increasingly commonplace to commercial dispute resolution and pose challenges regarding combining the different claims and parties in arbitration proceedings.[2] The risk of not doing so, keeping issues of costs and inefficiencies relating to multiplicity of proceedings to the side, is that the conclusions of different proceedings may differ and possibly even contradict each other, which in turn may pose challenges during the enforcement of an award.

The crux of these problems emanate from the fact that arbitration, conceptually, is a consent-driven process which normally would prevent the introduction into the proceedings of claims or parties which are not within the scope of the four corners of the agreement which the contracting parties had agreed to and which forms the mandate of the arbitral tribunal. In a dispute scenario, it is difficult to envisage all the parties giving their consent to amalgamate proceedings thereby enlarging the '*playing field*' or

‡Associate, International Dispute Resolution and Litigation Practice, Nishith Desai Associates (he can be reached at arjun.gupta@nishithdesai.com).
† Senior Associate, International Dispute Resolution and Litigation Practice, Nishith Desai Associates (he can be reached at sahil.kanuga@nishithdesai.com).
*Partner, International Dispute Resolution and Litigation Practice, Nishith Desai Associates (he can be reached at vyapak.desai@nishithdesai.com).
[1] JULIAN LEW ET AL., COMPARATIVE AND COMMERCIAL INTERNATIONAL ARBITRATION 377 (2003).
[2] MICHAEL J. MUSTILL & STEWART C. BOYD, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND 136-140 (2d ed. 1989).

'*mandate*' of the arbitral tribunal.[3] It will not be unusual to come across a party that prefers to resolve disputes only in the manner envisaged under their specific agreement. This could be for various different reasons including unnecessary increase in the time and cost burden of a larger, consolidated arbitration.

Having said that, not so long ago, the Supreme Court of India has, in *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc,*[4] interpreted the expression '*person claiming through or under*' in Section 45[5] of the Arbitration and Conciliation Act, 1996 ["Act"] to mean and take within its ambit *multiple* and *multi-party* agreements. Consequently, even *non-signatories* to some of the agreements could be referred to arbitration. The Court clarified that this was an exception and not the rule. However, the door has been opened and as of now, in certain cases involving composite transactions and interlinked agreements, even *non-signatories* may possibly be referred to arbitration. International jurisprudence in this sphere has been increasingly leaning towards consolidation of separate arbitral proceedings with a view to get a more holistic and conclusive determination of the dispute, as is more specifically pointed out hereunder.

Whether a party can be compelled to participate in arbitration proceedings would depend on a number of factors including the choice of the arbitration rules, the laws governing the arbitration and the clauses of the contract. They may, amongst other things, go so far as to allow joinder of third parties or even consolidation of different arbitral proceedings.[6] Having said that, one cannot lose sight of the fact that issues surrounding joinder and consolidation in arbitration emanate out of an inherent conflict that exists between party autonomy and the desire to finally resolve a dispute under the arbitral process, by bringing in the required parties to the proceedings notwithstanding the fact that they may not have agreed to do so.

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[3] ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 184-185 (2d ed. 1991).

[4] Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc, (2013) 1 S.C.C. 641 (India).

[5] The Arbitration & Conciliation Act, No. 26 of 1996, § 45, INDIA CODE (1996). Section 45: Power of judicial authority to refer parties to arbitration.—Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (V of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

[6] Patrice Level, *Joinder of Proceedings, Intervention of Third Parties, and Additional Claims and Counterclaims,* I.C.C. INT'L CT. OF ARB. BULL., 36, 39 (1996).

The following paragraphs deal with the general concepts of joinder and consolidation and how municipal laws of various jurisdictions have incorporated these concepts. Thereafter, the paper discusses some of the institutional regimes and how they have dealt with the concepts of consolidation and joinder.

## I. Joinder

'*Joinder*' refers to when a party, who is not party to the arbitration agreement, is '*joined*' as party to the arbitration proceedings. The concept of *joinder* of third parties or their intervention in *litigation* is a well-recognized and established feature of the national court's sovereign power. A joinder is permitted for reasons of efficient administration and procedural economy. It does not require the explicit consent of the parties.[7]

The position is very different in arbitral proceedings where party autonomy is of paramount importance and consideration. The *forced joinder* of third parties, or even intervention in proceedings, is in conflict with the basic principles of arbitration. In arbitration, enshrined principles of party autonomy outweigh considerations of procedural efficacy and economy. It is because of this reason that, barring a few exceptions, arbitration laws of most countries have not recognized the concepts of *consolidation* and *joinder* against the will of any of the concerned parties. In arbitration, it is usually necessary for all parties to consent to a *joinder* of a third party to the proceedings. [8]

However, it is not compulsory for the parties to consent to *joinder* after the initiation of the proceedings; consent can be considered granted even by merely agreeing to arbitration under institutional arbitration rules which may allow and provide for joinder. An example of such a rule is Article 22(1)(viii) of the London Court of International Arbitration Rules ["LCIA Rules"] which provides that upon an application being made to the arbitral tribunal, a third party may be joined to the proceedings after obtaining the consent of such third party and the applicant. It is not necessary to obtain consent of the other parties as that has been impliedly provided by agreeing to be governed by the LCIA Rules.

A narrower rule can be found in Article 18 of the Geneva Chamber of Commerce and Industry Arbitration Rules, 1992, where only the respondent to the proceedings can ask for a joinder of parties (ostensibly as the petitioner had an option to

[7] *See* CODE CIV. PROC., No. 5 of 1908, Order I.
[8] Jean-Louis Devolve, *Final Report on Multi Party Arbitrations*, I.C.C. INT'L CT. OF ARB. BULL., 26 (1995).

avail of such an option at the time of filing the statement of claim). The respondent has to do so at the time of filing the reply the statement of the claim. Should it be done at a later stage, all parties would have to provide their consent of such a joinder of parties.[9] Interestingly, while the institution has the discretion to allow *joinder* of parties on an application by the respondent, the tribunal would have the final say.

The Netherlands Code of Civil Procedure[10] requires all concerned parties to provide their consent for joinder of a third party or intervention. However, the final discretion to allow *joinder* lies with the arbitral tribunal irrespective of whether all concerned parties have consented.[11]

The choice of institutional arbitration rules thus assumes significance in determining whether a party has the opportunity and ability to object to *joinder* of a third party once arbitration proceedings have been invoked. The power of the arbitral tribunal does, however, supersede this in most jurisdictions and thus, a mere enabling provision in the institutional rules may sometimes not be enough to warrant the joinder of a third party into arbitration proceedings. There is no straightjacket solution and the choice of governing rules plays a significant role in determining whether joinder will be permissible.

## II. Consolidation

'*Consolidation*' refers to the amalgamation of different arbitral proceedings which are pending or initiated into a single proceeding. In so far as *consolidation* of arbitral proceedings is concerned, consent of all parties is required. In *consolidation,* all the parties must agree to '*merge*' separate arbitration proceedings arising out of different arbitration agreements. The point of consideration that is usually the catalyst for this decision is

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[9] Christophe Imhoos, *The 1992 Geneva Chamber of Commerce and Industry Arbitration Rules under Scrutiny*, 9.4 J. INT'L ARB 121, 132 (1992).

[10] *See* RV 1986, art. 1045 (Neth.):

(1) At the written request of a third party who has an interest in the outcome of the arbitral proceedings, the arbitral tribunal may permit such party to join the proceedings, or to intervene therein. The arbitral tribunal shall send without delay a copy of the request to the parties.
(2) A party who claims to be indemnified by a third party may serve a notice of joinder on such a party. A copy of the notice shall be sent without delay to the arbitral tribunal and the other party.
(3) The joinder, intervention or joinder for the claim of indemnity may only be permitted by the arbitral tribunal, having heard the parties, if the third party accedes by agreement in writing between him and the parties to the arbitration agreement.
(4) On the grant of a request for joinder, intervention, or joinder for the claim of indemnity, the third party becomes a party to the arbitral proceedings. Unless, the parties have agreed thereon, the arbitral tribunal shall determine the further conduct of the proceedings.

[11] A.J. VAN DEN BERG ET AL., NETHERLANDS ARBITRATION LAW 69 (1993).

whether these separate arbitration proceedings can be amalgamated into one set of proceedings to promote efficiency and/or avoid inconsistent awards (which would open up its own can of worms for the warring parties).[12]

The most convenient manner in which arbitration proceedings can be *consolidated* is to incorporate a provision for consolidation in the arbitration agreement itself. However, a practical issue that parties face is that at the stage of negotiation, it is difficult to envisage and anticipate the nature of disputes that might arise out of the contract.[13] It is a brave party that is willing to sign a provision for consolidation without understanding and being aware of all the potential ramifications. Should a party adopt a clause for consolidation of arbitration proceedings, it may very well find itself in arbitration against numerous other parties, which was a situation it never envisaged or even contemplated. This could be detrimental for its interest if all the other parties to the proceedings are pooling in their resources and expertise against a party which would have been otherwise be segregated into different arbitration proceedings if consolidation was not agreed to by the parties.

Consolidation revolves around "*related disputes*"; which brings forth the consideration of what actually constitutes a *related dispute* and what would be the threshold required to be a *related dispute*. Moreover, at least theoretically, all arbitration clauses in all (independent) contracts would need to contain a similar provision of *consolidation*, for the different proceedings to be merged.

The House of Lords in *Lafarge Redland v. Shepard Hill*[14] stated that Party A could not be asked to mandatorily be a part of the arbitration proceedings between Party B and C, even though all of the parties had entered into contracts with each other regarding the same economic transaction, unless the arbitration clause imposed such an obligation on Party A.

If all the arbitration clauses in different contracts for the same economic venture are identically worded or are covered under the same heading, then it might potentially be argued and construed that the parties had intended to agree to consolidate the proceedings. However, this is not a straightjacket formula that can be implemented to

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[12] *Supra* note 3, at pp. 184-187.
[13] *Supra* note 3, at ¶¶ 3-80; KLAUS-PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 296 (1993); Philippe Leboulanger, *Multi-Contract Arbitration*, 13.4 J. INT'L ARB. 43, 72 (1996).
[14] Lafarge Redlands Aggregates Ltd. v. Shephard Hill Civil Engineering Ltd, [2000] 1 W.L.R. 1621 (U.K.).

infer consent of all parties and would depend on the facts and circumstances of each particular scenario.[15]

In the *Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Coopérative,*[16] there was a dispute regarding the jurisdiction of the arbitral tribunal to adjudicate proceedings arising out from differently worded arbitration clauses in different contracts. The newer contracts contained arbitration clauses providing for ICC arbitration while the older arbitration clauses, which were not amended to bring them in line with the new contracts, did not contain any provisions for ICC arbitration. The Swiss Supreme Court relied on the principles of agency, incorporation by reference, waiver, estoppel and good faith to conclude that the whole dispute should be resolved through a single arbitration proceeding despite the existence of three different arbitration clauses in the various contracts. The Supreme Court held that the most recent arbitration clause would be made applicable for all the separate contracts and would be binding on all parties. The Supreme Court had applied the abovementioned principles of law not on the basis of any particular national law but as *general principles of law*.

One of the major obstacles in consolidating arbitral proceedings even when all concerned contracts have been executed within the framework of the same venture is when material determinations such as the governing law of an arbitration agreement and/or the substantive law of the contract is different in different contracts.[17]

The decision of the French Cour d' Appel de Versailles in the *Iran-French*[18] dispute dealt with a situation where some of the arbitration clauses in a group of related contracts mentioned the seat of arbitration to be France and the applicable law to be French Law and some of the other agreements were silent on this aspect. The French Court of Appeal concluded that the tribunal could not have assumed jurisdiction on an assumption of general will of all parties in a project to resolve disputes through arbitration.

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[15] *Supra* note 8, at 32; Nichlisch, *Multi-Party Arbitration and Dispute Resolution in Major Industrial Projects*, 11.4 J INT'L ARB. 57, 60 (1994); *See generally* Case No. 5989 of 1990, XV Y.B. Comm. Arb. 74 (ICC Int'l Ct. Arb.).
[16] Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Coopérative, Case No. 9797/CK/AER/ACS (I.C.C.).
[17] Ricardo Ugarte & Thomas Bevilacqua, *Ensuring Party Equality in the Process of Designating Arbitrators in Multiparty Arbitration: An Update on the Governing Provisions*, 27.1 J. INT'L ARB. 9 (2010).
[18] Cour d'appel [CA] [regional court of appeal] Versailles, Mar. 7, 1990, Rev. Arb. 1991, note Loquin (Fr.).

Closer home, in *PR Shah, Shares & Stock Broker (P) Ltd. v. BHH Securities (P) Ltd. & Ors.,*[19] the Supreme Court upheld the doctrine of consolidation of proceedings. This was also followed later by the Bombay High Court.[20]

In *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors.,*[21] the Supreme Court has held that the expression '*person claiming through or under*' as provided under Section 45 of the Arbitration and Conciliation Act, 1996 would mean and take within its ambit multiple and multi-party agreements and hence even non-signatory parties to some of the agreements can be referred to arbitration. The Supreme Court, relying on international jurisprudence, gave illustrations of situations where a third party can claim through or under a party to the agreement.[22]

This ruling has widespread implications as now, in certain exceptional cases involving composite transactions and interlinked agreements, even non-signatories to a particular agreement can be referred to and made party to an international commercial arbitration.

As with *joinder*, the consent of parties to *consolidate* arbitration proceedings can also be inferred from their acceptance of institutional arbitration rules, which provide for *consolidation*.[23]

Article 10 of the Belgian Centre for Arbitration and Mediation ["CEPANI Rules"] states that if all contracts contain a CEPANI arbitration clause, then it could be assumed that all the parties have consented to consolidation of the proceedings, even if the clauses are differently worded. If any of the clauses does not contain a CEPANI arbitration clause, then it would have to be examined if the applicable rules allow such a consolidation of proceedings.[24] Similarly, Article 13 of the International Arbitration Rules

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[19] P.R. Shah, Shares & Stock Broker (P) Ltd. v. BHH Securities (P) Ltd. & Ors., (2012) 1 S.C.C. 594 (India).
[20] Filmwaves Combine Pvt. Ltd. v. Kochi Cricket Private Limited & Ors., Arbitration Application 352 of 2012 (India).
[21] *Supra* note 4.
[22] *Id.*
[23] *Supra* note 3, at 308.
[24] CENTRE FOR ARBITRATION AND MEDIATION RULES [CEPANI RULES] art. 10 (Belg.): Multiple Contracts:-
1. Claims arising out of various contracts or in connection with same may be made in a single arbitration. This is the case when the said claims are made pursuant to various arbitration agreements:
a) If the parties have agreed to have recourse to arbitration under the CEPANI Rules and b) if all the parties to the arbitration have agreed to have their claims decided within a single set of proceedings.
2. Differences concerning the applicable rules of law or the language of the proceedings do not give rise to any presumption as to the incompatibility of the arbitration agreements.

of Zurich Chamber of Commerce, 1989 states that the same members would constitute the arbitral tribunal in case of a multi-party situation and the tribunal could decide as to whether the proceedings should be consolidated. [25]

If there is no provision for consolidation of proceedings in the arbitration clause, then the only way to consolidate such multi-party arbitrations is by operation of the governing law. Considering that consolidation without consent goes against the most basic tenet of arbitration, i.e. party autonomy, therefore it appears that very few laws have provisions for consolidation of proceedings without consent of the concerned parties.[26]

Section 35 of the English Arbitration Act requires that all concerned parties agree to consolidation or concurrent hearings. In keeping with party autonomy, unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.[27] Similar provisions exist in the International Commercial Arbitration Act of British Columbia[28] and some of the state

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3. Arbitration agreements concerning matters that are not related to one another give rise to a presumption that the parties have not agreed to have their claims decided in a single set of proceedings.
4. Within a single set of proceedings each party may make a claim against any other party, subject to the limitations set out in Article 23.8 of the Rules.

[25] International Arbitration Rules of Zurich Chamber of Commerce, 1989 art. 13 (Switz.): If there are several claimants or several respondents, or if the respondent, within the deadline for the answer, files a claim with the Zurich Chamber of Commerce, against a third party based on an arbitration clause valid according to Article 2 subs. 2 an identical three-men Arbitral Tribunal is appointed according to Article 12 subs. 3 for the first and all other arbitrations. The Arbitral Tribunal may conduct the arbitrations separately, or consolidate them, partly or altogether.

[26] Nana Adjoa Hackman, *The Problem of Arbitration and Multi-Party/Multi-Contract Disputes: Is Court-Ordered Consolidation An Adequate Response?* CENTRE FOR ENERGY, PETROLEUM AND MINERAL LAW AND POLICY (CEPMLP), UNIV. OF DUNDEE, http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=cepmlp_car13_5_612306438.pdf.

[27] The Arbitration Act, 1996, ch. 23, § 35 (U.K.):

(1) The parties are free to agree
  (a) That the arbitral proceedings shall be consolidated with other arbitral proceedings, or
  (b) That concurrent hearings shall be held, on such terms as may be agreed.
(2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings

[28] *See* International Commercial Arbitration Act of British Columbia, R.S.B.C. 1996, ch. 233, § 27(2) (Can.). Where the parties to two or more arbitration agreements have agreed in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those arbitration agreements, the Supreme Court, may on application by one party with the consent of all the other parties to those arbitration agreements, do one or more of the following:

(a) Order the arbitrations to be consolidated on terms the court considers just and necessary;
(b) Where all parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with section 11(8)
(c) Where all parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary.

arbitration statutes of the United States.[29] The Australian Statute[30] confers the powers of consolidation on the arbitral tribunal instead of the Court. In certain statutes, there is a distinction between the consolidation of proceedings which are underway before the same tribunal or before different tribunals.

The case of the Dutch Arbitration Law is different.[31] The earlier law provided that an application can be made before the President of the District Court of Amsterdam for consolidation of separate arbitration proceedings either pending before the same arbitral tribunal or different arbitral tribunals and the Court would use its discretion to decide whether the proceedings should be consolidated. Under the new Act, a party may now request that a third party may order consolidation with other arbitral proceedings pending within or outside the Netherlands, if the parties have agreed on such a third party (e.g. an arbitration institute).[32] Similar provisions exist in the arbitration laws for domestic arbitration in Hong Kong.[33]

The Federal Arbitration Act ["FAA"] of the United States does not have a rule providing for consolidation; however, some of the U.S. Courts have consolidated proceedings relying on Section 42(a) of the Federal Rules of Civil Procedure providing for consolidation in litigation. In *Compania Espanola de Petroleos SA v. Nereus Shipping SA,*[34] the Court of Appeal for the Second Circuit had consolidated the proceedings between Party A and Party B with the proceedings between Party A and Party C stating that the liberal purpose of the FAA was to be interpreted in a manner so as to consolidate appropriate proceedings.

This ruling was discarded by the Court of Appeal for the Second Circuit in *Government of the United Kingdom of Greater Britain v. Boeing Co.,*[35] where it was held that if the parties want to consolidate arbitration proceedings arising from the same factual

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[29] *See* California International Arbitration and Conciliation Act, 1988, §§ 1297.272 & 1297.273, CAL. CIV. PROC. CODE § 1297.283 (West Supp. 1990); Arbitration and Conciliation of International Disputes, TEX. REV. CIV. STAT. ANN. §§ 172-173 (Vernon 1989); Oregon International Commercial Arbitration and Conciliation Act, H.B., art. 2381 36.506(2) (1991); OHIO CODE ch. 2712, International Commercial Arbitration, art. 2712.52, (1991); International Commercial Arbitration Act, Cch. 1, art.1-567.57 (1991).
[30] *See* International Arbitration Act 1974 (Cth) s 24 (Austl.).
[31] *See* Netherlands Arbitration Law, Rv Stb. 1986, art. 1046 (Neth.).
[32] Van Haersolte van Hof, *Consolidation under the English Arbitration Act 1996: A View from the Netherlands*, 13 ARB. INT'L 427, 428 (1997).
[33] *See* Hong Kong Arbitration Ordinance, (1982) Cap. 341, O.H.K., § 6 cl. B (H.K.); Shui On Construction Co. Ltd. v. Moon Yik Company Ltd., [1987] 2 H.K.L.R. 1224 (H.C.).; V.V. Veeder, *Consolidation: More News from the Front Line- The Second Shui On Case*, 3 ARB. INT'L. 262 (1987).
[34] Compania Espanola de Petroleos S.A. v. Nereus Shipping S.A., 426 U.S. 936 (1976).
[35] The United Kingdom of Greater Britain v. Boeing Co., 998 F.2d 68 (2d Cir. 1993).

situation, then, the same should be appropriately mentioned in the arbitration clause. In the absence of such an arbitration clause, the Court could not reform the contract which underlines the dispute because of inefficiencies and possible inconsistent determinations.

One of the other methods of consolidating proceedings is by appointing the same arbitrators in all the different proceedings. However, such a mechanism has to be suggested by the parties through the arbitration clause.[36] This may be possible when the arbitrators are being appointed by an institution and not by the parties themselves. If the parties have elected to appoint the arbitrators themselves, then, it may very well give rise to a situation that the different parties do not agree upon the same set of arbitrators. It might be a situation where a party gives more importance to a particular arbitrator rather than a conflicting decision. Having said that, in such ad-hoc situations in the Indian context, it is not uncommon for parties to eventually realize that consolidation results in overall efficiencies thus reducing costs, which operates as a major driver for such a decision. Further, while this may bring about procedural and time efficiencies, it may not strictly operate as 'consolidation' given that the arbitral tribunal would still have the obligation of passing separate awards for each reference, but would have the operational benefit of being consistent.

Another way to imbibe some extent of procedural efficacy is to have concurrent proceedings for those portions of the dispute which are inter-related. The Supreme Court of New South Wales in *Aerospatiale v. Elspan et. al.*[37] had considered extending this approach to arbitral proceedings which were concurrent to court proceedings. To avoid conflicting decisions in the parallel proceedings, the Court assumed the power to appoint an arbitrator for some of the issues in the dispute who would act as a referee and update the court regarding those issues.

It is to be seen if the consolidation of proceedings would encroach upon the basic principles of arbitration, such as party autonomy, for the sake of procedural efficiency. It is possible that the parties would not be privy to (although that might not be a valid defense) the existence of such provisions in the domestic laws which would force them to enter into arbitrations with parties that they did not envisage. The other issue which is of considerable importance is the importance of confidentiality in

[36] *Supra* note 1, at 378.
[37] *Aerospatiale Holdings Australia Pty Ltd. v. Elspan International Pty Ltd.* [1994] NSWLR 635 (Austl.).

arbitration. The parties might not want to divulge information to a third party with which it had not entered into a contract, but is forced to arbitrate because of consolidation of proceedings. Each of these issues are part of a minefield leaving such arbitral awards vulnerable.

## III. The Role of Institutional Arbitration

Whilst ad-hoc arbitration appears to have gained a head start over institutional arbitration in India, parties who have access to sophisticated legal advice and who have high value disputes, slowly but surely prefer to have their disputes resolved by reference to a reputed arbitral institution. In such a situation, the rules of an arbitral institution govern the manner in which proceedings are administered and eventually, whether joinder and/or consolidation are envisaged and therefore provided for.

Given the evolution of multi-party arbitration, the complexities it has thrown up and learnings therefrom, most arbitral institutions have proactively updated or are currently in the process of updating their rules to incorporate provisions in this regard. Therefore, the institutional rules of most arbitral institutions contain provisions to implead, and thereby bind third or additional parties to arbitration proceedings. Presently, the reputed arbitral forums which have incorporated the provisions of *joinder* and *consolidation* into their rules include the ICC, LCIA, HKIAC, KLRCA and CIETAC.[38] However, there are differences in the manner of implementation before the various arbitral institutions including the stage of proceedings at which an application for *joinder* can be preferred; whether an application for *joinder* can be preferred by existing parties or by a third party,[39] and the threshold required to be met for a third party to be impleaded into the proceedings. The choice of which institutional rules are chosen therefore assumes significance.

The current SIAC[40] rules are silent on the issue of consolidation of arbitration proceedings. The arbitral tribunal can, upon request of a party to the arbitration

[38] CIETAC Arbitration Rules 2015 (Article 19 and Article 14); KLRCA Arbitration Rules 2013 (Rule 8- Consolidation of proceedings); LCIA Arbitration Rules 2014 (Article 22- consolidation and joinder); HKIAC Administered Arbitration Rules 2013 (Article 27- Joinder Article 28- Consolidation)

[39] Whilst technically an application by a third party to become involved and bound by arbitral proceedings is an application for intervention, because it arises in the H.K.I.A.C. Rules within the joinder provision, we use the banner of joinder application.

[40] Singapore International Arbitration Centre Rules, 2013, http://www.siac.org.sg/images/stories/articles/rules/SIAC-Rules-2013_English_31072014.pdf.

proceeding, implead one or more third parties to the arbitration provided such third party consents to be impleaded and is bound by the arbitration agreement. However, the recent Singapore Court of Appeal decision *in Astro v. Lippo*[41] considered whether non-parties to an arbitration agreement can be joined to arbitral proceedings under the SIAC Rules, finding that the SIAC Rules do not provide for the so-called "forced joinder" of third parties, absent the parties' consent. The Court of Appeal considered the circumstances in which non-signatories to an arbitration agreement can be joined into existing arbitration proceedings. The decision highlights the care parties and the arbitral tribunals need to take while considering extending the jurisdiction of an arbitral tribunal to non-parties to the arbitration agreement. It would not be out of place to mention here that the current SIAC rules are in the process of being revised and the revised rules are expected to incorporate mechanisms for consolidation, joinder and intervention among other improvements.[42]

The ICC Rules of Arbitration of 1998 did not expressly provide for multi-party and multi-contract arbitration, except for appointment of arbitrators in multi-party situations. This situation has been remedied in the 2012 Rules[43] which provides for the joinder of additional parties to arbitration proceedings. Any of the parties to a proceeding can request for joinder of parties by submitting a request to the ICC Secretariat. The determining factor i.e. the criteria to be satisfied for joinder of parties is that the ICA is *prima facie* satisfied that an arbitration agreement may exist under the ICC Rules that binds them all. Therefore, for a third party to be impleaded into the arbitration proceedings it would have to be a signatory to a contract in dispute or to an umbrella agreement containing an arbitration clause. However, the final decision pertaining to the validity of a request for joinder vests with the arbitral tribunal which would conclusively determine whether it has the requisite jurisdiction over the third party which is to be impleaded into the proceedings. The consolidation of arbitrations is also provided for in the Rules. The ICA may, at the request of one of the parties, consolidate two or more arbitrations that are pending under the Rules into a single arbitration. The Court may, in certain situations, decide on the consolidation after considering the facts of a case.

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[41] P.T. First Media T.B.K. v. Astro Nusantara International B.V., [2014] 1 S.L.R. 372, 75 [Singapore].

[42] Gary Born, *SIAC Rules under Revision*, KLUWER ARB. BLOG (December 10th, 2015), http://kluwerarbitrationblog.com/2015/12/10/a-new-book-published-and-rules-under-revision/.

[43] Art. 7, ICC Rules of Arbitration, (2012 *available at* http://www.iccwbo.org/products-and-services/arbitrationand-adr/arbitration/icc-rules-of-arbitration/.

Significantly, the Court has the discretion to deny a request for consolidation of proceedings even though the requirements under the Rules stand satisfied.

In Hong Kong, there is a dual system for arbitrations i.e. the Hong Kong Arbitration Act, 1982 which is applicable to domestic arbitrations and the Model Law which is applicable to international arbitrations. The Hong Kong Arbitration Act, 1982[44] provides for consolidation in domestic cases by an order of a Judicial Authority. The law governing International Arbitrations did not have any provision for the courts to order consolidation of arbitral proceedings.

The current HKIAC rules[45] incorporate the power to consolidate multiple arbitrations at the request of the parties to the proceeding; where the parties agree to consolidation of arbitral proceedings; and when the claims arise out of a common question of fact or law.

The 2013 Rules now expressly allow the HKIAC to consolidate two or more arbitration proceedings that are governed by the 2013 Rules. Where arbitration proceedings are consolidated, they will generally be consolidated into that arbitration proceeding which had commenced first unless otherwise agreed and taking into account the circumstances of the case. Consolidation of pending arbitrations is possible when the parties agree to the same; when all of the claims in the separate arbitration proceedings relate to the same arbitration agreement; or when in claims made under the different arbitration agreements, a common question of fact or law arises in all of the separate arbitration proceedings and the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions, and the HKIAC finds the arbitration agreements to be 'compatible'.

In deciding whether to consolidate the arbitral proceedings, the HKIAC will consider the circumstances of the case, the contents of the arbitration agreement including whether arbitrators have been designated or confirmed in more than one of the arbitration proceedings (and if so, whether the same or different arbitrators have been appointed). The provisions of consolidation only apply to arbitral agreements concluded after 1 November 2013 (i.e., the date the 2013 Rules come into force), unless otherwise agreed to by the parties.

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[44] *See* Hong Kong Arbitration Ordinance, (1982) Cap. 341, § 6 cl. B (H.K.).

[45] Hong Kong International Arbitration Centre, Administered Arbitration Rules (2013), http://www.hkiac.org/images/stories/arbitration/2013_hkiac_rules.pdf.

All parties will be consulted before the tribunal exercises its power to implead third parties. A non-party to an arbitration agreement can prefer an application to be impleaded as a party in an on-going arbitration proceeding. The tribunal may use its discretion to decide as to whether the request should be granted as per the facts of the case after examining whether it would be in the interest of the parties and proceeding. Objections to the tribunal's actions in this regard can be raised by the parties after the formation of the tribunal.

Where an additional party is impleaded into the arbitration proceedings before the tribunal is appointed, or where two or more arbitration proceedings are consolidated, there are various implications. At the outset, all parties will be deemed to have waived their rights to designate an arbitrator and the HKIAC may revoke the appointment of any arbitrators already designated or appointed. In these circumstances, the HKIAC will appoint the arbitral tribunal. The revocation of the appointment of an arbitrator is without prejudice to the validity of any act done or order made by the arbitrators before their appointment was revoked. These are, of course, necessary to make the arbitration workable.

## Conclusion

The need to ensure consistency in dispute resolution in the age of back to back agreements and multiple layers of contracts has forced the arbitration fraternity to come up with new and largely untested solutions. Traditionally, one arbitral proceeding was sought to be stayed till the other was completed, enabling the tribunal to observe the outcome and appropriately take steps to ensure that there are no conflicting decisions. This would inevitably result in delays, as well as a breach of confidentiality and privacy. This has often been experimented with in the Indian context, especially in ad-hoc arbitrations, where delays are anyway abound. Consolidation and joinder in international arbitration are slowly but surely finding their way into the rules of most arbitral institutions.

An aspect of consolidation and joinder that often remains unseen and unreported is the challenges that are faced at the time of execution of an award. Where a third party has been made party to the proceedings, or if multiple proceedings are consolidated, this might violate a cardinal principle of arbitration, being party autonomy. Needless to say, where consent of all concerned parties for joinder or consolidation was obtained, then it is likely that the resultant award would get enforced; however if the joinder or

consolidation has been ordered by a tribunal or a court in pursuance of some law or rule, then the issues on enforceability are not clear.

The question arises as to whether the competent authority should allow such consolidation or joinder of proceedings. A multi-party arbitration can be considered viable if it saves time and money i.e. for procedural efficiency; it reduces the risk of inconsistent awards; it is fair and equitable in order to facilitate fact-finding and the comprehensive presentation of legal and factual positions; it is appropriate for purposes of privacy and confidentiality and if the parties involved can have equal influence on the composition of the tribunal or if the selection of arbitrators is left to an appointing authority.

In certain situations, multiparty arbitrations may throw up more problems than solutions and consequently should not be ordered. These include where two different arbitration tribunals have been constituted; where one of the parties chooses to appoint different arbitrators for different arbitrations; where it is apparent from the outset that the parties would not cooperate and where the award would be vulnerable to challenges and anti-enforcement actions.

One thing remains certain – the doctrines of *joinder* and *consolidation* in arbitration will lead the next wave of changes to institutional rules and will throw up new and untested challenges for courts dealing with enforcement proceedings.