

# ARBITRATION AND THE SUPREME COURT: A TALE OF DISCORDANCE BETWEEN THE TEXT AND JUDICIAL DETERMINATION

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*There is considerable dissonance between the text of the Arbitration and Conciliation Act, 1996 and the judicial decisions interpreting it. This discordance has a significant impact on arbitration in India. This paper analyses the possible impact of these discrepancies through eight cases decided by the Supreme Court in the past decade.*

## I. INTRODUCTION

“Arbitration in India is not for the faint-hearted.”<sup>1</sup>

The Arbitration and Conciliation Act, 1996 (‘the Act’) is sixteen years old. In these sixteen years, the manner in which courts have interpreted, or supplied to, the text of the statute is astounding. The Act virtually followed the structure of the Model Law on International Commercial Arbitration, 1985 (‘the Model Law’). The advantage of following the configuration of the Model Law was that the Act (and India as a destination for arbitration) could be marketed as being in consonance with international practices on dispute resolution. Followers of Indian arbitration would, however, notice the significant discrepancies between the statute and the judicial decisions on it.<sup>2</sup> This paper examines some of these discrepancies and appraises their possible implications on arbitration in India. The paper also notes some criticisms of these decisions that have so far not prominently figured in arbitration literature.

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<sup>1</sup> Javed Gaya, *Judicial Ambush of Arbitration in India*, 120 L. Q. R. 571, 571 (2004).

<sup>2</sup> See Sumeet Kachwaha, *The Indian Arbitration Law: Towards a New Jurisprudence*, 10 INT. A.L.R. 13, 17 (2007).

## II. SUPREME COURT DECISIONS ON THE ARBITRATION AND CONCILIATION ACT

### A. *BHATIA INTERNATIONAL* v. *BULK TRADING S.A.*<sup>3</sup> (‘*BHATIA INTERNATIONAL*’):

The Supreme Court, in *Bhatia International*, held that Part-I of the Act would apply to international commercial arbitration held outside India (‘outside arbitration’) but parties could exclude the applicability of Part-I expressly or impliedly. The Court reasoned that were Part-I to be held inapplicable to such arbitrations, the following anomalies would arise:

1. There would be no law governing arbitrations held in non-convention countries.<sup>4</sup>
2. Part-I would apply to Jammu & Kashmir in all international commercial arbitrations (including outside arbitrations) but for the rest of India, Part-I would not apply to outside arbitrations.
3. §§2(4) and (5) would be in conflict with §2(2) of the Act.
4. A party to an outside arbitration would have no remedy to obtain interim relief even if the assets which are the subject matter of such application for interim relief are in India.

The above reasoning in *Bhatia International* has been criticized as grossly erroneous.<sup>5</sup>

One of the justifications in *Bhatia International* was that Part-I did not provide for interim measures in arbitrations held outside India. This was the chief issue that confronted the Court. Prior to *Bhatia International*,

<sup>3</sup> (2002) 4 SCC 105 : AIR 2002 SC 1432.

<sup>4</sup> Non-convention countries are countries that are not signatories to any one of the following protocols/conventions- Geneva Protocol on Arbitration Clauses, 1923; Geneva Convention on the Execution of Foreign Arbitral Awards, 1927; New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (‘the Convention’). Examples are countries such as Republic of Yemen, Belize, Comoros, East Timor, Eritrea, Ethiopia, etc.

<sup>5</sup> Vasudha Sharma & Pankhuri Agarwal, *Rendering India into an Arbitration Friendly Jurisdiction- Analysis of the Proposed Amendments to the Arbitration and Conciliation Act, 1996*, 3 NUJS L. REV. 535 (2010); Rukmini Das & Anisha Keyal, *Judicial Intervention in International Arbitration*, 2 NUJS L. REV. 585 (2009); Fali S. Nariman, *India and International Arbitration*, 41 GEO. WASH. INT’L. L. REV. 367, 374-376 (2009); SK Dholakia, *Bhatia International v. Bulk Trading S.A.*, (2003) 5 SCC J-22, also available at <http://www.ebc-india.com/lawyer/articles/2003v5a6.htm> (Last visited on April 12, 2011); Badrinath Srinivasan, *Review of the Consultation Paper on Proposed Amendments to the Arbitration and Conciliation Act, 1996 - Part I*, May 6, 2010, available at <http://practicalacademic.blogspot.com/2010/05/review-of-consultation-paper-on.html> (Last visited on April 17, 2011).

there were conflicting decisions of High Courts on the power of a court to order interim measures of protection in an outside arbitration. Some High Courts held that the statute did not grant courts the power to order interim measures in such cases,<sup>6</sup> while others held that since Part-I was applicable even to outside arbitrations, a court could order interim measures to be taken under §9.<sup>7</sup> In *Bhatia International*, it was argued that Art. 1(2) of the Model Law, which allowed for interim measures of protection even if the seat of arbitration was not in the country where the application for such measures was sought, was not adopted in India. Therefore, the argument was that it was the legislative intent not to extend the power of a court to order interim measures in case of arbitrations held outside India. Though the Supreme Court emphatically rejected it, the contention seems to be convincing. Contrary to the Court's opinion that the Act was not a well-drafted legislation, it is submitted that the Act is a carefully crafted legislation, albeit with certain defects just like any other statute. Although the drafters of the Act drew inspiration from the Model Law, there are several small but crucial pro-arbitration changes in the Act that are meant to ensure speedy and efficient arbitration. The absence of provisions for interim measures in outside arbitrations in such a carefully drafted law might not have been unintended. The 'lacuna' may have been deliberate. By not providing for interim measures for arbitrations held outside India, the drafters might have intended to encourage, albeit forcefully, parties to choose India as the seat of arbitration. The motive of the drafters might have been to aid Indian parties to avoid costly arbitration outside India, and to develop the arbitration industry in India. In any case, post-*Bhatia International*, it has been suggested that the law ought to be amended to restrict the applicability of Part-I to limited provisions for outside arbitrations, including those related to interim measures.<sup>8</sup>

The Court's error in *Bhatia International* was in interpreting §2(2), which provides that Part-I would apply to arbitration in India, to mean that Part-I would also apply to outside arbitration. The Court's logic was that by not employing the term "only" in §2(2), the Legislature's intent was to make Part-I applicable even to outside arbitrations. This construction is completely out-of-sync with the literal reading of the provision. This has resulted in ambiguity on the applicability of Part-I of the Act to outside arbitrations leading to inconsistent decisions, especially on the issue of implied exclusion of Part-I of the Act to outside arbitrations.

In certain cases, courts have held that Part-I was not excluded even though the venue was outside India, the substantive law of contract was

<sup>6</sup> See e.g., *East Coast Shipping v. M.J. Scrap*, (1997) 1 Cal HN 444; *Kitechnology NV v Unicor GmbH Rahn Plastmaschinen*, 1999 (1) Arb LR 452 (Delhi); *Marrriot Hotels v. Ansal International*, 2000(3) Arb LR 369 (Delhi).

<sup>7</sup> See e.g., *Olex Focas Pty. Ltd. v. Skodaexport Co. Ltd.*, 1999 (Suppl.) Arb LR 533 (Delhi).

<sup>8</sup> Ministry of Law and Justice, Government of India, *Proposed Amendments to the Arbitration & Conciliation Act, 1996: A Consultation Paper* ¶A(xviii) (April 2010) available at <http://lawmin.nic.in/la/consultationpaper.pdf> (Last visited on April 19, 2011).

a foreign law and the procedural law was not the Act.<sup>9</sup> In certain decisions, however, it has been held that in such cases Part-I was impliedly excluded.<sup>10</sup> In several cases, courts have held that Part-I would be impliedly excluded if the seat was foreign and the procedural law was not the Act. For instance, in *Hardy Oil and Gas Ltd. v. Hindustan Oil Exploration Co. Ltd.*,<sup>11</sup> the substantive law of the contract was Indian law, the substantive law of the arbitration agreement was English law, the arbitration was to be conducted as per Rules of the London Court of International Arbitration and the venue was London. The Gujarat High Court held that Part-I was impliedly excluded because the parties had expressly chosen English law to be the law governing arbitration. In *Videocon Industries Ltd. v. Union of India*,<sup>12</sup> the agreement provided for Indian law as the substantive law of contract, Kuala Lumpur, Malaysia as the venue of arbitration and English law as the law of arbitration. The Court held that by virtue of English law being the law of arbitration, Part-I was excluded.<sup>13</sup> In *Yograj Infrastructure Ltd. v. Ssangyong Engineering & Construction Ltd.-I*,<sup>14</sup> the agreement provided for the arbitration Rules of the Singapore International Arbitration Centre ('SIAC') as the rules of arbitration and the seat was Singapore. The Court held that Part-I was excluded although the substantive law of contract as per the agreement was Indian law.<sup>15</sup> *Per contra*, in *Aurohill Global Commodities Ltd. v. M.S.T.C. Ltd.*<sup>16</sup> and *Paragon Steels Pvt. Ltd. v. European Metal Recycling Ltd.*,<sup>17</sup> the substantive law of contract was Indian law, the venue in both cases was London and

<sup>9</sup> National Aluminium Co. Ltd. v. Gerald Metals, 2004(2) Arb LR 382 (AP), J.K. Industries Limited v. D.S. Strategem Trade A.G., MANU/DE/8771/2007, Venture Global Engineering v. Satyam Computer Services Ltd., (2008) 4 SCC 190 : AIR 2008 SC 1061, Citation Infowares Ltd. v. Equinox Corporation, (2009) 7 SCC 220, Abbas Cashew Company v. Bond Commodities, available at <http://www.indiankanoon.org/doc/1593428/> (Last visited on April 20, 2011).

<sup>10</sup> Liverpool and London Steamship Protection and Indemnity Association Ltd. v. Arabian Tankers Co., 2003 (3) Arb LR 537 (Bom), Max India v. General Binding Corporation, (2009) 112 DRJ 611, DGS Realtors Pvt. Ltd. v. Realogy Corporation, MANU/DE/2115/2009, Dozco India P. Ltd. v. Doosan Infracore Co. Ltd. (2011) 6 SCC 179.

<sup>11</sup> 2006(1) Arb LR 61 (Guj).

<sup>12</sup> (2011) 6 SCC 161 : 2011(5) SCALE 678.

<sup>13</sup> It may also be noted that the court seems to have confounded the concept of the law of arbitration with that of the law of arbitration agreement. At ¶18, the court stated that the Gujarat High Court was right in stating in *Hardy Oil and Gas v. Hindustan Oil Exploration Co. Ltd.*, *supra*, note 11, that Part-I was excluded because English Law was the law governing arbitration but in ¶19, the Court found the case before it to be identical and stated: "In the present case also, the parties had agreed that notwithstanding Article 33.1, the arbitration agreement contained in Article 34 shall be governed by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part-I of the Act." (emphasis added).

<sup>14</sup> (2011) 9 SCC 735 : 2011(4) Arb LR 82 (SC).

<sup>15</sup> The Court, however, added a new dimension to the already confusing law on implied exclusion. The Court held that Part-I was excluded impliedly because of Rule 32 of the SIAC Rules which provided that the Singaporean International Arbitration Act. According to the court, the SIAC Rules came into force only after the commencement of arbitration. Thus, prior to the commencement of arbitration, parties were free to approach Indian courts for interim measures under §9 of the Act as the parties had not excluded Part-I of the Act.

<sup>16</sup> (2007) 7 SCC 120 : AIR 2007 SC 2706.

<sup>17</sup> 2006(4) Arb LR 299 (Ker).

procedural rules were of non-Indian arbitral institutions. Nevertheless, it was held that Part-I was not excluded.<sup>18</sup>

Further, several courts have applied a different reasoning for excluding §34 of the Act although the courts seem to have conceded that Part-I would be applicable to all arbitrations. For instance, in *Force Shipping Ltd. v. Ashapura Minechem Ltd.*,<sup>19</sup> *Bulk Trading S.A. v. Dalmia Cement (Bharat) Ltd.*,<sup>20</sup> *Inventa Fischer GmbH & Co. v. Polygenta Technologies Ltd.*,<sup>21</sup> the courts held that §34 of the Act (which is in Part-I) would not apply to outside arbitration awards for the reason that when there were ‘special’ provisions for enforcement of arbitral awards, general provisions like §34 would not apply. In *Goldcrest Exports v. Swissgen N.V.*,<sup>22</sup> the Bombay High Court held that a foreign award could not be challenged under §34 as it would be absurd to have two rounds of litigation to enforce a foreign award.

The confusion in the law is amply demonstrated in the English case of *Roger Shashoua v. Mukesh Sharma*<sup>23</sup> (*Roger Shashoua*). In this case, when the judge tried to find out the Indian law pertaining to the applicability of Part-I of the Act to an arbitration whose seat was London and with Indian law as the substantive law of contract, two former Chief Justices of India gave conflicting evidence on the same.

There is also some confusion as to whether the concept of curial law is synonymous to the governing law of arbitration. In *Financial Software & Systems (P) Ltd. v. ACI Worldwide Corp.*,<sup>24</sup> the Madras High Court held that the curial law was the SIAC Rules but held that Singaporean law was the law governing arbitration. In *Yograj Infrastructure v. Ssangyong Engineering & Construction Co. Ltd.-II*,<sup>25</sup> in a similar clause, the two judge Bench of the Supreme Court held that the curial law was the Singaporean International Arbitration Act.

A serious consequence of *Bhatia International* from a transactional perspective is that it severely restricts party autonomy. It gives the parties a choice to either exclude Part-I in its entirety and thereby exclude the right to approach an Indian court for interim measures or to not exclude Part-I and thereby bring it within the reach of §34 of the Act. It may, however, be

<sup>18</sup> In *Cauvery Coffee Traders, Mangalore v. Hornor Resources (Inter.) Co. Ltd.*, (2011) 10 SCC 420: 2011(4) Arb LR 1 (SC), the Supreme Court has held that where the arbitration clause merely provided that the venue of arbitration shall be a third country, Part-I was not excluded.

<sup>19</sup> (2003) 4 Mah LJ 329.

<sup>20</sup> 2006(1) Arb LR 38 (Del).

<sup>21</sup> 2005(2) Arb LR 125 (Bom).

<sup>22</sup> 2005(3) Arb LR 58 (Bom).

<sup>23</sup> [2009] EWHC 957 (Comm); [2009] 2 All ER (Comm) 477; [2009] 2 Lloyd's Rep 376.

<sup>24</sup> (2011) 3 CTC 261, ¶28.

<sup>25</sup> Civil Appeal No. 7562 of 2011, decided on 15-12-2011.

noted that *Bhatia International* provided that parties could exclude some or all provisions of Part-I in an outside arbitration. It held that in case of outside arbitrations, “all or some of the provisions of Part-I may also get excluded by an express or implied agreement of parties”<sup>26</sup> (emphasis added). Thus, parties could choose to exclude Part-I, except §9 thereby enabling a party to obtain interim measures in India. Despite this, drafting arbitration clauses becomes a tough exercise even for lawyers. It must be understood that in India, negotiation of contracts is usually done by businessmen with little or no legal counsel. The law should be simple in order to enable businessmen to negotiate arbitration clauses. Now that the law has become complicated, the transactional costs of international commercial transactions increase substantially.<sup>27</sup>

### B. NARAYAN PRASAD LOHIA v. NIKUNJ KUMAR LOHIA<sup>28</sup> (‘LOHIA’):

§10(1) provides that the parties shall not appoint an even number of arbitrators. Notwithstanding the said provision, the Supreme Court held in *Lohia* that the appointment of a two member tribunal was valid. This came as a shock to the followers of Indian arbitration because the decision was in complete contradiction to the statute.<sup>29</sup>

The Court’s reason was that since there was no ground by which an award could be set aside for the reason that it was passed by a two member tribunal, the provision was not mandatory in nature. The Court stated that it would make no difference if two arbitrators were appointed and in case of a disagreement between them the matter could be referred to a third arbitrator. Consequently, the Court interpreted “shall” in the provision to mean “may”.<sup>30</sup>

The Court’s reasoning may, however, not be altogether correct. §34(2)(a)(v) provides, *inter alia*, for setting aside the award on the ground that the arbitral tribunal was constituted without following the arbitration agreement, “or, failing such agreement”, without following the Act. As was argued in the case, “failing” would also mean the inoperability of the agreement. An

<sup>26</sup> (2002) 4 SCC 105 : AIR 2002 SC 1432.

<sup>27</sup> See generally, Gerhard Wagner, *Transaction Costs, Choice of Law and Uniform Contract Law* (9-12 July 2007), available at <http://www.uncitral.org/pdf/english/congress/WagnerG.pdf> (Last visited on April 17, 2011); Fernando Gómez Pomar, *The Harmonization of Contract Law through European Rules: a Law and Economics Perspective* (2008), available at [http://www.indret.com/pdf/535\\_en.pdf](http://www.indret.com/pdf/535_en.pdf) (Last visited on April 17, 2011).

<sup>28</sup> (2002) 3 SCC 572 : AIR 2002 SC 1139.

<sup>29</sup> See OP MALHOTRA & INDU MALHOTRA, *THE LAW & PRACTICE OF ARBITRATION AND CONCILIATION* 471- 473 (2006); Rajinder Sachar, *Some Aspects on Arbitration Law*, (2003) PL WEBJOUR 11, also available at <http://www.ebc-india.com/lawyer/articles/608.htm> (Last visited on April 12, 2011) (for criticisms of the judgement).

<sup>30</sup> There have been numerous decisions in the past where the courts have interpreted “shall” to mean “may”. See e.g., *B.P. Khemka Pvt. Ltd v. Birendra Kumar Bhowmick*, (1987) 2 SCC 407.

agreement to appoint two arbitrators is forbidden by §10. Therefore the agreement would be inoperable due the bar under §23 of the Indian Contract Act, 1872.<sup>31</sup>

In terms of the decision's impact, the validity of a two arbitrator tribunal would probably have had no adverse impact on arbitration although interpreting the law to mean something when it actually meant the opposite invited severe criticism. Notwithstanding the repudiation by the Supreme Court of the text of §10, there seems to be no purpose served in prohibiting even numbered tribunals.<sup>32</sup> Nevertheless, the decision is a typical example of courts adopting a stand contrary to the plain words of the statute.

*C. OIL & NATURAL GAS CORPORATION LTD. v. SAW PIPES LTD.*<sup>33</sup> ('SAW PIPES'):

The Supreme Court in *SAW Pipes* broadly read the ground of public policy for setting aside arbitral awards to the consternation of many stakeholders Indian arbitration. The reason for their anguish was that the Court held that an award could be set aside even if it was patently illegal. This meant that substantive review of arbitral awards could take place in the annulment proceedings, which, according to critics, reflected unjustified judicial mistrust and hostility towards arbitration.

The principal issue in the setting aside proceedings was the correctness of the tribunal's decision on the proof of loss suffered when there was a provision on liquidated damages in the contract. ONGC challenged the award, *inter alia*, on the ground that the award was contrary to the public policy of India under §34(2)(b)(ii) of the Act. Consequently, the Supreme Court had to decide whether 'public policy' was broad enough to cover patent illegality of the award. Although the Court conceded that public policy could be interpreted in a narrow or a broad manner depending on the context, it nevertheless held that there was no necessity to construe the term narrowly and also felt that such a construction would render certain provisions of the Act, like §28, otiose. It reasoned that an award passed in contravention of §§24, 28 or 31 and challenges under §13(5) or §16(6) could be brought under §34 only by reading public policy broadly. Hence, it concluded that an award could be set aside under §34(2)(b)(ii) even if the award was patently illegal.

<sup>31</sup> Indian Contract Act, 1872, §23 provides, *inter alia*, that "the consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law...".

<sup>32</sup> The analogous provision in the Model Law, Art. 10, does not contain the mandatory condition that there should be odd number of arbitrators.

<sup>33</sup> (2003) 5 SCC 705 : AIR 2003 SC 2629.

*SAW Pipes* has been criticised for subverting the arbitral process and for being in contradiction to the policies contained in the Act, especially the policies of finality of awards and minimum judicial intervention into the arbitral process.<sup>34</sup> The judgement, it has been argued, has struck at the very heart of arbitration in India by potentially exposing all awards to be questioned in courts and has made commercial dispute resolution a time-consuming and expensive process, and has hindered foreign investment in India.

While the reasoning in *SAW Pipes* seems to suggest that even errors of law would be against public policy, the Supreme Court noted at the end of its discussion on public policy that the illegality must not be trivial in nature.<sup>35</sup> Some courts have interpreted the Supreme Court to have meant that the award would be liable to be set aside only if it is patently illegal.<sup>36</sup> Other courts have, however, taken *Saw Pipes* to mean that even errors of law would be hit by §34(2)(b)(ii) of the Act. For instance, the Supreme Court in *Delhi Development Authority v. R.S. Sharma* stated:

“From the above decisions, the following principles emerge:

- (a) An Award, which is
  - (i) contrary to substantive provisions of law ; or
  - (ii) the provisions of the Arbitration and Conciliation Act, 1996 ;  
or
  - (iii) against the terms of the respective contract ; or
  - (iv) patently illegal, or

<sup>34</sup> See e.g., Sarah E. Hilmer, *Did Arbitration Fail India or did India Fail Arbitration*, 10 INT. A.L.R. 2007 33, 34 (2007); Nadia Darwazeh & Rita F. Linnane, *Set-Aside and Enforcement Proceedings: The 1996 Indian Arbitration Act under Threat*, 7 INT. A.L.R. 81 (2004); Vahanvati, *Sore Pipes*, DECCAN CHRONICLE (Hyderabad) July 26, 2003; Sunil Gupta, *Challenge to Arbitral Awards on the Ground of ‘Public Policy’*, 2003(3) ARB. LR 193 (J); Javed Gaya, *supra* note 1; Zia Mody & Raghenth, *Case Comment India: Public Policy*, INT. A.L.R. 2003, 6(4), N35-37; R. Dhanuka, *A Critical Analysis of the Judgement ONGC Ltd vs. SAW Pipes Limited*, (2003) 5 SCC 705 : 2003(2) ARB. LR 5 (SC), 2003(2) Arb. LR 9 (J). *Per contra*, see, Amelia C. Rendeiro, *Indian Arbitration and “Public Policy”*, 89 TEX. L. REV. 699 (2011); O.P. Malhotra, *The Scope of Public Policy under the Arbitration and Conciliation Act 1996*, 71 ARBITRATION 36 (2005); R.A. Sharma, *Case of ONGC vs. Saw Pipes Ltd.*, (2003) 5 SCC 705 : 2003(2) ARB. LR 5 (SC); R.A. Sharma, *No Need for Reconsideration*, 2007(1) ARB. LR 9, 11-16 (J). See also Badrinath Srinivasan, *infra*, note 119 (criticizing both positions and arguing for a middle path).

<sup>35</sup> (2003) 5 SCC 705 :AIR 2003 SC 2629.

<sup>36</sup> See Sumeet Kachwaha, *Enforcement of Arbitration Awards in India*, (2008) 4 AIAJ 64 (notes the difference in approaches of the courts following *Saw Pipes* of requiring illegality to be patent).



(iv) [*sic*] prejudicial to the rights of the parties,

is open to interference by the Court under § 34(2) of the Act.

(b) Award could be set aside if it is contrary to:

(a) fundamental policy of Indian Law; or

(b) the interest of India; or

(c) justice or morality;

(c) [*sic*] The Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court.

(d) It is open to the Court to consider whether the Award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.<sup>37</sup>

Nevertheless, the truth of the apprehension that *SAW Pipes* adversely affected finality of arbitral awards can be gauged only on the basis of empirical evidence.<sup>38</sup>

***D. CENTROTRADE MINERALS AND METAL INC. v. HINDUSTAN COPPER LTD.***<sup>39</sup> (*'CENTROTRADE'*):

In *Centrotrade*, a Division Bench of the Supreme Court comprising Sinha and Tarun Chatterjee, JJ. disagreed on the validity of an arbitration clause providing for two-tiered arbitration vis-à-vis the Act. Although Sinha, J. noted that there were several decisions under the Arbitration Act, 1940 where two-tier arbitration clauses were held to be valid,<sup>40</sup> the two-tier arbitration as contemplated in the arbitration clause was, nevertheless, held to be invalid.

<sup>37</sup> (2008) 13 SCC 80.

<sup>38</sup> See Rendeiro, *supra*, note 34. Quantitative data on Indian arbitration is lacking. Although one of the chief reasons for the lack of such data is the private nature of arbitration, even data on applications to courts for appointment of arbitrators, interim measures, challenge of arbitrators or post-award litigation, which could be gathered from information in the public domain, are not available. *But see*, Kachwaha, *supra* note 36 (analysing data pertaining to setting aside arbitral awards).

<sup>39</sup> (2006) 11 SCC 245:2006(3) Arb LR 201 (SC).

<sup>40</sup> *Hiralal Agarwalla & Co. v. Jokin Nahopier & Co. Ltd.*, AIR 1927 Cal 647 : 103 Ind. Cas. 648: (rules of the Calcutta Baled Jute Association); *Fazalally Jivaji Raja v. Khimji Poonja & Co.*, AIR 1934 Bom 476: (1934) 36 Bom.LR 1005 (the Bye-laws of East India Cotton Association, Ltd.); *M.A. Sons v. Madras Oil & Seeds Exchange Ltd.*, AIR 1965 Mad 392 : ILR (1965) 2 Mad 154 (bye-laws of Madras Oil & Seeds Exchange Private Ltd.).

The arbitration clause provided for domestic arbitration under the Rules of the Indian Council for Arbitration ('ICA') and for arbitration appeal in London under the International Chamber of Commerce Rules. The judge stated that had the clause provided for arbitral appeal to the ICA, it would have "probably" been valid. Since the arbitration clause provided for domestic arbitration in the first instance, this would, according to him, mean that the moment the arbitral tribunal gave the award, it was enforceable as a decree when the award was not challenged within the period specified in §34.<sup>41</sup> Sinha, J. reasoned that an appeal from a domestic award leading to a foreign award was not contemplated in the Act and therefore, the arbitration clause was invalid. He distinguished the two-tier arbitration contemplated in the arbitration clause with two-tier arbitrations conducted under the aegis of arbitral institutions.

"We are not oblivious of the fact that rules of some chambers contemplate such a provision but in such an event the one that is made by the first arbitrator does not become final. The appeal committee follows the same procedure, relies upon the same evidence unless additional evidence either by consent of the parties or otherwise is permitted. By reason of such a procedure applicability of different set of rules is not envisaged. It is within the same jurisdiction. It does not contemplate two different and distinct jurisdictions. But in the present case, parties were not bound by any such agreement of trade or community association. As the parties were individual companies and only guided by their agreement, the above situation may not be applicable."<sup>42</sup>

The Act was meant to be an improvement from the 1940 Act. When such arbitration clauses were valid under the 1940 Act, it is difficult to envisage how a multi-tier arbitration clause was invalid for the reason that the new and improved statute did not contemplate such a provision.

A recent commentary notes that *Centrotrade* dealt with a peculiar arbitration clause where both the awards were "final in their own respects" and both were governed by different rules in different jurisdictions. The commentary clarifies that the decision "does not cast any doubt on cases where multi-tier clauses do not envisage applicability of different procedures to various legs of arbitration".<sup>43</sup> On the contrary, there are indications in the judgement, noted below, that the invalidity could even apply to multi-tier arbitration with the tiers

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<sup>41</sup> Arbitration & Conciliation Act, 1996, §36.

<sup>42</sup> (2006) 11 SCC 245 : 2006 (3) Arb LR 201 (SC).

<sup>43</sup> JUSTICE R.S. BACHAWAT, LAW OF ARBITRATION AND CONCILIATION 270 (Anirudh Wadhwa *et al.* eds., 2010).

being governed by the same jurisdiction.<sup>44</sup> The judge stated that §36 provided for a legal fiction that on the expiry of the limitation period set out in §34, the award attains the status of a decree. Hence, an appeal “before another forum from an award *and that too* when a part of the award would be a domestic award and another part would be a foreign award is not contemplated under the 1996 Act” (emphasis added). The rationale that once an award is passed it becomes final and binding applies even to domestic two-tier arbitrations.<sup>45</sup> When the award at the first instance is given, it becomes enforceable as a decree unless challenged under §34. Further, just as much as the absence of a provision in the Act implying a two-tier arbitration clause to be valid with one tier being a domestic arbitration and the second being an outside arbitration, the Act is also silent on domestic two-tier arbitration clauses.

The judge stated that an appeal does not contemplate different procedures and separate sets of evidence. Further, he stated that the appellate bodies of arbitral institutions follow “the same procedure, relies upon the same evidence unless additional evidence either by consent of the parties or otherwise is permitted. By reason of such a procedure applicability of different set of rules is not envisaged.”<sup>46</sup> It may be noted that this is not altogether correct. For instance, the GAFTA Arbitration Form Rules (No. 125) provide for two-tiered arbitration. A party has a right to appeal to the Board of Appeal.<sup>47</sup> Contrary to the analysis by the judge, the GAFTA Rules provide that documentary evidence not submitted to the tribunal at the first instance could also be submitted to the Board of Appeal.<sup>48</sup> More importantly, the Rules state that the appeal involves a new hearing of the dispute.<sup>49</sup> Thus, the GAFTA appeal being a fresh proceeding is no different from an appeal to another arbitral tribunal. The chief complaint of Sinha, J. seemed to be that there are two different legal regimes applicable to each tier of arbitration. Tarun Chatterjee, J., disagreeing with Sinha, J.’s opinion, rightly relied on party autonomy to hold the two-tiered arbitration clause to be valid.

Oddly, a court which had scant regard for the text of the Act adopted a doctrinaire approach to the issue, especially when the arbitration clause was not contrary to public interest or policy considerations. Tarun Chatterjee, J. rightly pointed out that in interpreting the Act, party autonomy

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<sup>44</sup> (2006) 11 SCC 245:2006 (3) Arb LR 201 (SC)., where Tarun Chatterjee, J. stated “According to my learned brother, the part of the agreement providing for two tier arbitration is invalid under the 1996 Act...”

<sup>45</sup> See Norton Rose, *International Arbitration*, October 2009, available at <http://www.norton-rose.com/knowledge/publications/2009/pub23718.aspx?page=all&lang=en-gb> (Last visited on April 20, 2011): “Until [*Centrotech*] is resolved, it would be imprudent to draft multi-layered agreements.”

<sup>46</sup> *Supra* note 43, ¶14.3.

<sup>47</sup> GAFTA Rules, Rule 10:1.

<sup>48</sup> GAFTA Rules, Rule 12:2.

<sup>49</sup> GAFTA Rules, Rule 12:4.

was the “paramount consideration... subject only to such safeguards as are necessary in public interest”.<sup>50</sup>

This judgement is notable not for its disregard for the text of the law but for being too faithful to the text of the statute. The judgement has created uncertainty over the validity of two-tiered arbitration clauses.<sup>51</sup>

*E. SBP & CO. v. M/S. PATEL ENGINEERING LTD.*<sup>52</sup>  
(‘PATEL ENGINEERING’):

The extent of the *Kompetenz-Kompetenz* doctrine was one of the earliest controversies under the Act.<sup>53</sup> According to a three judge bench of the Supreme Court in *Konkan Railway Corporation v. Mehul Constructions*,<sup>54</sup> the role of the Chief Justice under §11 was merely to act as an appointing authority in case of failure of the appointment procedure agreed upon by the parties. The Court held that the Act advocated extreme *Kompetenz-Kompetenz*. Hence, according to the Court, the decision of the Chief Justice was an administrative decision and all jurisdictional questions, including questions pertaining to the validity of the arbitration agreement, were to be taken before the arbitral tribunal.<sup>55</sup> This decision was confirmed by a five judge Bench in *Konkan Railway Corporation v. Rani Constructions*.<sup>56</sup>

In *Patel Engineering*,<sup>57</sup> a seven judge Bench of the Supreme Court had to decide on the nature of function of the Chief Justice (or his designate) under §11 of the Act. The issue was whether the Chief Justice should decide any contentious jurisdictional issue before referring the parties to arbitration.

<sup>50</sup> (2006) 11 SCC 245; 2006 (3) Arb LR 201 (SC).

<sup>51</sup> Norton Rose, *supra* note 45; Sarita Woolhouse, *India: Appeal from a Domestic Arbitration Award to an International Arbitration Tribunal - Two Conflicting Awards*, 10 INT. A.L.R. 8 (2007).

<sup>52</sup> (2005) 8 SCC 618 : 2005 (3) Arb LR 285 (SC).

<sup>53</sup> “*Kompetenz-Kompetenz*”, meaning “jurisdiction concerning jurisdiction”, is used in this paper to refer to the doctrine which answers the question as to what kind of issues concerning the arbitral tribunal’s jurisdiction could be decided by it without any court interference. The extreme version of the doctrine (extreme *Kompetenz-Kompetenz*) states that all kinds of questions pertaining to the tribunal’s jurisdiction should be taken before the arbitral tribunal. *See generally*, William W. Park, *Kompetenz-Kompetenz: The Arbitrability Dicta in First Options in Arbitration of International Disputes: Studies in Law and Practice* 92-96 (2006).

<sup>54</sup> (2000) 7 SCC 201 : AIR 2000 SC 2821.

<sup>55</sup> This interpretation is supported by the understanding in the UNCITRAL that the decision of a court under Art. 11 of the Model Law was an administrative decision. United Nations Commission for International Trade Laws [UNCITRAL], *Analytical Commentary on Draft Text Of a Model Law on International Commercial Arbitration*, 29, A/CN.9/264, March 25, 1985.

<sup>56</sup> (2002) 2 SCC 388 : 2002 (1) Arb LR 326 (SC).

<sup>57</sup> (2005) 8 SCC 618 : 2005 (3) Arb LR 285 (SC).

§11(7) provides that the Chief Justice's decision is final. §11(6) provides that where the appointment procedure agreed directly or indirectly by the parties fails, a party could approach the Chief Justice or his designate to aid in the constitution of the tribunal. It does not describe the nature of this function of the Chief Justice. The provision is silent on questions such as whether he is bound to refer a dispute to arbitration irrespective of whether arbitration of such disputes is not permitted by law.

The Court held that when any tribunal exercises jurisdiction, it has to be satisfied with the existence of conditions, known as jurisdictional facts, which permit it to do so. According to the Court, when a statute confers power to the tribunal "to adjudicate"<sup>58</sup> and makes its decision final, such decision is judicial in character.<sup>59</sup> The tribunal, according to the Court, has to be satisfied of the existence of the jurisdictional facts. Consequently, the Court held that the Chief Justice has to necessarily be satisfied of the existence of jurisdictional facts such as the existence of an arbitration agreement, existence of such agreement between the parties to the application, etc. The Court supported its conclusion with the following reasons:

1. When a statute confers power on the highest judicial authority, the authority has to necessarily act judicially unless the statute states otherwise.
2. When under §8 a court decides on the existence of the arbitration agreement, it is inappropriate that the highest judicial authority cannot decide under §11 on the existence of the arbitration agreement.
3. Credibility is the reason for the statute to grant such a function to the Chief Justice. There would be no credibility in the decision of the Chief Justice if he refers the matter to arbitration when the dispute ought not to have been referred to arbitration for reasons such non-existence or invalidity of arbitration agreement. Such a decision might have serious monetary consequences on the respondent. This view is fortified by the fact that in case a mechanical reference is done by the Chief Justice and the tribunal refuses to accept the respondent's genuine contention of non-existence or invalidity of the arbitration agreement, the respondent has to wait till the final award is passed and apply for setting the award aside. This approach is advantageous as the tribunal need not decide on issues pertaining to jurisdiction in view of the court's confirmation of the existence of jurisdictional facts.

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<sup>58</sup> *Id.*, ¶8.

<sup>59</sup> *See* Province of Bombay v. Khushal Das, AIR 1950 SC 222; A. K. Kraipak v. Union Of India, (1969) 2 SCC 262 : AIR 1970 SC 150 (for discussion on the difference between judicial and administrative decisions).

§16, titled “competence of arbitral tribunal to rule on its jurisdiction”, grants the tribunal the power to rule on questions pertaining to the existence and validity of the arbitration clause and other questions pertaining to its jurisdiction. This, to the Court, was merely an expression of what was obvious—a decision by the tribunal on a question as to its jurisdiction is not *ipso facto* invalid. §16(1) came in the way of the Court’s view on the nature of the Chief Justice’s decision— if the “highest judicial authority” decides on a jurisdictional question, the tribunal cannot have the power to decide contrary to the Chief Justice’s pronouncement on the same question. Therefore, the Court held that once the Chief Justice decides that jurisdictional facts exist and constitute the tribunal, the decision is binding on the parties and the tribunal. The only exception, according to the Court, was an appeal from a decision by the Chief Justice of the High Court constituting the tribunal to the Supreme Court under Art. 136 of the Constitution of India.

There are many flaws in the Court’s reasoning.<sup>60</sup> For instance, a decision by the Chief Justice to appoint the arbitrator despite the respondent’s contentions that jurisdictional facts did not exist was, for the court, a determination on the existence or non-existence of the jurisdictional facts. The flaw here is the assumption that Chief Justice was the proper authority for the respondent to raise such arguments in the first place. A corollary to the faulty assumption is branding the appointment by the Chief Justice as “adjudication”.

### *DISCORDANCE BETWEEN THE TEXT OF THE STATUTE AND THE DECISION*

The decision has altered the law on several aspects, leading to partial or absolute redundancy of some provisions of the Act. Examples include:

1. Finality of the decision of the Chief Justice vis-à-vis domestic arbitration: After *Patel Engineering*, a decision of the Chief Justice of the High Court on appointment of the arbitrator is subject to appeal to the Supreme Court under Art. 136 of the Constitution of India.<sup>61</sup> Such appeal before the additional forum is needless and would only result in increased costs. The fee for senior and junior counsels for representation and for conferences, court fee etc. significantly increase the costs.<sup>62</sup> Also, substantial delay would ensue in the constitution of the tribunal.

<sup>60</sup> See Aniruddha Sen, *The Role of the Court in the Appointment of Arbitrators - An Analysis with Reference to the Supreme Court of India’s Decision in S.B.P. v. Patel Engineering*, (2006) 10 VJ 45; Sumeet Kachwaha, *supra* note 2.

<sup>61</sup> Art. 136 deals with appeal by special leave of the Supreme Court on a decision from any judgment, decree, determination, sentence or order in any cause or matter passed or made by a court or tribunal.

<sup>62</sup> See Priya Sahgal & Kaveree Bamzai, *Rich Lawyers: The New Nawabs*, INDIA TODAY, December 4, 2010 (for a discussion on the fee charged by prominent senior advocates).

*Indian Oil Corporation v. SPS Engineering*<sup>63</sup> is a typical example. In this case, the Delhi High Court, after deciding on jurisdictional questions, passed an order dismissing the application for appointment of arbitrator on December 8, 2009. The applicant appealed to the Supreme Court under Art. 136 of the Constitution. The Court appointed the arbitrator only on February 3, 2011. Thus, it has taken almost fourteen months to constitute the arbitral tribunal than it would have taken, had the decision of the Chief Justice of the Delhi High Court been final. This, it is submitted, is not an indication of an efficient arbitration system. Even if no appeal is filed under Art. 136, there are chances of delay in disposing of the application for appointment of the arbitrator. For instance, in *Bharat Rasiklal Ashra v. Gautam Rasiklal Ashra*,<sup>64</sup> the Supreme Court held that since a question as to whether there exists an arbitration agreement is a condition precedent for the Chief Justice to appoint an arbitrator under §11 of the Act where serious allegations of fraud and fabrication are made as regards the formation of the agreement, the Chief Justice had to decide on such allegations, notwithstanding the delay in disposal of the application for appointment.

2. Institutional Arbitration: In institutional arbitrations, if the parties fail to agree on the arbitrators, the institution itself constitutes the tribunal on behalf of the parties.<sup>65</sup> In *ad hoc* arbitrations, however, there is no alternative if the appointment mechanism agreed by the parties fails. To avoid this situation, parties might provide, in their arbitration agreement, that they would approach a particular institution or a person to aid them in the constitution of the tribunal. Such clauses are, however, rare. In the absence of such a provision, the Chief Justice has been given the power by the Act to aid the parties, either by himself or through others, in the constitution of the arbitral tribunal. Many jurisdictions grant the Chief Justice the power to nominate arbitral institutions to exercise the function of constituting the arbitral tribunal. For instance, the Singapore International Arbitration Act expressly gives the power to the Chief Justice to designate arbitral institutions to act as appointing authorities.<sup>66</sup> By holding that a decision under §11 constituting the arbitral tribunal is a quasi-judicial decision, however, the Supreme Court in *Patel Engineering* foreclosed the possibility of an arbitral institution performing the role of constituting the arbitral tribunal in case the party appointed mechanism failed. An arbitral institution cannot have quasi-judicial powers unless mandated by a statute. Consequently, the

<sup>63</sup> (2011) 3 SCC 507.

<sup>64</sup> Civil Appeal No. 7334 of 2011, decided on 25-08-2011.

<sup>65</sup> See e.g., Arts. 6.2 and 7.2, SIAC Rules, 2007; Art. 3.3, GAFTA Rules; Arts. 8.3 and 8.4 of the Rules of Arbitration of the International Chamber of Commerce, 1998.

<sup>66</sup> Art. 8(2), Singapore International Arbitration Act provides that the Chairman, SIAC or any other person as the Chief Justice would be entitled to act as appointing authority in case of failure of party-appointed procedure.

Court held that the role of an arbitral institution designated by the Chief Justice under §11 was to merely aid the Chief Justice in selecting the arbitrator. The Act does not contemplate such a meek role to arbitration institutions.<sup>67</sup> As regards institutional arbitration, the Act contemplates a role that is equivalent to that of the Chief Justice for appointment of the tribunal. The decision has hindered the growth of institutional arbitration in India.

3. *Kompetenz-Kompetenz*: The Act advocated extreme *Kompetenz-Kompetenz*. The Supreme Court, however, considerably watered it down and held that the jurisdictional questions were to be decided by the court under §11 and not by the arbitrator.<sup>68</sup>
4. Reference under §§8 and 9: Art. 8 of the Model Law empowered the judicial authority to refer a dispute to arbitration unless it found that the arbitration agreement was “null and void, inoperative or incapable of being performed”. §8 did not provide for such a power to the judicial authority. The judicial authority had to only see if an original arbitration agreement existed. The enquiry that the judicial authority had to conduct under §8 was not a detailed enquiry on jurisdictional facts. Similarly, under §9, the court had to be satisfied, *prima facie*, that the jurisdictional facts existed for the court to grant interim relief. In *Patel Engineering*, the Court came to the opposite conclusion. It held that the judicial authority under §8 and a court §9 had to be satisfied of the existence of the jurisdictional facts.<sup>69</sup>

#### F. *VENTURE GLOBAL ENGINEERING v. SATYAM COMPUTER SERVICES PVT. LTD.*<sup>70</sup> (*‘VENTURE GLOBAL’*):

The Supreme Court had to decide in *Venture Global* if an Indian court could have a supervisory role over an arbitration whose seat was outside India.

<sup>67</sup> Consultation Paper, *supra*, note 8, ¶B(vii).

<sup>68</sup> The Court also conceded that it would not be possible for certain questions to be decided without deciding on questions of fact. In such cases, it held that the arbitrators should decide such questions. *See* National Insurance Company v. Bughara Polyfab, (2009) 1 SCC 267, ¶17.

<sup>69</sup> *See* BACHAWAT, *supra* note 43, 435 (noting the existence of two views on whether an inquiry under § 8 as to the existence of jurisdictional facts is *prima facie* or final). *See also*, Jagatjit Jaiswal. v. Karmajit Singh Jaiswal, 2007(4) Arb LR 300 (Del) (“The court has to decide upon the existence of the arbitration clause even while entertaining a petition under § 9 of the Act, in case the existence of the arbitration agreement is challenged by the opposite party.”); BACHAWAT, *supra* note 43, 605-610.

<sup>70</sup> (2010) 8 SCC 660 : AIR 2010 SC 3371.



## 1. The Judgement

A dispute arose between the parties under a shareholders' agreement and was referred to arbitration in London. The arbitrator passed an award that was taken up by Satyam Computer Services Pvt. Ltd ('Satyam') for enforcement in the Michigan District Court, USA.

Venture Global Engineering ('Venture') approached the Indian courts for setting the award aside. Ultimately, the matter went to the Supreme Court of India, where the question was whether the foreign award could be set aside under §34 of the Act. Both the parties relied on *Bhatia International* to support their respective contentions and therefore, the Court had to interpret *Bhatia International*. The Court construed *Bhatia International* to mean that Part-I, including §34, applied to all arbitrations, domestic or foreign, and the Court could set aside a patently illegal foreign award for violating the public policy of India. The Bench comprising Tarun Chatterjee and Sathasivam, JJ, held that *Bhatia International* never exempted foreign awards from the applicability of Part-I of the Act; rather, the courts had wrongly interpreted *Bhatia International*. After quoting *Bhatia International* extensively, the Court concluded that the legislative intent in not expressly providing that Part-I will apply only to domestic arbitration was to make Part-I apply even to outside arbitrations; but by not expressly stating that Part-I would apply to outside arbitrations, the intention was to allow parties to provide by agreement that Part-I or any provision therein (including the non-derogable provisions) will not apply.

The Court also held that the extended definition of public policy that is inclusive of patent illegality could be bypassed by taking the award to a foreign country for enforcing it. Lastly, the Court held that by seeking enforcement of the award in the Michigan District Court instead of Indian Courts, Satyam was motivated by the intention of evading the legal and regulatory scrutiny to which this transaction would have been subject to had it been enforced in India, though the award was closely connected to India due to several factors such as the company's location in India, the transfer of the ownership interests to be made in India under the laws of India, etc.

On the applicability of Part-I of the Act to the case, the Court held that Part-I was not expressly or impliedly excluded due to the presence of the non-obstante clause in Clause 11.05(c)<sup>71</sup> of the shareholders' agreement, despite the fact that the governing law of the contract was the law of Michigan.

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<sup>71</sup> The relevant portions of Cl. 11.05 read: "(b). This Agreement shall be construed in accordance with and governed by the laws of the STATE of Michigan, United States, without regard to the conflicts of law rules of such jurisdiction. Disputes between the parties that cannot be resolved via negotiations shall be submitted for final, binding arbitration to the London Court of Arbitration.

## 2. Consequences

- a. *Venture Global* and Multilocalisation: The judgement has completely disregarded the seat theory, which is the prevailing norm in international commercial arbitration.<sup>72</sup> Even the Model Law is based on the territoriality principle with the seat of arbitration having supervisory power and control over arbitral proceedings taking place within its territory. While discussing the problems surrounding the territorial applicability of the Model Law during its drafting, it was unequivocally stated that the criteria used for determining the Model Law's applicability must be in harmony with the Convention (which also recognises the seat theory) so as to avoid any conflict between them.<sup>73</sup> This meant that the Model Law was to be applicable on the basis of the seat of arbitration.<sup>74</sup> Art. 1(2) of the Model Law declares that the Model Law would apply "only if the place of arbitration is in the territory of this State."

The seat theory holds that the law of the seat of arbitration is the *lex arbitri*. *Lex arbitri* is the law that "grants the parties or the arbitrators the freedom to set the rules, which may also impose some restrictions on them, and which-even more importantly- will control the use of that freedom and sanction any abuses by setting aside the award."<sup>75</sup> *Lex arbitri* is a vital aspect of international commercial arbitration as it gives the legal touch to the arbitration.<sup>76</sup> Consequent to the privileged position of the law of the seat vis-à-vis the arbitration is another privilege- the power to decide whether to grant the "legal touch" at all through annulment provisions. The law of the seat allows a party to challenge the arbitral award for its legal validity. If the challenge fails, the award acquires a special status, especially in respect of countries that are a part of the Convention. Pursuant to the Convention, the status of such an award is equivalent to an award made in the country

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- (c). Notwithstanding anything to the contrary in this agreement, the Shareholders shall at all times act in accordance with the Company's Act and other applicable Acts/Rules being in force, in India at any time."

<sup>72</sup> ALAN REDFERN *et al.*, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 78- 93 (2004).

<sup>73</sup> UNCITRAL, REPORT OF THE SECRETARY- GENERAL: POSSIBLE FEATURES OF A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, ¶38, A/CN.9/207, May 14, 1981.

<sup>74</sup> Regardless of this allegiance to territoriality, there were certain provisions that had to apply extraterritorially due to the international character of arbitration, such as, recognition of arbitration agreements, interim measures of protection, recognition and enforcement of awards, etc.

<sup>75</sup> Gabrielle Kaufmann-Kohler, *Identifying and Applying the Law Governing the Arbitration Procedure - The Role of the Law of the Place of Arbitration* in AJ van den Berg, IMPROVING THE EFFICACY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE 1998 (1999).

<sup>76</sup> *But See*, Jan Paulsson, *Arbitration in Three Dimensions*, January 13, 2010, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1536093](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1536093) (last visited on April 29, 2011).

in which the award is sought to be enforced.<sup>77</sup> *Venture Global* has made it more onerous for foreign awards to be enforced because it not only requires that the award must have resisted challenge in the seat of the arbitration but must also not fall foul of §34 of the Act. The Convention contemplates a challenge to the award only in the seat of arbitration.<sup>78</sup> *Venture Global* provides for challenge even in another country, which not in consonance of the Convention.<sup>79</sup>

*Roger Shashoua* presents a powerful example of the incompatibility of *Venture Global* with the international regime of dispute resolution. The contract provided for resolution of disputes by arbitration in London under the Rules of Conciliation and Arbitration of the International Chamber of Commerce and the substantive law of contract was Indian law.<sup>80</sup> An interim award pertaining to costs was passed in favour of the petitioner. Several applications were filed both in England and India to prevent enforcement of the interim award. The respondent also filed a petition before the Delhi High Court for setting aside the said award.<sup>81</sup> The petitioners applied to the Court to make permanent the temporary anti-suit injunction they had previously obtained from the English court. The English Commercial Court held that the choice of seat was akin to an exclusive jurisdiction clause. Confirming the prevalence of the seat theory, the Court held that “by agreeing to the seat the parties agree that any challenge to an interim or final award is to be made only in the courts of the place designated as the seat of the arbitration”.<sup>82</sup> The Court viewed the respondent’s action of approaching the Delhi High Court as an attempt “to outflank the agreed supervisory jurisdiction”<sup>83</sup> of the English courts and therefore granted an anti-suit injunction restraining the respondent from pursuing annulment proceedings in India.

The Court censured the respondent’s attempt to oust the contractually agreed supervisory jurisdiction of the English courts.

<sup>77</sup> New York Convention on the Recognition and Enforcement of Foreign Awards, 1958, Art. III.

<sup>78</sup> New York Convention on the Recognition and Enforcement of Foreign Awards, 1958, Art. V(1)(e).

<sup>79</sup> See generally, Akash Pierre Rebello, *Of Impossible Dreams and Recurring Nightmares: The Set Aside of Foreign Awards in India*, [2010] CSLR 274.

<sup>80</sup> According to courts in India, such an arbitration clause implied that Part-I was not excluded. See text accompanying notes 12-14.

<sup>81</sup> The petition numbered, OMP 4 of 2008, is still pending before the Delhi High Court. In view of the anti-suit injunction passed by the English Commercial Court, the proceedings for setting the award aside has been adjourned till the disposal of the appeal filed before the English Court of Appeal. See, *Mukesh Sharma v. Roger Shashoua*, order in OMP 4/ 2008, available at [http://courtnic.nic.in/dhcorder/dhcqrydisp\\_o.asp?pn=215655&yr=2009](http://courtnic.nic.in/dhcorder/dhcqrydisp_o.asp?pn=215655&yr=2009) (Last visited on April 18, 2011).

<sup>82</sup> *Supra* note 23, ¶23.

<sup>83</sup> *Id.*, ¶38.

While holding nothing directly on the state of the Indian law, the court held:

“This whole stance [of the respondent of challenging the award in India] is one of asking the courts in India to do that which should only be done by the courts of the country of the seat of arbitration.”<sup>84</sup>

Multilocalisation, apart from being against the prevailing norms of international commercial arbitration, creates severe hardship for the party in whose favour the award was passed as that party may have to face annulment proceedings in more than one country.

- b. Doctrine of Optional Public Policy- A *contradictio in terminis*: In *Venture Global*, the Supreme Court introduced into jurisprudence a concept which was probably never heard of hitherto- the concept of optional public policy. In common usage, legal parlance and even in *Saw Pipes*, the term “public policy” connoted public good or the public interest. An award contrary to it would fall foul of §34. In *Venture Global*, while holding that an award which would contravene public interest or public good would be set aside, the Court also held that the parties had the option to exclude Part-I and thereby allow the parties to avert invalidation of awards that contravene “public policy”. A public policy rule cannot be such if it is optional.

***G. TDM INFRASTRUCTURE PVT. LTD. v. UE DEVELOPMENT INDIA PVT. LTD.***<sup>85</sup> (*‘TDM INFRASTRUCTURE’*):

Another instance of the Court’s digression from the text of the statute is in the case of *TDM Infrastructure*. Both TDM Infrastructure Pvt. Ltd. (‘TDM’) and the UE Development India Private Limited (‘UEDI’) were companies registered under Indian laws. The directors and the shareholders of TDM were residents of Malaysia. The arbitration clause provided for New Delhi as the venue and the proceedings were to be conducted as per the Arbitration Act, 1940. An application was filed by TDM in the Supreme Court for appointment of the arbitrator. The application was resisted by UEDI on the ground that the arbitration was a domestic arbitration and therefore it was only the relevant High Court that had jurisdiction.<sup>86</sup> TDM, however, argued that the central management of the company was in Malaysia and therefore the arbitration was an

<sup>84</sup> *Id.*, ¶53.

<sup>85</sup> (2008) 14 SCC 271.

<sup>86</sup> Under §11 of the Act, the appropriate authority for constitution of the arbitral tribunal is the Chief Justice of India in an international commercial arbitration while the proper authority in case of arbitration between Indian parties is the Chief Justice of the relevant High Court.

international commercial arbitration and supported its argument with §2(1)(f) of the Act, which defined international commercial arbitration to mean, *inter alia*, “(ii) a body corporate which is incorporated in any country other than India; or (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India” (emphasis added).

The Court held otherwise. According to the Court, if neither of the bodies corporate were registered abroad, arbitration between them would not be international commercial arbitration. This reasoning implied that §§2(1)(f)(ii) and 2(1)(f)(iii) were incongruous in respect of companies registered in India but whose central management and control were outside India. The Court stated that a corporation is a “national of, or habitually resident in, any country other than India”<sup>87</sup> when it is incorporated in any country other than India. According to the Court, a corporation cannot have two nationalities simultaneously; if registered in India, a corporation would be an Indian corporation and arbitration between two Indian corporations would not be international commercial arbitration notwithstanding whether the control or management or whether the seat of arbitration is outside India. The Court read §2(1)(f)(iii) to be applicable only when §2(1)(f)(ii) did not apply.

The following two aspects seemed to have made the Court so decide:

1. The Court held that the question of control was not altogether objective and there might be situations where issues pertaining to control would be raised when the alleged control is outside India. Thus, the Court justified its interpretation on the ground of certainty in matters involving jurisdiction.
2. §28 gives the option to the parties to choose substantive law of another country in an international commercial arbitration held in India. Substantive laws of India are, however, compulsorily applicable to Indian parties. Therefore, the Court stated that an Indian corporation is not permitted for public policy reasons to derogate from substantive law of India. The Court probably apprehended that Indian laws could be evaded by Indian companies by simply having them controlled or managed from outside India.

The judgement seems to go clearly against the text of the statute, which suggests that if a company is registered or if its management or control is outside India, the arbitration involving such a company would be an international arbitration. The judgement has been criticized for reducing the

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<sup>87</sup> Arbitration and Conciliation Act, §2(1)(f)(i).

flexibilities in the Act and for being contrary to party autonomy.<sup>88</sup> The following are the two main criticisms:<sup>89</sup>

1. The judgement deviates from the unambiguous text of the statute and the legislative intent.
2. It would remove the option of a foreign parent company to have a non-Indian substantive law where its Indian special purpose vehicle or subsidiary enters into an arbitration agreement with an Indian party, thereby making the Act more rigid.

It is submitted that though the criticisms raise genuine questions, on balance, the Supreme Court was possibly right in giving priority to an interpretation that prevented evasion of Indian law.

The Model Law adopts two criteria for determination of the international character of the arbitration. The first criterion, contained in Arts. 1(3) (a) and 1(3)(b), is based on territoriality. The second criterion is the agreement of the parties that the arbitration is international. There seems to have been some discussion on the acceptability of the second criterion during the drafting of the Model Law.<sup>90</sup> In one of those discussions, apprehensions were raised regarding a clause, which gave the right for the parties to choose whether their arbitration had an international character or not. The French delegate's opinion on such an "opt-in clause" is apt:

"However... it would allow two parties who both had businesses in a given country to agree to resort to international law even if their transactions were devoid of any international subject-matter."<sup>91</sup>

Although this view was supported by delegates from Hungary and Japan, ultimately it was decided to have such a clause in the Model Law.<sup>92</sup> The Act adopts a strictly territorial approach to determine the international character and, unlike the Model Law, has not left it to the parties to choose

<sup>88</sup> Arvind Datar, *Introduction to the Fifth Edition in JUSTICE R.S. BACHAWAT'S LAW ON ARBITRATION AND CONCILIATION* ix, xi-xii (Anirudh Wadhwa *et al.* eds., 2010); BACHAWAT *supra* note 43, 105- 106; AMLT Legal, *India Brief* (September 2008), available at [http://www.almlegal.com/newsletters/almnewsletter34\\_india-brief-september-2008.pdf](http://www.almlegal.com/newsletters/almnewsletter34_india-brief-september-2008.pdf) (Last visited on April 12, 2011).

<sup>89</sup> BACHAWAT, *supra* note 43, 105.

<sup>90</sup> UNCITRAL, 306<sup>th</sup> Meeting, ¶52, June, 3 1985, available at <http://www.uncitral.org/pdf/english/travaux/arbitration/ml-arb/306meeting-e.pdf> (Last visited on April 25, 2011); UNCITRAL, 307<sup>th</sup> Meeting, ¶¶18 and 42, June 4, 1985, available at <http://www.uncitral.org/pdf/english/travaux/arbitration/ml-arb/307meeting-e.pdf> (Last visited on April 25, 2011).

<sup>91</sup> *Id.*, ¶42.

<sup>92</sup> Model Law, Art. 1(3): "An arbitration is international if... (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country".

internationality of the arbitration. Any interpretation of the Act should be in consonance with this intent. Consequently, it could also be argued that the drafters had intended that Indian parties should not be able simply dodge Indian laws by having the seat of arbitration outside India or by controlling and managing the Indian company from outside India.

*H. N. RADHAKRISHNAN v. MAESTRO ENGINEERS*<sup>93</sup>  
(‘*MAESTRO ENGINEERS*’).<sup>94</sup>

The Supreme Court held in *Maestro Engineers* that a court could refuse to refer a dispute to arbitration if it involved allegations of fraud or misappropriation.<sup>95</sup> The dispute arose out of a partnership agreement. One of the partners, Radhakrishnan, asked for the return of his investment and profits of the firm to enable him quit from the partnership as he apprehended fraud on the part of the other partners. The other partners denied that they were liable to pay Radhakrishnan and approached the Court for a declaration that Radhakrishnan was not a partner and for permanent injunction preventing Radhakrishnan from causing any disturbance to the peaceful running of the firm. Radhakrishnan filed an application under §8 of the Act for referring the pending disputes to arbitration.

Ultimately, the matter reached the Supreme Court. Relying on *Abdul Kadir v. Madhav Prabhakar Oak*,<sup>96</sup> (‘*Abdul Kadir*’), the Court dismissed the application holding that when serious allegations of fraud were raised, the dispute cannot be decided by the arbitrator. According to the Court, proof of fraud involved elaborate production of evidence and “such a situation cannot be properly gone into by the Arbitrator”.<sup>97</sup> The Court held that courts would be more competent to, and would “have the means to decide such a complicated matter involving various questions and issues raised in the dispute”<sup>98</sup> and that it was in furtherance of justice that the issue should not be tried by the arbitrator.

§8 of the Act casts a duty on the court to refer a dispute to arbitration if there is an arbitration agreement. §8 also imposes certain conditions on the satisfaction of which the dispute should be referred to arbitration. Disputes are not capable of being arbitrated primarily for two reasons. *Firstly*, parties may intend that certain disputes arising in connection with an agreement should

<sup>93</sup> (2010) 1 SCC 72.

<sup>94</sup> This portion of the paper is based on Badrinath Srinivasan, *Arbitrability of Claims Relating to Fraud: Recent Developments in India*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1530182](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1530182) (Last visited on April 28, 2011).

<sup>95</sup> Much before *Maestro Engineers*, in *India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd.*, (2007) 5 SCC 510, one of the grounds relied on by the Supreme Court for dismissing an application for appointment of the arbitrator was fraud.

<sup>96</sup> AIR 1962 SC 406.

<sup>97</sup> (2010) 1 SCC 72.

<sup>98</sup> *Id.*, ¶11.

not be referred to arbitration. For instance, certain disputes of technical nature are referred to experts, whose decisions are final and binding, and are kept out of the purview of arbitration. *Secondly*, law may prohibit disputes from being arbitrated, usually for policy reasons.<sup>99</sup> While §8 expressly provides for the former, it does not deal with the latter. Notwithstanding the absence of the latter, a court deciding on an application under §8 has to refrain from referring a dispute incapable of resolution by arbitration. In *Maestro Engineers*, the Court chose not to refer the dispute to arbitration by holding that it was not capable of being arbitrated. The decision of the Supreme Court is a retrograde step in development of arbitration law in India.<sup>100</sup>

*Abdul Kadir* involves a different reasoning on why claims concerning fraud need to be resolved in a court of law and not before a private adjudicator. The decision was based on an application made by Madhav Prabhakar Oak under §20 of the Arbitration Act, 1940.<sup>101</sup> Abdul Kadir, relying on the English case *Russell v. Russell*,<sup>102</sup> argued that where serious allegations of fraud were involved, the dispute is to be adjudicated by the court and not by the tribunal. The Court agreed with the argument and held that where serious allegations of fraud were made against a party and that party desires that the case must be tried by the open court, the court would not refer to the matter to arbitration. The Court, however, held that it is only when serious allegations of fraud were made that the Court will refrain from referring the same to arbitration. The rationale for the refusal of reference to arbitration was that a person had the right to defend himself in public when charges of fraud were levelled against him. The decision was in no way concerned with the competence of arbitrators to decide disputes concerning questions of fraud.

It is fallacious to assume, as the Supreme Court did in *Maestro Engineers*, that arbitrators are not capable of deciding matters involving complicated questions of fact and of law. Many arbitral proceedings deal with complex technical issues which arbitrators are capable of dealing with. Further, even disputes between nations-states have been decided by arbitral tribunals constituted under the aegis of the Permanent Court of Arbitration or the International Centre for Settlement of Investment Disputes. The argument that arbitrators

<sup>99</sup> §2(3) of the Act saves provisions of other law prohibiting submission to arbitration of certain classes of disputes.

<sup>100</sup> Freshfields Bruckhaus Deringer LLP, *Indian Arbitration Moves Backwards* (December 2009) available at <http://www.freshfields.com/publications/pdfs/2009/dec09/27311.pdf> (Last visited on April 20, 2011); Herbert Smith LLP, *Arbitration e-bulletin: Recent International Arbitration Developments* (December 21, 2009), available at <http://www.herbertsmith.com/NR/rdonlyres/43660312-B61B-4E19-B10D-37BF25FE9075/13904/Decemberebulletin.htm> (Last visited on April 20, 2011).

<sup>101</sup> Under §20 of the 1940 Act, a party could apply to the court for reference of a dispute to arbitration and, the court would, in its discretion, refer the same to arbitration.

<sup>102</sup> [1880] 14 Ch. D. 471. In *Russell v. Russell*, the Court held that where party against whom allegations of fraud are made, such party should have the right to be cleared of the allegations in public, and not before a private arbitrator.



would not be competent to decide such issues should not come from the Indian courts that refer disputes to arbitration to their retired brethren.

The decision in *Maestro Engineers* even goes against the prevailing policy on arbitration, as reflected in the Act. If the conditions in §8 of the Act are satisfied, the judicial authority is, unlike §20 of the Arbitration Act, 1940 bound to refer the dispute to arbitration. There is no discretion involved.

Refusal to refer to arbitration disputes involving fraud, as reflected in *Russell v. Russel*, has been abandoned even in England. The English Arbitration Act, 1996 contains no provision whereby courts can refuse reference to arbitration of a dispute regarding allegations of fraud for the following reason:

“[T]he agreement of the parties to refer future disputes to arbitration ought to prevail over a right of public defence, and that there was in any event no reason to believe that arbitrators were incapable of dealing with issues of fraud on their merits and reaching appropriate conclusions.”<sup>103</sup>

Further, *Maestro Engineers* has been decided without duly considering past decisions of the Supreme Court and the High Courts that have contemplated determination by the arbitrator of issues pertaining to fraud.<sup>104</sup>

There may be some other grounds for not referring disputes involving allegations of fraud such as impact of fraud on third parties, right of the public to know fraudulent conduct and so on. These concerns must be balanced with the need for speedy resolution of commercial disputes. Obsolete arguments to the effect that arbitrators are not capable of handling disputes involving elaborate production of evidence must be cast-off at once.

### III. CONCLUSION

Arbitration statutes are expected to be free from complications. The 1989 Report of the Departmental Advisory Committee recommended that an English law on arbitration should be “free from technicalities to be readily comprehensible to the layman”.<sup>105</sup> It is important that the arbitration law be

<sup>103</sup> ROBERT MERKIN, *ARBITRATION LAW* 85-86 (2004) (states that the provisions of the English Arbitration Acts 1950 and 1979 providing for stay of arbitral proceedings in case of allegations of fraud have been not been carried into the Arbitration Act, 1996, although, theoretically, the courts could read into an open-worded §86 of the Arbitration Act, 1996 the power to stay arbitration in cases of allegations of fraud under § 86. Nevertheless, §86, apart from being a transitional provision meant to be repealed as per §88, has not been brought into force).

<sup>104</sup> BACHAWAT, *supra* note 49, 450.

<sup>105</sup> Departmental Advisory Committee on Arbitration Law, *REPORT ON THE ARBITRATION BILL*, 1996, in BACHAWAT, *id.*, 3312- 3365, 3313.

simple, lucid and free of intricacies as even non-lawyers such as expert arbitrators, conciliators, etc. play an important role in the resolution of commercial disputes.<sup>106</sup> The courts have, however, made arbitration so intricate that even drafting proper arbitration clauses has become a tough exercise. Complications in transactional law lead to high transaction costs.<sup>107</sup>

The courts have alleged that the Act is not a well-drafted legislation. The blame game started prominently with *Bhatia International* where the Court held that there was a lacuna in the Act as the Act did not provide for interim relief in case of arbitrations held outside India and that the Act was not a well-drafted legislation. As the criticisms of the judgement would show, the only “lacuna” of the Act was not to provide for interim relief in such situations. This, as stated previously, might have been deliberate. Instead of leaving it to the Legislature to correct the “defect”, the Court went on an interpretative adventure resulting in a confusing law. The Court could perhaps learn from Lord Denning’s counsel on the interpretation of problematic statutes:<sup>108</sup>

“A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it [*sic*], how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.”

Even so, the courts cannot be blamed altogether for the current state of Indian arbitration. Perhaps, the Legislature was too far ahead in time in bringing out the reforms when an efficient arbitration industry of international standards was lacking. In a system consisting of inefficient and corrupt arbitrators, *SAW Pipes* was perhaps not altogether wrong in providing for patent illegality as a ground for setting aside arbitral awards especially due to considerations such as the need for judicial supervision of arbitral awards, the prevailing bias and corruption in arbitration.<sup>109</sup>

<sup>106</sup> It is in the interest of the parties to have their dispute resolved by a specialist in the field than to have the same resolved by an ex-judge or an advocate, who hardly understands the technical, commercial and other aspects of the relevant business. See generally, Rajiv Sinha, *Specialist Arbitrator- A Call for Future*, 2006(4) ARB LR 6 (J) (arguing for specialist arbitrators with knowledge of the technical and other aspects of the relevant industry).

<sup>107</sup> See, Joseph Tirado, *Enforcement of Awards in India: Lessons from the Indian Arbitration Act*, 792 PLI/LIT 225 (2009); Herbert Smith, *Dispute Resolution and Governing Law Clauses in India-related Commercial Contracts*, available at <http://www.herbertsmith.com/NR/rdonlyres/D55058D4-7CBD-4E4A-AB06-3566026A7B43/0/8619Disputeresolutionandgoverni nglawclausesinIndiarelatedcommercialcontracts7.pdf> (Last visited on April 18, 2011) (discussing the complications of drafting an international arbitration agreement with India as the venue).

<sup>108</sup> *Seaford Court Estates Ltd v Asher*, [1949] 2 KB 481.

<sup>109</sup> See *Ariba India Pvt. Ltd. v. Ispat Industries*, 2011(3) Arb LR 163 (Del); *Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj*, available at <http://indiankanoon.org/>

In any case, there is a colossal discordance between the text of the Act and the judicial decisions interpreting it. Either the Judiciary or the Legislature has got it wrong. There is a pressing need for both the institutions to figure out what exactly should arbitration law seek to achieve.

Two recent developments have immense potential in rectifying the institutional discord. In April, 2010, the Ministry of Law and Justice came up with the Consultation Paper on the amendments proposed on the Act ('Consultation Paper').<sup>110</sup> The Consultation Paper was aimed at removing the lacunae in the Act and making right the erroneous interpretations made by the courts, which had the effect of defeating the objectives of the statute.<sup>111</sup> About ten broad proposals have been made in the Consultation Paper seeking to correct several problems such as applicability of Part-I to outside arbitrations, absence of robust institutionalized arbitration, absence of specialised commercial benches to deal with arbitration matters, clarity on circumstances that are likely to give rise to justifiable doubts about the independence or impartiality of the proposed arbitrator, high default interest rate, expansive notion of public policy, etc. To an extent, the Consultation Paper seeks to harmonize certain provisions of the Act with the Model Law. For instance, §2(2) of the Act is sought to be amended to nullify *Bhatia International* and clarify that although Part-I of the Act would apply "only" where the place of arbitration is in India, §9 would be applicable even to outside arbitrations.<sup>112</sup> This amendment has, however, been argued to be inadequate.<sup>113</sup> The apprehension is that the proposal does not provide directions to situations where the seat is indeterminate.<sup>114</sup> As regards *Saw Pipes*, the Consultation Paper proposes to nullify the effect of the decision by adding an Explanation to the effect that public policy would include only those grounds contemplated in *Renusagar Power Co. Ltd. v. General Electric*.<sup>115</sup> In line with the suggestion made by the Law Commission of India,<sup>116</sup> the Consultation Paper provides that a domestic non-international commercial arbitral award could be set aside on the ground that the award is patently and

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doc/1444315/ (Last visited on April 27, 2011) (stating that arbitration in India is a racket); Vahanvati, *supra*, note 34 ("It is only when the comfort level relating to the manner in which arbitrations are conducted in [India] rises and comes on par with that of international arbitrations, that one will legitimately be able to argue that there is a case for making arbitral awards virtually free from challenge"); Srinivasan, *infra*, note 119.

<sup>110</sup> *Supra* note 8.

<sup>111</sup> *Id.*, ¶5.

<sup>112</sup> The proposed §2(2) also provides for applicability of §27 (Court Assistance in Taking Evidence) to outside arbitrations. It may be noted that Model Law does not make the analogous Art. 27 applicable to outside arbitrations. The proposal is virtually similar to the amendment suggested by the Saraf Committee. See Justice Saraf Committee on Arbitration, REPORT OF JUSTICE SARAF COMMITTEE ON ARBITRATION 16 (January 29, 2005).

<sup>113</sup> See Sumit Rai, *Proposed Amendments to the Indian Arbitration Act: A Fraction of the Whole?*, JOUR INTL. DISP. SETTLEMENT 1, 13 (2011); See also, Vasudha Sharma & Pankhuri Agarwal, *supra* note 5, 534-535.

<sup>114</sup> *Id.*

<sup>115</sup> 1994 Supp (1) SCC 644 : AIR 1994 SC 860.

<sup>116</sup> Law Commission of India, LAW COMMISSION OF INDIA 176<sup>th</sup> REPORT 134-143 (2001).

seriously illegal and has or is likely to cause substantial injustice.<sup>117</sup> It has also been argued, perhaps harshly, that the Consultation Paper is wrong in providing for merits review in case of domestic awards.<sup>118</sup> Considering the ground realities of Indian arbitration, it may not be prudent at this juncture to completely exclude patent and serious error as a ground for setting aside an award.<sup>119</sup> The mechanics of such challenge may be made in such a way that challenges on flimsy grounds are filtered. One possible method of filtering such challenges is by adopting fee shifting provisions for challenges of arbitral awards.<sup>120</sup>

Certain suggestions in the Consultation Paper are vague. For instance, although the Consultation Paper proposes to restrict the meaning of public policy, it does not clarify if the same interpretation would be afforded to the same expression in §§48 and 57 of the Act.<sup>121</sup> The proposal to add §34(2) (b)(iii) is also problematic. There are two aspects to this proposal: (1) whether such a clarification necessary; and (2) whether a decision of the tribunal under §13(2) or §16(3) should be allowed at an interlocutory stage. These are two different aspects and must not be confused. The Law Commission's suggestion was only to clarify that while challenging the award under §34, the challenging party could raise pleas questioning the decision of the arbitral tribunal rejecting the party's plea under §13(2) or §16(3). It specifically rejected suggestions that an immediate right of appeal should be provided from a decision rejecting the plea of a party under §13(2) or §16(3). Instead of clarifying the same by way of an explanation or a specific provision in §34, it would be more apt to clarify the same in §13(5) or §16(6), as the case may be. Another instance is the proposal for "implied arbitration agreement" in contracts whose value is Rs. 5 crores or more. The rationale given for the proposal is that it would eliminate challenges based on the existence of a valid arbitration agreement. Although the proposal seems novel, it seems to impose a particular mode of dispute resolution on the parties. Another problem with the proposal is that the default arbitration clause seems to provide for institutional arbitration. Thus, the clause considerably

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<sup>117</sup> *Supra* note 8, 27-29.

<sup>118</sup> Rai, *supra* note 113, 25-26. *See also*, Tom Birch Reynardson & Rupert Talbot-Garman, *The Consultation Paper on Amendments to the Indian Arbitration and Conciliation Act, 1996-Does it Go Far Enough?*, 2011 INT, ALR 95.

<sup>119</sup> *See* Badrinath Srinivasan, *Public Policy and Setting Aside Patently Illegal Arbitral Awards in India* 26-46 (2011) available at <http://ssrn.com/abstract=1958201>. It has been argued that unlike the recommendations of the Law Commission of India, the Consultation Paper does not adopt the safeguards provided in the English Arbitration Act, 1996 against challenging awards for flimsy reasons. *See* Rai, *supra* note 113, 26-27.

<sup>120</sup> Srinivasan, *id.*, 124-128.

<sup>121</sup> Reynardson *et al.*, *supra* note 118, 90. Recently, the Supreme Court has stated in *Phulchand Exports Ltd. v. OOO Patriot*, 2011 STPL(web) 885 SC that "public policy" in §§48 and 57 would have the same extended meaning as is afforded in §34, contradicting a much-appreciated judgement of the Delhi High Court in *Penn Racquet Sports v. Mayor International Ltd.*, available at [www.indiankanoon.org/doc/232104](http://www.indiankanoon.org/doc/232104) (Last visited on December 25, 2011).

reduces autonomy of parties to a contract to: (1) not go for arbitration to settle their disputes; and (2) opt for *ad hoc* arbitration if they so desire.<sup>122</sup>

Another criticism levelled against the Consultation Paper is that it does not go the whole way in rectifying lacunae in the Act. There are certain aspects like amending the law on interim measures by the arbitral tribunal on the lines of Chapter VII inserted in the Model Law in 2006, nullifying the decision of the Supreme Court in *Maestro Engineers*, enforcement of investment treaty arbitration awards,<sup>123</sup> unreasonable fees charged by the tribunal, rationalisation of costs,<sup>124</sup> etc. which need urgent reforms.

Despite the criticisms, the Consultation Paper reflects the intent of the Government to reform the arbitration law in India. Certain recommendations like removal of the provision for automatic stay of enforcement of arbitral awards if challenged under §34 would be beneficial to Indian arbitration. The amendments suggested may, however, either be inadequate or ineffective. Hence, it is of utmost importance to initiate a reform process that is open and transparent wherein the views of all the stakeholders are duly considered. One would not be too wrong in stating that the lack of guidance for the courts in interpreting the Act was due to the absence of any documents akin to the *travaux préparatoires* of instruments such as the Model Law of the UNCITRAL Arbitration Rules or the Departmental Advisory Committee Reports on the English Arbitration Bill which could provide guidance to the courts in interpreting various provisions of the Act.

Another development is the reference of the question of applicability of Part-I to outside arbitrations to a Constitution Bench of the Supreme Court in *Bharat Aluminium Co. Ltd. v. Kaiser Aluminium*.<sup>125</sup> The re-consideration affords the chance to the Supreme Court to correct the errors in *Bhatia International*.

These attempts at reforming Indian arbitration law have given a sense of hope to the followers of Indian arbitration. History, on the other hand, tells a different story. It can only be hoped that history does not repeat itself.

<sup>122</sup> See also, Vasudha Sharma & Pankhuri Agarwal, *supra* note 5, 537-538.

<sup>123</sup> Prabhash Ranjan & Deepak Raju, *The Enigma of Enforceability of Investment Treaty Arbitration Awards in India*, 6 ASIAN J. OF COMP. LAW ART. 5 (2011). Also available at <http://www.bepress.com/asjcl/vol6/iss1/art5> (Last visited on 24 December 2011); S. Bhushan, *BIT Arbitration in India: Exploring Applicability of 1996 Act and Enforcement of resultant Arbitral Awards*, 4(2) COMNYEMP. ASIA ARB. J., also available at <http://ssrn.com/abstract=1966470> (Last visited on December 24, 2011).

<sup>124</sup> Vasudha Sharma & Pankhuri Agarwal, *supra* note 5, 538-539.

<sup>125</sup> Karan Singh Tyagi, *A Second Look at International Arbitration*, THE HINDU (Chennai) December 21, 2011.

