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RGNUL STUDENT RESEARCH REVIEW

Theme:

"Contemporary Issues in Alternate Dispute Redressal Mechanisms"

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EDITORIAL BOARD

PEER REVIEW BOARD

CHIEF PATRON'S MESSAGE

"The Courts of this country should not be the places where resolution of disputes begins but the places where disputes end after alternative methods of resolving disputes have been considered and tried."

- Sandra Day O' Connor J.

I am delighted to present the First Issue of Third Volume of RGNUL Student Research Review (RSRR) in its triennial year.

The present edition of RSRR aims to provide a platform to students, academicians and legal practitioners to express their original thought on the contemporary legal issues. I sincerely believe that it would help in providing momentum to quality legal research.

This edition of the journal contains articles covering different aspects relating to "Alternative Methods of Resolution". A successful judicial system is defined in terms of its dispute resolution policies and implementation of law & order. Further, the extensive trans-boundary interaction among the sovereign nations and legal persons therein require a set of uniform principles, rules and regulations to solve the disputes arising out of such transactions amicably. In addition to this, various challenges such as "contrasting legislative regimes", "protection of privacy of parties" etc. require initiatives both at national and international level as a whole to tactfully combat them. Therefore, the present issue of the journal aspires a detailed discussion on resorting to alternative methods of conflict solutions to speedily and effectively resolve the disputes among such parties.

I, on behalf of the students and faculty of RGNUL Punjab, express my deep gratitude to all the distinguished members of the Peer Review Board who have devoted their valuable time in reviewing the papers and providing their valuable insights. I would like to appreciate the efforts made by the Faculty Editor and the entire student-run Editorial Board. This issue of the RSRR, I hope, will be a trendsetter. I wish the journal all the best.

Professor (Dr.) Paramjit S. Jaswal
Chief Patron
RGNUL Student Research Review

PATRON'S MESSAGE

It is a matter of satisfaction that the present issue of RGNUL Student Research Review (RSRR) is continuing commendable success in the quest to promote legal education over a period now. The objective of RSRR is sharing of knowledge on current legal issues and to enhance the understanding of these issues through extensive research.

The current issue of the journal is on Alternative Methods of Dispute Resolution and it has received extensive participation and exchange of thought amongst the developing legal minds. In recent years ADR has come to be widely recognized as prominent way of dispute resolution apart from orthodox court systems. ADR clauses play a key role in business transaction agreements and has the effect of making and breaking the business. The current era of globalisation calls for considerable research in ADR methods which can play a facilitating role in speedy resolution of disputes. Keeping in mind the significance of legal research in ADR methods, RGNUL has always promoted the culture of academic deliberation and writing in its students.

RGNUL Student Research Review has achieved an unprecedented success by achieving new heights in quality of scrutiny involved in review and time bound delivery. Further, I would appreciate the hard work by students in making this journal internationally renowned, which has received contributions from across the India. The same fact is highlighted by the fact that Eastern Book Company, Publishers i.e., one of the premium publishing house of our country has agreed to publish the journal from this edition.

I would like to express my gratitude to all professionals and academicians who have joined to this initiative as a part of Peer Review Board and shared their enormous experience to the success of this journal. Further I would like to appreciate the efforts made by Dr. Anand Pawar, the Faculty Editor for providing guidance to the Student Editors. I congratulate the Editorial Board of RSRR and all the young scholars who took out time from their academics for this outstanding initiative and wish them success in all their future endeavors.

Prof. (Dr.) G.I.S Sandhu
Patron
RGNUL Student Research Review

FOREWORD

It gives me immense pleasure to write the foreword for the third edition of the RGNUL Student Research Review (RSRR). I would like to take the opportunity to appreciate the efforts made by the students of RGNUL in the form of an Editorial Board for the successful completion of this edition. RSRR has inspired the young and innovative students to undertake legal research and articulate it in a comprehensible form. In the course of running the Review, the editors have not only learnt editing skills but also managerial skills.

The support of our peer-reviewers who are the leading academicians of this country, practicing advocates and other legal luminaries has been invaluable to us and I humbly thank them for the time they took out to review the articles that were submitted for consideration. I would like to take this opportunity to thank our contributors for their excellent work. I also convey my deep regards to EBC Publishers for agreeing to publish the journal for wider circulation of the excellent work undertaken through this academic endeavor.

The Issue two of the third edition begins with the guest article from Mr. Vijay Purohit & Mr. Shubham Kaushal, Arbitrations Lawyers, LexArbitri. They has very succinctly dealt with the Arbitration Amendment Act, 2015 and the possible drawbacks associated therewith which require immediate attention.

Furthermore, the contributors have provided articles on a wide spectrum of topics, discussing resolution of disputes clauses in BIT's, need for development of ADR methods in order to combat problems in Adversarial System, and use of ADR means to solve Family and IP Related disputes whilst commenting on the case of *Rick v. Brandsema* & *Eros International Media Ltd. v. Telemax Links India Pvt Ltd.*.

We would appreciate any further improvements in the journal as may be suggested by the contributors.

Dr. Anand Pawar
Faculty Editor

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THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015: MAKING INDIA AN ARBITRATION FRIENDLY SEAT

- *Shubham Kaushal* & Vijay Purohit***

ABSTRACT

This article analysis the Arbitration and Conciliation (Amendment) Act, 2015, by which the legislature has amended the Arbitration & Conciliation Act, 1996 ("the Principal Act"). The Principal Act was brought in to complement the economic reforms undertaken by the Government then. Since the Indian economy was being liberalised to attract foreign investment, it had to be backed by a sound legal framework.

The gaps under the Principal Act later discovered were manifold, primarily concerning inordinate delays & unnecessary procedures. The 246th Law Commission discussed the lacunae at length and suggested amendments to the Principal Act. In pursuance thereof, amendments have been carried out in the Principal Act and the amended Act offers interesting times ahead in the realm of dispute resolution. An attempt has been made to understand the amendments & compare them to the Principal Act while trying to gauge the effect thereof. A section wise analysis of the amendments have been made.

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1. PROLOGUE

The Government of India has amended the Arbitration and Conciliation Act, 1996 ("the Principal Act" or "the Act") by the Arbitration and Conciliation (Amendment) Act, 2015 ("the Amendment Act")[3]. Given the nature of the amendments, it is likely that arbitration as a means of dispute resolution, will be the preferred means of dispute resolutions. The amendments in the Principal Act are essentially based on the 246th Report of the Law Commission of India ("the Law Commission Report")[4].

The Government in the recent past has undertaken a lot of initiatives to bring in more foreign investments. While it is necessary to strike all the right chords administratively, it is equally important to have a legal framework that reposes faith in foreign investors. The Amendment Act can be seen as one such step towards the same. Before discussing the Amendment Act, let us examine as to what led to the Principal Act being amended.

2. THE GENESIS OF ARBITRATION & CONCILIATION ACT, 1996

2.1. Indian Economy prior to and post 1991:

Until 1991, the Indian economy had been a closed one, with strict State control over most of the industries, with negligible private participation & minimal foreign investment. India faced a huge Balance of Payment (BOP) crisis in the year 1991. The government took some drastic reformative steps to liberalize the Indian economy by removing government monopoly, reduced tariffs & interest rates. However, the government now required a strong legal framework to supplement these economic reforms & incoming foreign investment, by way of enactment of legislations. During this period, arbitration had become a globally

[3] The Arbitration and Conciliation (Amendment) Act, 2015.

[4] The Law Commission of India Report, Two Hundred and Forty Sixth Report on Amendments to the Arbitration and Conciliation Act, 1996, (2014), available at http://lawcommissionofindia.nic.in/reports/Report246.pdf, (last accessed 28 July 2016).

accepted means of dispute resolution and the Arbitration Act, 1940 was proving to be insufficient to meet the contemporary challenges.

2.2. The Arbitration & Conciliation Act, 1996:

The Principal Act was hence brought in as a means to adhere to the UNCITRAL Model Law on International Commercial Arbitration 1985 and the UNCITRAL Arbitration Rules, 1976 ("the Model Law"). The Statement of Objects & Reasons provided that the Model Law was adopted for establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations. Clearly, the intention of the legislature was to establish an investor friendly regime which would ensure settling of commercial disputes expeditiously and instil confidence in foreign investors. As noted by the Law Commission in its report, although the Principal Act had been in place for two decades and arbitration had emerged as a frequently chosen alternative to litigation, it had become afflicted with various problems including those of high costs and delays.[5]

3. THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015

In order to strengthen the existing law on arbitration while dealing with the existing issues & anomalies, the following Amendments set out below have been brought in to the Principal Act.

3.1. Definition of "Court":

While the 1996 Act was enacted with the purpose of minimising judicial intervention, it failed to do so, in part due to the delays faced in Courts owing to the burden of backlog of cases. In part, the scheme of the 1996 Act was such that a foreign entity choosing to resolve a dispute through arbitration would have to resort to the lower Courts at various stages of the arbitration adding to the delays which effectively neutralised the benefits of arbitration. For instance, for seeking interim measures, the appointment of an arbitral tribunal, for an application for the Court's assistance in taking of evidence, setting aside of an arbitral award under section 34, or, even the enforcement of an arbitral award. This coupled with the plunging threshold for intervention by the Courts defeated the purpose of choosing a swift alternative dispute resolution mechanism.

[5] Ibid, Chapter-II, Introduction to Proposed Amendments, at 8.

The first important amendment in the Principal Act is hence under Section 2, i.e., the definition clause, wherein the definition of 'Court' has been amended, so as to clearly distinguish a purely domestic arbitration, i.e. seated in India with Indian parties, from an international commercial arbitration seated in India or a foreign country, and to vest jurisdiction solely in High Courts to entertain disputes pertaining to international commercial arbitrations[6]. This step will do away with the scepticism in relation to District Courts, given the diversity in languages and other parameters in India. The Law Commission's rationale for amending this section is to ensure that international commercial arbitrations will be heard expeditiously and by commercially oriented Judges at the High Court level. It also means that irrespective of whether a High Court has original jurisdiction or not, it shall have the power to entertain an issue arising in relation to international commercial arbitration, even in its Appellate capacity.

3.2. Scope of Part 1:

The 1996 Act is divided into four parts, part 1 applicable to arbitrations taking place in India and part 2 applicable to arbitrations taking place in convention countries, viz. international commercial arbitrations. The scope of Part 1 is described under sub-section (2) of Section 2 of the 1996 Act,

"*This part shall apply where the place of arbitration is in India.*"

This section is modelled on the Article 1(2) of the UNCITRAL Model Law, which embodies the principle of seat of arbitration, i.e. arbitration in the territory of the state.

"*The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.*"

However, the interpretation given to sub-section (2) of Section 2 over time, blurred the difference between the geographical venue of arbitration and the seat of arbitration. Whether or not the principle of seat of arbitration has been embodied into this provision, gained further importance when the Supreme Court in Bhatia International v. Interbulk Trading SA[7] ("Bhatia International") interpreted sub-section (2) to read

[6] The Arbitration and Conciliation (Amendment) Act, 2015, s. 2.

[7] *Bhatia International* v. *Inter-Bulk Trading SA*, (2002) 4 SCC 105.

as Part 1 being compulsorily applicable to arbitrations seated in India, and also applicable to those seated outside India, unless expressly or impliedly excluded by an agreement. The consequence of this interpretation was that the threshold for intervention by the Courts in arbitrations seated outside India reduced to a level that the Courts were able to even set aside foreign awards.[8] Thereafter, a five-judge bench of the Supreme Court, in Bharat Aluminum and Co. v. Kaiser Aluminum and Co.[9] ("BALCO"), corrected this interpretation and decided that Part 1 and Part 2 were mutually exclusive of one another.

While BALCO v Kaiser Aluminium was a welcome judgment, the interpretation given to Section 2(2) rendered the applicability of Part 1 of the 1996 Act only to arbitrations seated in India. This meant that none of the provisions under Part 1 would be available to parties in an arbitration seated outside India, i.e. international arbitrations, even if, for instance, one of the parties is Indian or where one of the parties has assets located in India. The parties to such an arbitration hence would have no recourse in the likelihood of the India based party or party having assets in India, disposing of their assets either prior or pending the arbitration, likely to hamper the proceedings.

Therefore, to address this shortcoming, the Amendment Act by way of a proviso extends the scope of section 9 (interim measures by the Court), section 27 (Court assistance in taking of evidence), section 37(1) (a) and section 37(3) (appealable orders) to arbitrations where the award to be made or made, fulfils the recognition and enforcement criteria under the Part 2. A pertinent point is that this amendment recognizes the territorial principle apart from ensuring that the parties to an arbitration where Part 2 is applicable, are not left remediless.

3.3. Power to refer parties to arbitration:

Under the 1996 Act regime, the judicial authority before which an application under section 8 was preferred was mandated to refer the parties to arbitration. The only requirement was to see whether there existed an arbitration agreement.[10] However, the Supreme Court's

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[8] *Venture Global Engineering* v. *Satyam Computer Services Ltd & Anr.*, (2008) 4 SCC 190; *Videocon Industries* v. *Union of India*, (2011) 6 SCC 161.

[9] *Bharat Aluminium & Co.* v. *Kaiser Aluminium & Co.*, (2012) 9 SCC 552.

[10] The Arbitration and Conciliation Act, 1996, s. 8(2).

decision in SBP & Co. v. Patel Engineering Ltd[11], where it propounded that the Courts were to decide certain jurisdictional issues before appointing an arbitral tribunal in an application under section 11, extended this requirement even to section 8. This paved the way for judicial intervention even in the pre-arbitration stage.

To address this shortcoming, the Law Commission recommended the approach of the Supreme Court in Shin Etsu Chemicals Co. Ltd. v. Aksh Optifibre[12], where only a prima facie examination has been favoured in an application for reference to arbitration under section 45. The Amendment Act has therefore recognized this approach and confined the role of the judiciary under section 8 by way of substitution of sub-section (1). It now states that a judicial authority can refer any of the contesting parties or *any person claiming through or under him* to arbitration *notwithstanding any judgment, decree or order of the Supreme Court or any Court, unless it finds that prima facie no valid arbitration agreement exists.* The crucial changes contained herein are:

3.3.1. 'Prima facie' review -

Firstly, the role of the judicial authority has been confined to a prima facie review of the existence and validity of the arbitration agreement. The intention behind this seems to have been to restrict any intervention on jurisdictional issues, as noted by the Supreme Court in Sundaram Finance Ltd. v. T Thankam[13]. The non-obstante clause thereafter has been added to override the effect of any past or pending cases affecting such applications. This also means that the question of arbitrability of the matter has largely been left to be decided by the arbitral tribunal, unless the parties contest the validity of the agreement before the Court, or the Court finds fraud or such other elements that vitiate the arbitration agreement.

3.3.2. 'Any person claiming through or under a party'

Further, the amendment imports the language of section 45 which allows persons claiming through or under the signatories to apply for the reference. This overrules the decision in Sukanya Holdings[14] and

[11] *SBP & Co.* v. *Patel Engineering Ltd.*, (2005) 8 SCC 618.

[12] *Shin Etsu Chemicals Co. Ltd.* v. *Aksh Optifibre*, (2005) 7 SCC 234.

[13] *Sundaram Finance Ltd.* v. *T Thankam*, (2015) 2 SCC 66.

[14] *Sukanya Holdings Pvt. Ltd.* v. *Jayesh H Pandya & Anr.*, (2003) 5 SCC 531.

recognizes the principles of the decision in Chloro Controls v. Severn Trent Water Purification[15] which is applicable only to Part 2. In the latter case, the group of companies doctrine was applied to bind 'non-signatories' to the arbitration agreement. The amendment records this by broadening the scope of 'parties' so as to include any person claiming through the party to the arbitration agreement, such as successors-of-interest of such parties. The Law Commission noted that in case of unincorporated entities, where the issue of 'personality' is a difficult legal question, a closed definition of parties can create further difficulties.

3.3.3. 'Copy of the arbitration agreement'

The second major change in section 8 is with regard to production of the Arbitration Agreement between the parties. It was previously contemplated that an application under section 8, i.e., to refer the parties to arbitration was to be accompanied by the original arbitration agreement or a duly certified copy thereof, failing which, such application was liable to be rejected. In government contracts, or contracts between the state/state agency/instrumentality where the State is employer and a private party (being a concessionaires, contractor etc.) there is a general trend that the State doesn't provide a copy of the original agreement or a certified copy of the agreement. What is provided is a photo-copy of the agreement. This proved to be a big hurdle where a section 8 application was preferred by the private party.

However, a proviso has been now added to sub-section (2) of Section 8, which provides that *where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court*. Therefore, now an application under section 8 will not be defeated on the mere technicality of non-production of original agreement/certified copies.

[15] *Chloro Controls* v. *Severn Trent Water Purification*, (2013) 1 SCC 641.

3.4. Interim Relief by the Courts:

Another important amendment is to section 9 of the Principal Act, where two new sub-sections, viz. section 9(2) and 9(3) have been added with the objective of reducing the role of Courts and empowering the arbitral tribunals.

3.4.1. 'Invoking arbitration within 90 days'

Section 9(2) prescribes that arbitration has to commence within a period of 90 days from the date of passing of any interim-order/measure of protection under section 9(1).[16] A lot of parties invoke arbitration by serving a notice to the other party merely in order to approach a Court for interim protection under section 9, so as to portray their 'manifest intention' to arbitrate. Once such protection is granted, they are reluctant in commencement of arbitration and enjoy the fruits of an interim order in an unfettered manner. A large number of petitions are pending on account of this in various courts in India, and it is about time this is changed.

Section 9(2) intends to change that in as much as it mandates a time frame for the parties to commence arbitration post passing of an interim order. An extension to this time period may be granted by the Court at its discretion upon examining the facts and circumstance of a case, hence, the parties will remain under compulsion to commence arbitration expeditiously. However, the amendment does not provide for an automatic vacation of an interim protection if the parties fail to commence arbitration within 90 days.

3.4.2. 'Empowering the arbitral tribunal'

Another important aspect of this amendment is to reduce intervention by Courts where the arbitral tribunal is empowered to grant interim relief.[17] Following the Amendment, it is now a general rule that the Courts are not to interfere in on-going arbitration proceedings, or where the arbitral tribunal has been appointed, if a party tries to circumvent the same by applying for interim relief under section 9(1). However, an exception has been provided to this bar in cases where it appears to the Court that resort to section 17 is likely to render the

[16] The Arbitration and Conciliation (Amendment) Act, 2015, s. 9(2).

[17] The Arbitration and Conciliation (Amendment) Act, 2015, s. 9(3).

party remediless. The intention of the legislature here is to have a check-and-balances mechanism while ensuring that Courts come in to picture only in extreme circumstances. The purpose of this amendment is to ensure that parties eventually resolve their disputes through a proper adjudication on merits by an arbitral tribunal without resorting to or adopting means which render an arbitration clause redundant.

3.5. Appointment of Arbitrator:

In cases where parties are unable to appoint an arbitral tribunal consensually, the Principal Act provided for filing an application under section 11 for the appointment. For domestic arbitrations, this power had been vested with the High Courts, 'the Chief Justice or a person designated by him' to be precise, while for international commercial arbitrations, the same had been vested with the Supreme Court through 'the Chief Justice of India, or any persona designated by him'. With the passage of time, the power of appointment of an arbitral tribunal assumed more of a judicial role than a supplemental one. This broadened the scope for pre-arbitration judicial intervention to such levels that Courts began delving into questions of accord and satisfaction of contractual obligations[18], which was intended to be the domain of the arbitral tribunal by the Act. This gave rise to the debate whether this power is a judicial one or an administrative one and became the subject of judicial interpretations. The Supreme Court in Konkan Railway Corporation Ltd. v. Rani Construction[19] held that power to appoint arbitrator is an administrative power. However in SBP & Co. v. Patel Engineering[20] the Court took a contrary view and held that the power to appoint an arbitrator by the Chief Justice of India or his designate is a 'judicial power'.

Section 11 of the Amendment Act however strives to confine this role only to a prima facie test of determination of the existence of the arbitration agreement. The amendment substitutes the expressions 'Chief Justice or any person or institution designated by him' in sub-sections (4), (5) and (6) with 'the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court' respectively. It also substitutes 'Chief Justice of India or the person or institution designated by him' with the words, 'the Supreme Court or

[18] *National Insurance Co. Ltd.* v. *Boghara Polyfab Pvt. Ltd.*, (2009) 1 SCC 267.

[19] *Konkan Railway Corporation Ltd.* v. *Rani Construction*, AIR 2000 SC 2821.

[20] Supra *note* 9.

the person or institution designated by that Court' under sub-section (9).

The amendment further makes it clear by amending sub-section (7) that the decision made by the Supreme Court, or as the case may be, the High Court or the person or institution designated by such Court shall be final and not amenable to appeal including a Letters Patent Appeal. However, a Special Leave Petition (SLP) has not specifically been barred from the purview of this section.

Another important feature of this amendment is fixing of a time-line for appointment of arbitrator by the Supreme Courts and High Courts.[21] A bare perusal of the sub-section suggests that the period of 60 days for appointment of an arbitrator by the Supreme Court or High Court (as the case may be) is only guiding in nature and not mandatory, even so, the presence of a recommendatory time line will have a bearing on petitions filed henceforth under this section.

3.6. Fees Structure:

Another aspect of cost effectiveness of arbitration is in terms of the fees charged by an arbitral tribunal. Under the 1996 Act regime, high costs arose from the unilateral and excessive fees charged by arbitral tribunals to which the parties were usually unable to express their objection.[22] To address this concern, the Amendment Act has laid down a model-fee structure for arbitrators by inserting a new Schedule IV[23]. There is now a cap on fees depending upon the sum in dispute. A sole arbitrator will be entitled to an additional amount of 25% additional amount. This will allow predictability of costs for the parties deciding to go for arbitration. It also gives an idea to rival parties to assess how viable it would be to initiate arbitral proceedings. However, these caps are not applicable to international commercial arbitrations and in cases other than international commercial arbitrations, where the parties have mutually set a fee structure.

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[21] The Arbitration and Conciliation (Amendment) Act, 2015, s. 11 (13).

[22] *Union of India* v. *Singh Builders Syndicate*, (2009) 4 SCC 523.

[23] The Arbitration and Conciliation (Amendment) Act, 2015, s. 11(14), Sch. IV.

3.7. Independence & Impartiality of arbitrators:

Section 12 of the Principal Act was modelled on Article 12 of the Model Law, which leaves the determination of circumstances likely to give rise to justifiable doubts as to independence or impartiality of the arbitrator, on the reasonability test. The article also gave a lot of room to the parties to model their requirements in an arbitrator. Prior to the onset of the 1996 Act, the practice of appointing persons associated with one of the parties, commonly, an employee, as the arbitrator, had evolved, supported by Supreme Court cases upholding the binding terms of the contract.[24] This trend needed a check as it seriously undermined the principles of natural justice, thereby the arbitration itself. The Law Commission makes a pertinent point in favour of the need for impartiality and independence of arbitrators as against party autonomy.[25]

The Amendment takes care of this concern by dispensing with subjectivity and providing an illustrative list of situations that may qualify as circumstances giving rise to justifiable doubts as to independence and impartiality of the arbitrator. This list under a new Schedule V[26] is based on the Orange List of the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines")[27]. As per the new section 12(1), this list will come into picture where an arbitrator files a mandatory declaration regarding two things, one, his independence and impartiality in terms of the circumstances referred to above, and, second, his ability to complete the entire proceedings within twelve months.[28] The disclosure is to be made by the arbitrator in a form specified in the new Schedule VI[29]. However, a person to be appointed as an arbitrator will be deemed ineligible when he/she shares relationships with the parties, counsel or the subject-matter of the

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[24] *Indian Oil Corporation Ltd.* v. *Raja Transport Pvt. Ltd.*, (2009) 8 SCC 520; *Ladli Construction Co.* v. *Punjab Police Housing Corp Ltd.*, (2012) 4 SCC 609.

[25] Supra *note* 2, at 30.

[26] The Arbitration and Conciliation (Amendment) Act, 2015, Sch. V.

[27] *IBA Guidelines on Conflicts of Interest in International Arbitration*, 23 October 2014, IBA Council, International Bar Association, available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#Practice%20Rules%20and%20Guidelines, (last accessed 29 July 2016).

[28] The Arbitration and Conciliation (Amendment) Act, 2015, s. 12 (1).

[29] The Arbitration and Conciliation (Amendment) Act, 2015, Sch. VI.

dispute[30]. The list for this purpose has been inserted under a new Schedule VII[31], which is based on the Red List of the IBA Guidelines[32]. The section also seeks to ensure that the arbitrator devotes enough time to the proceedings so that the same are completed within 12 months.

3.8. Interim measures by Arbitral Tribunal:

Under the scheme of the Principal Act, an arbitral tribunal could merely order a party to take interim measures of protection. If such order was not complied with, all that an arbitral tribunal could do was to refer such contemptuous action to the relevant Court upon an application under section 27(5) by the aggrieved party, and it was the Court which could determine the question of contempt. This lacuna was also recorded by the Supreme Court in Sundaram Finance Ltd. v. NEPC[33] that while an arbitral tribunal has the power to pass orders, the same cannot be enforced as orders of a court and it is for this reason only that section 9 gives the Court power to pass interim orders during the arbitration proceedings.

Another crucial amendment that has hence been brought in is, enforceability of orders passed by an arbitral tribunal. Section 17 (ii) (e) of the Amendment Act provides that the tribunal shall have power to pass an interim order in accordance with section 17(ii) (a) to (d) and sub-clause *(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.* Further, section 17(2) has been added which provides that "*subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as if it were an order of the Court.*"

As against the Principal act, the Amendment act empowers a tribunal to enforce its orders. Therefore, parties will think twice before flouting any order passed by a tribunal. This also compliments with the

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[30] The Arbitration and Conciliation (Amendment) Act, 2015, s. 12(5).

[31] The Arbitration and Conciliation (Amendment) Act, 2015, Sch. VII.

[32] Supra *note* 23.

[33] *Sundaram Finance Ltd.* v. *NEPC*, (1999) 2 SCC 479; *M.D. Army Welfare Housing Organization* v. *Sumangal Services Pvt. Ltd.*, (2004) 9 SCC 619.

amendment to section 9 whereby the Courts will refrain from entertaining applications where the arbitral tribunal is capable of granting relief to the parties.

3.9. Curtailing unnecessary adjournments:

Another measure which the Amendment act brings in is to expedite arbitral proceedings by putting an end to unnecessary adjournments by empowering the arbitral tribunal to hold oral hearings on a day to day basis.[34] The discretion whether to hold oral hearings or not, no more remains solely with the parties. Furthermore and importantly, failure to attend hearings or seeking adjournments without a sufficient cause can attract costs including exemplary costs. Therefore, parties will avoid seeking unnecessary adjournments.

3.10. Timeline for passing of an award:

We now come to, perhaps, the most important amendment in the Amendment Act, which is likely to attract a lot of positive responses from stake-holders as well as practitioners, arbitrators, etc. The Amendment Act has provided a time frame of 12 months for completion of arbitration proceedings, for which a new section 29A has been added. An arbitrator is mandated to finish arbitral proceedings and make an award within a period of 12 months from the date of reference. If an award is made within 6 months instead then the arbitrator is entitled to additional fee (to be decided mutually by the parties), which incentivizes the arbitrators to finish off the proceedings expeditiously. However, under section 29A(3), the parties have been bestowed with a discretion of extending the term of 12 months by a further period of 6 months by mutual consent. Beyond 18 months (12 months as stipulated in 29A (1) and 6 months in 29A (3) only a Court can extend the period.

If an award is not made within such period (12 months, if not extended or 18 months) then the mandate of the tribunal shall stand terminated. If a court comes to the finding that the delay in completion of arbitration as per the prescribed timelines has been caused on account of the tribunal, it can reduce the fee of the arbitrator(s) by a maximum of 5% per month for each month's delay.[35] It is to be noted that a

[34] The Arbitration and Conciliation (Amendment) Act, 2015, s. 24(1) *proviso*.

[35] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29A (4).

further extension as contemplated under section 29A (3) can be granted only on a sufficient cause made out by any of the parties on such conditions as the Court may impose.[36] Courts may also impose actual or exemplary costs on the parties.[37] Any such application made to the Court by a party is to be decided by the Court within a period of sixty days from the date of service of notice on the opposite party.[38]

The Amendment also provides that in cases where one or all of the arbitrators are substituted, then the proceedings shall continue from the stage where the arbitrator(s) left them and will not start afresh. It has been seen in a lot of cases that where arbitrators are substituted, the new arbitrator(s) start the proceedings afresh, which is a time consuming & costly affair for the parties. A thorough attempt has been made to ensure that the proceedings don't drag for years and are concluded as expeditiously as possible. Through this system the Courts can monitor any inordinate/intentional/unreasonable delay beyond a period of 18 months.

On the flip side, 18 months may not be sufficient for cases involving complex technical issues and extensive documentation, such that in such cases sufficient time is required to review the voluminous documents, take expert opinions, etc. Beyond the period of 18 months, a Court must be approached to extend the time limit further. It must be borne in mind that this section empowers the Courts to impose penalties on both, the arbitrators as well as the parties in case of delay. The Courts must exercise discretion with caution, depending upon the facts and circumstances of the case and grant extension accordingly. An application to the Court for further extension could also be a time consuming affair. In this manner, the section ensures that there will not be any frivolous applications for extension of time.

3.11. Fast Track Procedure:

Among the important objectives of the Amendment Act, one is to make the arbitration process more fruitful by introducing streamlining measures and another is to make it cost effective for its users. At times, the cost of the arbitration borne by the party or parties, as the case may be, exceeds the value of the arbitration or the claims brought forward

[36] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29A (5).

[37] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29A (8).

[38] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29A (9).

by the parties. The Amendment Act introduces a Fast Track Procedure by way of section 29B that is based on 'documents only arbitrations' to cater to these objectives. Such type of an arbitration is suited to straightforward and simple cases of facts, and where all the relevant evidence can be found in documents such that the need for hearings can be bypassed. The arbitral tribunal makes the award solely on the basis of the written submissions made by the parties with oral submissions only if deemed necessary, all within 6 months from the date of reference. It is also at the hearings stage that the proceedings usually encounter delays in the form of adjournments that then shoot up the costs, which this fast track procedure aims to dodge. Such an arbitration will be suitable in both cases involving small amounts, such as consumer disputes, or high value transactions, where both the parties are willingly seeking a prompt resolution such as disputes in the financial sector relating to trading activities, etc., or disputes in the construction sector relating to price escalation, work fronts, etc.

3.11.1. Invoking the procedure

Parties to an arbitration agreement choosing to resolve their disputes through the fast track procedure can do so, at any stage, before or during the appointment of the arbitral tribunal, and by a written agreement referring to the resolution of disputes by the fast track procedure.[39] The parties may agree for an arbitral tribunal consisting of a sole arbitrator which is to be chosen by them.[40] While a sole arbitrator is preferable for expeditiously moving through the proceedings, the provision does not make it mandatory to have a sole arbitrator which becomes beneficial where the parties do not agree on one.

3.11.2. Conducting the proceedings

After the appointment, the arbitral tribunal shall follow the procedure for conducting a fast track arbitration prescribed under sub-section (3) of section 29B. The sub-section mandates only certain basic rules to be followed by the arbitral tribunal, much of the procedure has been left to be agreed upon by the parties. The provision does not specify the length of the submissions to be made and again leaves it open for the parties to agree upon or the arbitral tribunal to instruct. The submissions must include all written pleadings, relevant documents,

[39] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29B (1).

[40] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29B (2).

evidences and expert reports, wherever necessary.[41] However, an endeavour to focus the submissions on the precise issues and material facts without compromising on their clarity must be made. Further, the arbitral tribunal can call for any further information from the parties in addition to that already filed, or furthermore, hold oral hearings where the parties so request or the arbitral tribunal considers it necessary for clarifications.[42] Formalities for conducting oral hearings may be dispensed with,[43] in spite of which, it will be pertinent for the arbitral tribunal to distinguish between a real need to be fully heard in the matter as against an unnecessary prolongation of the proceedings.

3.11.3. Award

The award shall be made within a period of 6 months from the date the arbitral tribunal is appointed by the parties.[44] If a tribunal is unable to make the award within the stipulated time frame, the provisions for extension of time limit as under section 29A shall be applicable.[45]

The section is silent on interim measures and understandably so, because in a procedure spanning 6 months or less, resort to interim measures will delay proceedings as against the purpose of this section. A successful fast track procedure arbitration is hence, dependent upon the willingness and the cooperation of the parties.

3.12. Interest on Award:

The power to award interest found under section 34 of the Civil Procedure Code, 1908 ("CPC") was embodied into section 31(7) of the 1996 Act and bifurcated into two categories – pre-award and post-award. However, the power of the arbitral tribunal to award this interest became a moot point in a lot of judgments of the Supreme Court.[46] The Supreme Court, in State of Haryana v. S L Arora[47] held that section

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[41] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29B (3) (a).

[42] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29B (3) (b) & (c).

[43] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29B (3) (d).

[44] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29B (4).

[45] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29B (5).

[46] *U.P. Cooperative Federation Ltd.* v. *Three Circles*, (2009) 10 SCC 374; *Hyder Consulting (UK)* v. *Governor of Orissa*, (2013) 2 SCC 719; *Indian Hume Pipe Co. Ltd.* v. *State of Rajasthan*, (2009) 10 SCC 187.

[47] *State of Haryana* v. *S L Arora*, (2010) 3 SCC 690.

31(7)(b) did not empower the arbitral tribunal to award compound interest, which meant that interest could not be awarded on the portion of the sum awarded as pre-award interest. This essentially went in contradiction to section 31(7). Later, in a three-judge bench decision of the Supreme Court[48], the majority disagreed with the S L Arora case and found that the meaning of 'sum' in section 31(7)(b) was intended to include both the principal sum and the pre-award interest and hence, the arbitral tribunal could again award interest on the entire sum.

An amendment has now been brought in by way of clause (b) sub-section (7)[49], incorporating this interpretation and setting forth a rate that is gauged by the current rate of interest, plus 2% rather than the strict prescription at 18%, hence aiming for functionality and longevity of the provision.

3.13. Regime for Costs:

The Amendment Act introduces a new provision governing the awarding of costs by the arbitral tribunals and also the Courts. In line with the objective of making arbitration, a more robust and cost effective means, the need for this provision arises from the lacuna in the 1996 Act that did not allow the arbitral tribunal to apportion the costs incurred by the parties on the basis of the success of theirs claims. Until now, they were apportioned on the basis of the principles in CPC, consequently, the losing party only paid a fraction of the actual costs incurred by the winning party. The new section adopts 'costs follow the event' rule as the general rule, an exception to which may require a separate order with reasons. The arbitral tribunal or the Court, as the case may be, is also provided with guidelines for the apportioning the costs.[50]

Further, the Courts and the arbitral tribunal have also been empowered to take into account the conduct of the parties. The threat of suffering the arbitration/litigation costs incurred by the winning party on account of frivolous or excessive claims brought forward will act as a deterrent to delaying techniques employed by the parties, for instance, challenging the appointment of arbitral tribunal, correctness of the award, setting

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[48] *Hyder Consulting (UK)* v. *Governor of Orissa*, (2013) 2 SCC 719.

[49] The Arbitration and Conciliation (Amendment) Act, 2015, s. 31 (7) (b).

[50] The Arbitration and Conciliation (Amendment) Act, 2015, s. 31A (4).

aside the award, etc.[51] Reflecting the relative success and failure of the parties, this rule will also bring in predictability. Finally, the provision enables the parties to pre-meditate the costs by allowing an agreement, however to be made after the dispute has arisen, for apportioning the costs of the arbitration between the parties.[52]

3.14. Challenging the award & the "public policy" question:

Unlike litigation, arbitration does not have a provision for appeal & an award under the 1996 Act could be challenged only on procedural grounds provided under section 34 of Part 1. One of the grounds for challenge, apart from procedure, is when the arbitral award is in conflict with the public policy of India[53]. Whereas an explanation provides a guiding description to public policy of India, over the years, the interpretation by Courts has broadened its scope, as a result, lowering the threshold for intervention and for a successful challenge by the losing party.

The term 'public policy'[54] was first described by the Supreme Court in Renusagar Power Plant Co. Ltd. v. General Electrical Co.[55] ("Renusagar case"), where it was held that a foreign award could be refused enforcement only if it was contrary to the fundamental policy of Indian law, or interests of India, or justice or morality. The Supreme Court, adopting these three grounds into domestic arbitration, in ONGC v. Saw Pipes[56] ("Saw Pipes case") further broadened the scope to include 'patent illegality'. An award would be considered 'patently illegal' if it violated the substantive laws of India, as in this case, the terms of the contract which would then be in contravention of section 28(3) of the 1996 Act. This expanding definition of 'public policy of India' concerned the foreign stakeholders when as a consequence of Bhatia International and Venture Global v. Satyam Computers[57], the scope of challenge under section 34 expanded in such a manner that even foreign

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[51] The Arbitration and Conciliation (Amendment) Act, 2015, s. 31A (3).

[52] The Arbitration and Conciliation (Amendment) Act, 2015, s. 31A (5).

[53] The Arbitration and Conciliation (Amendment) Act, 2015, s. 34 (b) (iv).

[54] Foreign Awards (Recognition and Enforcement) Act, 1961, s. 7(1) (b) (ii).

[55] *Renusagar Power Plant Co. Ltd.* v. *General Electrical Co.*, AIR 1994 SC 860.

[56] *ONGC* v. *Saw Pipes*, (2003) 5 SCC 705.

[57] *Venture Global* v. *Satyam Computers*, (2008) 4 SCC 190.

awards could to be subjected to the 'patent illegality' test under public policy which is discussed further in detail in heading of foreign awards.

The consequence of the Saw Pipes case was to allow the parties to present their case afresh and the Courts to re-open the case and re-appreciate the evidence so as to prolong the adjudication process and frustrate the objective of choosing arbitration. However, the Supreme Court in a recent case[58] steered back in the pro-arbitration direction while interpreting and providing guidelines for the grounds under public policy thereby increasing the threshold for judicial intervention in domestic arbitration. The most important interpretations being that, firstly, the arbitral tribunal is the sole judge of the quality and quantity of evidence, and secondly, the Courts are not empowered to act as appellate forum to set aside awards on the ground of errors of fact unless the approach had been arbitrary or capricious, or shocks the conscience of the Court. This decision is also applicable to domestic awards in an international arbitration, where the arbitration pre-dates the BALCO decision, thus assuaging concerns of foreign stakeholders involved in such arbitrations.

3.14.1. Amendment of 2015 -

The Amendment to section 34 rationalizes and reduces the scope of intervention by the Courts in a challenge proceeding under the ground of public policy of India. An award can no longer be challenged on the vague ground of 'interests of India'. It also mandates that testing an award will not entail a review on the merits of the dispute. Further, to restore the intended consequence of the Saw Pipes case, the new sub-section (2A)[59] distinguishes between a purely domestic award and a domestic award in an international arbitration, whereby only the former can be set aside by the Courts if the award is vitiated by patent illegality. Therefore, a purely domestic award that contravenes, either, the substantive law of India such that it goes to the root of the matter and not simply of a trivial nature, or, the Arbitration Act itself, or the terms of the contract, will be found to be vitiated by patent illegality.

The Amendment offers predictability by directing the applicant to give a prior-notice to the other party, along with an affidavit recording this compliance. It mandates that the application be disposed of within a

[58] *Associate Builders* v. *Delhi Development Authority*, 2014 (4) ARBLR 307(SC).

[59] The Arbitration and Conciliation (Amendment) Act, 2015, s. 31 (2A).

period of one year from the date of notice to the other party. A pertinent point here is that Courts are not empowered to extend this period. This will ensure that the applications are not an afterthought, with fewer chances of delay in hearing of the matter, and removal of the possibility of an ex-parte hearing or the applicant adopting any delaying techniques.

3.15. Enforcement of Awards:

Under the Principal Act, before making an application for enforcement, the parties were required to wait for a three month period from the date of the award to lapse. The award would then be enforceable under CPC as if it were a decree of the Court. An application under section 34 in the meantime, would however cause an automatic stay on the enforcement until such application was disposed of.

This mandatory provision meant that it incentivized the losing party to delay the enforcement process. Until recently, the threshold for judicial intervention was low enough to contribute to the delay in the enforcement process. This coupled with the backlog of cases in the Courts incapacitates the winning party, consequently frustrating the entire point of choosing a swift dispute resolution mechanism such as arbitration.[60]

Amendment to Section 34 dispenses with the automatic stay on enforcement of the arbitral award in case of an application under section 34. An applicant is now required to make a separate application for stay before the Court which shall grant a stay at its discretion for reasons recorded in writing.[61] In case of an arbitral award for payment of money, the Court may grant a stay on the same grounds as a money decree. This will ensure that the parties do not challenge the arbitral award before the Courts as an afterthought or with the intention only to delay.

3.16. Appeals:

Amended Section 37 empowers parties to appeal against orders refusing to refer the parties to an arbitration in an application under section 8.[62]

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[60] *National Aluminum Co. Ltd.* v. *Pressteel & Fabrications*, (2004) 1 SCC 540.

[61] The Arbitration and Conciliation (Amendment) Act, 2015, s. 36 (2).

[62] The Arbitration and Conciliation (Amendment) Act, 2015, s. 37 (a).

3.17. Enforcement of Foreign Awards:

Section 47 under Part 2 of the 1996 Act (New York Convention awards) and Section 56 under Part 3 of the 1996 Act (Geneva Convention awards) have been modified to record the amendment to the definition of 'Court' under section 2(e) of the Act, which has the effect of granting jurisdiction to the High Courts for matters relating to international commercial arbitrations. The amendment now enables a party with a foreign arbitral award to apply for enforcement directly before the High Court which are better equipped to handle international commercial arbitration cases and even have dedicated benches in some states.

Section 48 caters to the New York Convention awards and section 57 caters to the Geneva Convention awards. The conditions for enforcement under both sections prescribe a public policy test akin to section 34. Section 34 however deals with the validity of an arbitral award that is not yet final and executable whereas section 48 and 57 deal with the conditions for enforcing a final and executable arbitral award. Even so, these sections have been subjected to the same interpretations as section 34 in recent judgments, especially concerning the spectrum of the public policy test, which have been discussed below.

The patent illegality test laid down the Supreme Court in the Saw Pipes case was inaptly extended to conditions for refusing enforcement to foreign awards by the Supreme Court in the Phulchand Exports Ltd. v. O.O.O. Patriot[63], where it was held that the term 'public policy of India' under sections 34 and 48 are basically the same in scope and substance. This meant that the parties could now challenge a foreign award on the extensive grounds provided under public policy test and practically reargue the matter. The Courts would then engage in a review of the matter to examine whether the award was vitiated by patent illegality and hence against the public policy of India.

This approach was then steered by the Supreme Court in recent Shri Lal Mahal Ltd. v. Progetto Grano Spa[64], where it refused to apply the same test of public policy as under section 34. It propounded that an award challenged under section 34 had not attained finality in contrast with a final and binding award for enforcement under section 48. The Courts under a section 34 application have the jurisdiction to decide the validity

[63] *Phulchand Exports Ltd.* v. *O.O.O. Patriot*, (2011) 10 SCC 300.

[64] *Shri Lal Mahal Ltd.* v. *Progetto Grano Spa*, (2014) 2 SCC 433.

of an award which then attains finality and enforceability. Section 48 does not empower Courts to act as an appellate forum and delve into the merits. The Amendment narrows down the scope of the public policy test and goes back to the Renusagar case approach, however dispensing with the reference to 'interests of India'.[65]

Therefore, a foreign award will only be in conflict with public policy of India if the making of the award is induced by fraud or corruption or in violation of section 75 or 81, or in contravention of the fundamental policy of Indian law, or, most basic notions of morality or justice. The provision mandates that the public policy test will not entail a review on the merits.[66] This clarification streamlines the procedure for enforcement of foreign awards in India, aiming for making arbitration the preferred means for an effective dispute resolution mechanism for foreign stakeholders.

4. CONCLUSION:

The Amendment Act is indeed a welcome change for the dispute resolution canvas in India, a lot will however depend on its implementation. One of the primary objectives of the Amendment was to reduce judicial intervention and remove superfluous procedural requirements such that choosing arbitration becomes an efficacious form of dispute resolution.

Judicial intervention in arbitral proceedings has been reduced at all stages of arbitration, beginning from pre-reference to enforcement of the award. For some stages, the role of the Courts has been confined by prescribing the limits whereas at some stages by providing a time frame for disposing of the matter before them. The empowerment of the arbitral tribunal by enabling them to enforce their orders in the same manner as the Courts for the purpose of the proceedings before it, is another such step in the right direction albeit a departure from the Model Law. The Amendment also offers clarity in applicability of public policy to purely domestic arbitrations, India seated international commercial arbitrations and foreign seated ones. There is also now a section dedicated to resolution of disputes through the fast track procedure that dispenses with the need for conducting hearings. The Amendment hence manages to create a balance between court

[65] The Arbitration and Conciliation (Amendment) Act, 2015, s. 48 (2), *Explanation 1*.

[66] *Ibid.*

intervention and the arbitral process. The inclusion of the Red and Orange Lists of the IBA Guidelines on Conflicts of Interest in International Arbitration is also one such step that strives to create a balance between procedural fairness and party autonomy.

Another highlight of the amendment is the 18 month time frame for concluding proceedings and making of an award. How effective the time limits are, is something that can be assessed only after the results of the amendments emerge. Till such time it can definitely be considered as an earnest endeavour on part of the legislature to expedite procedures.

A few of the provisions of the amendment are likely to invite some scepticism. For instance, the flipside to the 18 month time line is that once the time line is transgressed, one has to approach the Court by way filing an application for an extension of time. This step will require an examination by the Court on a lot of parameters that will affect the arbitration process. The backlog of cases and listing issues at the Court may also add to the delays affecting the arbitration. Also, this time frame may prove to be inadequate for various shapes and sizes of arbitrations, some of which may require a thorough study of voluminous documents or expertise to understand the facts.

Another point which the Amendment overlooks is the requirement of an amendment to section 32, which renders an arbitral tribunal *functus officio* once the final arbitral award is made. The amended section 17 runs contrary to this, by empowering the arbitral tribunal to order interim measures even after making the final arbitral award, i.e. termination of the proceedings, up until its enforcement. It will have to be seen how the Courts interpret this provision.

One of the reasons for parties to choose arbitration over litigation is the privacy and confidentiality that arbitration offers. The obligation of confidentiality has been recorded by a lot of legislations world over including some of the arbitral institutes in India. However, the Act provides a recourse only as a challenge under section 34(2) (b), so a party would have to first wait for the proceedings to conclude. The Amendment was an opportunity to introduce a provision making it an obligation and to provide for a remedy in case of a breach.

However, there are a lot of positives to take away from the Amendment Act and the Amendment Act is likely complement economic reforms & instil confidence in stake-holders.

[ARTICLES]

ENFORCING MULTILATERAL TRADE OBLIGATIONS VIA UMBRELLA CLAUSES IN INVESTOR-STATE ARBITRATION– HOW DO BITS FARE?

- *Vishakha Choudhary** and *Noyanika Batta***

ABSTRACT

Arbitration as envisaged under Bilateral Investment Treaties has resulted in speedy, effective resolution of investor-state disputes. Ambiguously worded umbrella clauses in Bilateral Investment Treaties call into question the appropriate interpretation of these clauses - the nature of obligations enforceable under the wide ambit of the same is a contentious challenge to effective investor-state dispute settlement. An expansive connotation of Umbrella Clauses would enable enforcement of varied obligations, unilateral, bilateral and plurilateral, under them. Jurisprudential development may also be interpreted to indicate the possibility of enforcing general international obligations of a sovereign under broadly framed Umbrella Clauses.

This Article seeks to analyse the plausibility of enforcement of WTO trade obligations through investor-state arbitration- it evaluates the wide construction of the term 'any obligation' used in Umbrella Clauses to assess possibilities of inclusion of WTO obligations therein. The feasibility of the same in light of the differing objectives of WTO Dispute Settlement and Investment Arbitration, insofar as the former concerns liberalization of trade and the latter concerns investment protection, is evaluated through the course of this Article. The possible pitfalls of such enforcement of multilateral trade obligations are also extensively discussed– in conclusion, we seek to examine whether the Indian Model BIT provides for a scope of enforcement of Trade Obligations of India via an Investor-State Arbitration mechanism.

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INTRODUCTION

Bilateral Investment Treaties between States have facilitated cross-border investments by accounting for safety of foreign investments and businesses without compromising the interests of the State. Clauses and concepts that occupy prominence in such treaties include Umbrella Clauses, Expropriation Clauses, Fair Treatment Clause, 'Most Favoured Nations' Clause, Performance Clause, National Treatment Clause, Admission Clause, et al. By creating mutual rights and obligations between investor and a Nation, aforesaid clauses provide for balance of interests.

Perhaps of all the generic clauses that make an appearance in Bilateral Investment Treaties, Umbrella Clauses are the widest in their scope. The requirement contained therein is for State Parties to undertake to observe any obligation they may have entered into with an investor of the other state party. Due to their contentious and expansive nature, the interpretation of Umbrella Clauses has been subjected to sever scrutiny before Arbitral Tribunals, which have chosen to give varying degrees of scope to such clauses.

Emerging trends in Investment Arbitration have witnessed attempts of investors to seek enforcement of International Trade obligations of Contracting States by virtue of expansive Umbrella Clauses which often mandate a Contracting Party to observe any obligation it may have assumed with regard to investments. This Article seeks to analyse the feasibility of a wide interpretation of Umbrella Clauses, thereby facilitating enforcement of trade obligations.

Part I of the Article discusses the scope of Umbrella Clauses and the diverging interpretations of the Clause in recent arbitral practice. Part II discusses the enforcement of international obligations of the State party to a Bilateral Investment Treaty in Investor-State Arbitration. By applying the findings therein, in Part III the authors seek to discuss the importation of International Trade Obligations contained in the various WTO Agreements within the realm of Investor-State Arbitration, whereas Part IV discusses the workability of such practices, if deemed permissible. In Part V of the Article, the authors analyse the recent Model Indian Bilateral Investment Treaty and the possibility of enforcement of WTO Obligations of India under the same.

1. PART I: INCORPORATION OF UMBRELLA CLAUSES IN BILATERAL INVESTMENT TREATIES

The practice commenced with the incorporation of an 'Umbrella Clause' in the first modern BIT entered in 1959 between Germany and Pakistan.[3] Umbrella clauses are a reflection of the *Pacta Sunt Servanda* Doctrine. The intention contained in such clauses is to impose an international treaty obligation on host countries that requires them to respect obligations they have entered into with respect to investment protected by the treaty.[4]

The scope of umbrella clauses is determined largely on the basis of the language in the relevant Bilateral Investment Treaty – hence, the possibility of uniform interpretation of these clauses is entirely precluded. This has led to multiple constructions of such clauses in Investor-State Arbitration, conferring varied scope or reach upon Umbrella Clauses.

1.1. Narrow Construction of Umbrella Clauses: a Restricted, Apprehensive Approach:

The most pertinent arbitral dispute in this regard is *SGS* v. *Pakistan* wherein a restrictive interpretation of the umbrella clause was preferred by the Tribunal, stating that a broader interpretation could lead to a flood of lawsuits regarding the smallest claims and be subject to indefinite expansion.[5] The following formed the basis for the Tribunal's conclusion:

i. Flood of lawsuits concerning the smallest claims;

ii. Blurring the sense of other protective standards;

iii. Breach of contract per se does not amount to a breach of international law;

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3 K. Yannaca-Small, *Interpretation of Umbrella Clause in Investment Agreements*, OECD Working Papers on International Investment, 2006/03, Organisation for Economic Co-operation and Development (2006).

4 *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB 01/08, Award (12 May 2005).

5 *SGS Société Générale de Surveillance S.A.* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Award (6 August 2002).

iv. Feared the consequences of 'almost indefinite expansion' of BIT protection;

v. Relied on systematic differences between municipal and international laws;

In *Joy Mining* v. *Egypt*, the claim stemmed from the United Kingdom-Egypt BIT concerning a dispute over bank guarantees for equipment at a desert mining site. The Tribunal, ultimately referring contractual disputes to UNCITRAL arbitration, decided to reject the claim, given the noninvestment nature of the original transaction. The narrow construction of Umbrella Clauses was held by ICSID Tribunal to imply the lack of any link between a contractual breach and a treaty breach of the BIT – thereby implying that breaches governed by Contracts between Investors and the State could not be elevated to treaty breaches of a BIT by resorting to an Umbrella Clause.[6]

"In this context, it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection, which is not the case. The connection between the Contract and the Treaty is the missing link that prevents any such effect."

The rationale of the ICSID Tribunals in denying a broad construction of Umbrella Clauses contained in BITs rests on the apprehension that such interpretation of the so-called umbrella clauses would have far reaching consequences. This, in the Tribunal's opinion could be destructive of the distinction between national legal orders and the international legal order and would render useless all substantive standards of protection of the Treaty. [7] Thus, the practice of the Tribunal is often to adopt a conservative approach vis-à-vis application of Umbrella Clause to

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6 *Joy Mining Machinery Ltd.* v. *The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004).

7 *El Paso Energy International Company* v. *The Argentine Republic*, ICSID Case No ARB/03/15, Award (31 October 2011).

contracts concluded between the investor and the State acting as a sovereign. [8]

1.2. Broad Construction of Umbrella Clauses: Envisaging a wide scope

The ICSID tribunal prominently took to a broad interpretation of the umbrella clause, rejecting the findings in the *SGS* v. *Pakistan*[9] case in the *SGS* v. *Philippines* Case - concluding, that under the ambit of an extensive Umbrella Clause, the breach of a contract could be elevated to a treaty breach. [10] A similar finding was echoed by the Tribunal's opinion in the *Noble Ventures, Inc.* v. *Romania*[11] where the scope of the Umbrella Clause was extended beyond the specified provisions of the BIT itself and was deemed to envisage the Sovereign's investment contracts.

The motivation of the Tribunals in conferring a wide interpretation is to give effect to the language of the Umbrella Clause in the BIT – wherein the intention of the Contracting Parties in including a broadly-worded clause was given due acknowledgment and importance. [12]

1.3. Critique: Ideal interpretation of Umbrella Clauses?

In par. 166 of its decision, the Tribunal in *SGS* v. *Pakistan*[13] implicitly raised the argument that a narrow interpretation is necessary because SGS's view of the umbrella clause would make the provision

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8 *CMS Gas Transmission Company* v. *The Argentine Republic*, ICSID Case No. 01/08, Award (12 May 2005).

9 *SGS Société Générale de Surveillance S.A.* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction (6 August 2003).

10 *SGS Société Générale de Surveillance S.A.* v. *Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction and Separate Declaration (29 January 2004).

11 *Noble Ventures, Inc.* v. *Romania*, ICSID Case No. ARB/01/11 Award (12 October 2005).

12 *SGS Société Générale de Surveillance S.A.* v. *The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award (10 February 2012); *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A.* v. *Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012); *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc.* v. *The Argentine Republic*, ICSID case No ARB/02/1, Decision on Liability (3 October 2006).

13 *SGS Société Générale de Surveillance S.A.* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction (6 August 2002) para 166.

"susceptible of almost indefinite expansion.

However:

i. This is not a legal argument;

ii. The mere fact that a provision in a BIT has far-reaching consequences cannot be used as a justification for its narrow interpretation;

iii. Moreover, should the parties to a treaty want to confer upon the respective investors a lower level of protection, they would stipulate the clauses of the BIT differently.

As was explained by the tribunal in the case of *SGS* v. *Pakistan*, the umbrella clause, as an exception to the general rule that a violation by a state of a contract with an alien does not, by itself, constitute a violation of international law, has to be interpreted restrictively unless there is clear evidence giving rise to the fact that the Contracting Parties had intended to give the clause the far-reaching effect of imposing obligations on the host state.

It is pertinent to note that:

i. The Tribunal showed no evidence that, as a rule of international law, exceptions from general international law principles had to be interpreted in a restrictive way;

ii. Secondly, it would be totally impractical would the contracting parties to a treaty always have to add clear evidence that they mean what they say when stipulating, in very clear terms, exceptions from a general rule that they purport to have far-reaching consequences.

It may be argued that a wide Umbrella Clause interpretation is likely to render all the other current standards of treatment, 'substantially superfluous' as there would be no real need to demonstrate a violation of substantive treaty standards if a simple breach of contract would

suffice to constitute treaty violation and impose an international responsibility on the Party.[14]

The above view was supported by the Tribunal in the case of *El Paso* v. *Argentina*, where the Tribunal argued in favour of the narrow interpretation given in *SGS* v. *Pakistan* and stressed upon the fact that the interpretation given in *SGS* v. *Philippines* renders the whole Treaty completely useless and if this interpretation were to be followed – the violation of any legal obligation of a State, and not only of any contractual obligation with respect to investment, is a violation of the BIT, whatever the source of the obligation and whatever the seriousness of the breach – it would be sufficient to include a so-called 'umbrella clause' and a dispute settlement mechanism, and no other articles setting standards for the protection of foreign investments in any BIT.[15]

However, in the view of the authors, the BIT's substantive provisions deal with non-discrimination, fair and equitable treatment, national treatment, MFN treatment, free transfer of payments and protection from expropriation. These issues are not normally covered in contracts. There is no substantive evidence as to why the acceptance of an umbrella clause covering breaches is likely to render the *other* provisions superfluous. Therefore, extending the BIT's protection to investment contracts would not make the substance of a BIT superfluous.[16]

Although, it will hold true for several cases[17] that the acts and omissions of a state which are in violation of a protective BIT standard also constitute a breach of the umbrella clause [such as a simultaneous FET and Umbrella Clause violation]. However, laws and contracts also cover violations of substantive BIT standards other than the umbrella clause. Therefore, not every set of facts that gives rise to a claim based on one of the current BIT standards necessarily constitutes at the same time, a breach of the umbrella clause. It is thus dependent on the circumstances of each case, whether both a BIT standard and the umbrella clause, one

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14 *SGS Société Générale de Surveillance S.A.* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction (6 August 2002) para 168.

15 *El Paso Energy International Company* v. *The Argentine Republic*, ICSID Case No ARB/03/15, Award (31 October 2011) para 76.

16 *Eureko BV* v. *Poland*, Ad Hoc UNCITRAL Arbitration, IIC 98 (2005), Partial Award and Dissenting Opinion (19 August 2005).

17 *Ioan Micula & ors. v. Romania*, ICSID Case No. ARB/05/20, Award (11 December 2013).

or even none of them is violated. It is justified to include in a BIT, both the common protective standards and other like standards and the umbrella clause without rendering the prior useless or having to interpret the latter in a narrow way whatsoever.

2. PART II: ENFORCING UNILATERAL AND INTERNATIONAL OBLIGATIONS OF A SOVEREIGN IN INVESTOR-STATE ARBITRATION

The famed Award of the Tribunal in the *Metaclad Corporation* v. *Mexico*[18] lends to the practice of enforcing general international obligations under Investor-State Disputes, whereby importation of other obligations on "transparency" under NAFTA through the "international law" gateway was permitted by the Tribunal. While a similar practice has not been noticed in the Awards by ICSID Tribunals, the principle of Investment Arbitration relating to widely-worded clauses as expounded by the Metaclad Award may pave the way for enforcement of international, multilateral obligations under Bilateral Investment Treaties.

Even the UNCITRAL case concerning an alleged breach of an agreement between foreign investors and the Polish government in connection with the privatization of a major Polish state-owned insurance company saw the following observation of the Tribunal:

> *"…Shall observe any obligations it may have entered into' with regard to certain foreign investment is not obscure. The phrase 'shall observe' is imperative and categorical. 'Any' obligation is capacious; it means not only obligations of a certain type, but 'any'—that is to say, 'all'—obligations entered into with regard to investments of investors of the other Contracting Party…"*[19]

The ICSID Award that lends most support to a possible future practice of enforcement of WTO Obligations of States via investor-state arbitration is *Enron* v. *Argentina*, where the tribunal concluded that the

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[18] *Metaclad Corporation* v. *The United Mexican States,* ICSID Case No. ARB (AF)/97/1, Award (NAFTA Ch. 11 Arb. Trib. 2000) 40 I.L.M. 36, 70–99.

[19] *Eureko BV* v. *Poland*, Ad Hoc UNCITRAL Arbitration, IIC 98 (2005), Partial Award and Dissenting Opinion (19 August 2005).

umbrella clause referred to "any obligations regardless of their nature[20]; not only contractual obligations, but also "obligations assumed through law or regulation" that are "with regard to investments."[21] This is further supported by the Award in *SGS* v. *Paraguay*, where the Umbrella Clause was interpreted as creating "an obligation for the State to constantly guarantee observance of its commitments entered into with respect to investments of investors of the other party. The obligation has no limitations on its face—it apparently applies to all such commitments, whether established by contract or by law, unilaterally or bilaterally."[22] The partial award rendered in *Eureko* v. *Poland*[23] concluded that Article 3.5 of the Netherlands-Poland BIT, which stated that each contracting party "shall observe any obligations it may have entered into with the investments of investors" of the other contracting party, must be afforded:

> *"…the plain meaning – the 'ordinary' meaning – of a provision prescribing that a State 'shall observe any obligations it may have entered into' with regard to certain foreign investments is not obscure. The phrase 'shall observe' is imperative and categorical. 'Any' obligations is capacious; it means not only obligations of a certain type, but 'any' – that is to say, all obligations entered into with regards to investments of investors of the other Contracting Party".* [24]

Similarly, the *LG&E* v. *Argentina*[25] Award also imported contractual obligations within the ambit treaty obligations – without limiting the obligations envisaged by an Umbrella Clause to that of a contractual nature alone. The Tribunal held that the provisions of the Gas Law obligations in dispute in the case were not merely generic legal obligations; recognizing the pertinence of the aforesaid laws in relation to LG&E's investment in Argentina, the Tribunal held that "these laws

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20 *Enron Corporation Ponderosa Assets, L.P.* v. *The Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007) para 274)

21 Ibid.

22 *SGS Société Générale de Surveillance S.A.* v. *The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award (10 February 2012) para 167.

23 *Eureko BV* v. *Poland*, Ad Hoc UNCITRAL Arbitration, IIC 98 (2005), Partial Award and Dissenting Opinion (19 August 2005).

24 Ibid.

25 *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc.* v. *The Argentine Republic*, ICSID case No ARB/02/1, Decision on Liability (3 October 2006).

and regulations became obligations …. That gave rise to liability under the umbrella clause."

A similar rationale can be applied to trade obligations' enforcement in investor-state arbitration – when obligations arising out of trade agreements deal with the subject matter pertinent to the investors' interest in the host country, plea for enforcement of such obligations and remedies for their violations should not be completely barred.

This wide wording and connotation thus imply that the nature of the obligation is irrelevant – whether multilateral, unilateral, or bilateral. The pertinent test for whether an obligation of a sovereign can be enforced under the ambit of an Umbrella Clause is the nexus of the obligation with 'investment'. Trade Related obligations under the Marrakesh Agreement are aimed at enhancing investments – such would fall squarely within the textual confinements of the phrase 'any obligations' in Umbrella Clauses. If these investment-related obligations, unilateral or multilateral, can be viewed through umbrella clauses, their enforcement in investor-state arbitration may be possible.

3. PART III: TRADE OBLIGATIONS VIS-À-VIS ENFORCEMENT THROUGH UMBRELLA CLAUSES

It is pertinent to note that obligations unilaterally assumed by a State, whether in exercise of its legislative or executive actions, or as a result of its international obligations have been previously held to be envisaged under Umbrella Clauses – and thus arbitrable as a treaty obligation of the BIT. [26] The nature of the obligation in a widely worded umbrella clause ("any obligations regardless of their nature") is irrelevant[27]; such is thus not merely limited to contractual obligations, but also "obligations assumed through law or regulation" that are "with regard to investments."[28] Even legal and regulatory changes bought unilaterally by

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[26] *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc.* v. *The Argentine Republic*, ICSID case No ARB/02/1, Decision on Liability (3rd October 2006) para 175.

[27] *Enron Corporation Ponderosa Assets, L.P.* v. *The Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007) para 274.

[28] Ibid.

the State as part of its public function could be considered treaty violations under a wide umbrella clause.[29]

The most succinct explanation of the non-specificity of obligations contemplated by wide umbrella clauses was perhaps elucidated in *SGS* v. *Paraguay* where a tribunal interpreted a broad umbrella clause as creating-

> *"an obligation for the State to constantly guarantee observance of its commitments entered into with respect to investments of investors of the other party. The obligation has no limitations on its face—it apparently applies to all such commitments, whether established by contract or by law, unilaterally or bilaterally."*[30]

Conferral of an all-encompassing scope of a nature as discussed above leads one to believe that the nature of obligations that may be enforced through loosely worded and generic Umbrella Clauses are thus unrestricted[31] - meaning thereby, that trade obligations if closely related to investment would be readily encompasses within the same.

3.1. Investor-State Disputes: Is there an existing nexus with Trade Obligations?

The practice of reference to WTO jurisprudence to interpret investment obligations of sovereigns is not unknown. The investor-State tribunal in *Continental Casualty* v. *Argentina*, in its analysis of the defenses available to the State, interpreted the term "necessary" in the U.S.-Argentina BIT in accordance with WTO jurisprudence.[32]

The Marrakesh Declaration establishing the World Trade Organization identifies the objective of the WTO regime to "lead to more … investment … throughout the world."[33] A close nexus between trade

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29 *Sempra Energy International* v. *The Argentine Republic*, ICSID Case No. ARB/02/16, Award, (28 September 2007) paras 310-313.

30 *SGS Société Générale de Surveillance S.A.* v. *The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award (10 February 2012) para 167.

31 M. Sallas, *Do Umbrella Clauses Apply to Unilateral Undertakings*, 490 in *International Investment Law For The 21st Century: Essays In Honour Of Christoph Schreuer* (Christina Binder et al., eds. 2009).

32 *Continental Casualty Co.* v. *Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 September 2008) para 87.

33 Article 1, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154.

and investment can be observed herein.[34] This is further cemented by various multilateral WTO agreements – By way of illustration: The WTO Agreement on Trade Related Investment Measures (TRIMS[35]) prohibits a Member State from applying investment measures in a manner inconsistent with the State's national treatment obligations; The WTO Agreement on Trade Related Aspects of Intellectual Property (TRIPs[36]) affords enhances protection to firms investing in goods and services that are IP intensive. The General Agreement on Trade in Services (GATS[37]) of the WTO is also aimed at protection of cross-border investment in services.

In light of this observably close nexus, the plausibility of enforcing trade obligations under the WTO agreements by means of widely worded Umbrella Clauses becomes concretized.

An umbrella clause, which typically incorporates obligations "with regard to investments",[38] may thus prove to be a tool for securing arbitration and enforcement of trade obligations by private parties and not merely sovereign states. Investors have, in the past used WTO rules and decisions to interpret BIT obligations under National Treatment.[39]

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34 P. Sauvé, *A First Look at Investment in the Final Act of the Uruguay Round,* 241,242 in *Globalization And International Investment* (Fiona Beveridge., 1st ed., 2005).

35 Agreement on Trade-Related Investment Measures, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts: The Results Of The Uruguay Round Of Multilateral Trade Negotiations 143 (1999), 1868 U.N.T.S. 186.

36 General Agreement on Trade in Services, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts: The Results Of The Uruguay Round Of Multilateral Trade Negotiations 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

37 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts: The Results Of The Uruguay Round Of Multilateral Trade Negotiations 320 (1999) U.N.T.S. 299, 33 I.L.M. 1197 (1994).

38 *Eureko BV* v. *Poland*, Ad Hoc UNCITRAL Arbitration, IIC 98 (2005), Partial Award and Dissenting Opinion (19 August 2005); *SGS Société Générale de Surveillance S.A.* v. *Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction and Separate Declaration (29 January 2004).

39 *S.D. Myers Inc. v. Canada*, Ad Hoc UNCITRAL Arbitration IIC 249 (2000), Partial Award paras 244-46, 291-93; *Pope & Talbot Inc.* v. *Canada*, Ad Hoc UNCITRAL arbitration, IIC 193 (2001) Award on the Merits of Phase 2, paras 45-63.

3.2. Illustrative List: Umbrella Clauses in Bilateral Investment Treaties and their textual outreach

The following illustrative Bilateral Investment Treaties may be referred to substantiate such a contention:

> *3.2.1.* US-Argentina BIT, Article II.2(c) (1994): *Each Party shall observe any obligation it may have entered into with regard to investments.*[40]

'Any' obligations here may connote all kinds of obligations.86 The open-ended nature of these terms would not limit the reach of such an Umbrella Clause and consequently, the Bilateral Investment Treaty to WTO and its related disciplines.

> *3.2.2.* Germany-Pakistan BIT, Article 7 (1959): *Either Party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other Party*.[41]

It is the authors' belief that the same in just as wide in scope as the illustration that it succeeds. Any claim or assertion of a WTO-Agreement violation would necessarily be a violation of an obligation owed to national or company of another State. Thus, the interpretation that such 'obligations' would be limited to merely the contractual investors appears flawed.

> *3.2.3.* Germany-China BIT (2003), Article 10(2): *Each Contracting Party shall observe any other obligation it has entered into with regard to investments in its territory by investors of the other Contracting Party.*

Akin to the Germany-Pakistan BIT, the term 'any other obligation' contemplates that all obligations pertaining to investments in the host state's territory must be respected – which would de facto be inclusive of investment obligations contained in WTO trading agreements such as TRIPs, TRIMS, GATS, TBT (WTO Agreement on Technical Barriers to Trade[42]), et al.

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40 Article II.2(c), United States-Argentina Bilateral Investment Treaty, 1991.

41 Article 7, Germany-Pakistan Bilateral Investment Treaty, 1959.

42 Article 10(2), Germany-China Bilateral Investment Treaty, 2003.

3.3. Recent Jurisprudence: Exploring the likelihood of invoking WTO Obligations in Investor-State Arbitration

The plausibility of enforcement of Multilateral Trade Obligations under the WTO Regime was most recently explored in *PMA* v. *Australia*[43] - the investment treaty claim made by Philip Morris Asia Ltd. against Australia's plain tobacco packaging legislation. The contention of Australia being in violation of its WTO-TRIPs obligation was resorted to by PMA, which sought enforcement of such obligations under the wide ambit of the Umbrella Clause[44]. The contention rested on pertinent lack of any qualification or limitation of the scope of 'obligations' in the Umbrella Clause (by usage of textual restraints such as 'specific' or 'contractual'). Australia responded to the said contention by seeking a narrower interpretation of the Umbrella Clause – denying the possibility of Umbrella Clauses encompassing general obligations under multilateral treaties.[45] In this case, PMA's contentions were given no merit by the tribunal, which declined jurisdiction. However, contentions on violation of TRIPS Obligations were also discussed previously in the *Eli Lilly and Company* v. *The Government of Canada*[46].

WTO law has, on previous occasions, been referred to in investor-state arbitration, prominently featuring in *Methanex Corporation* v. *United States of America* where the Tribunal stated:

"[T]he Tribunal may derive guidance from the way in which a similar phrase in the GATT has been interpreted in the past. Whilst such interpretations cannot be treated by this Tribunal as binding precedents, the Tribunal may remain open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence, if relevant."[47]

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43 *Philip Morris Asia Limited* v. *The Commonwealth of Australia,* PCA Case No. 2012-12*,* Notice of Arbitration (21 November 2011) paras 6.6-6.11.

44 Ibid.

45 *Philip Morris Asia Limited* v. *The Commonwealth of Australia*, PCA Case No. 2012-12, Notice of Arbitration (21 November 2011) paras 56-58.

46 *Eli Lilly and Company* v. *The Government of Canada*, ICSID Case No. UNCT/14/2, Notice of Arbitration (12 September, 2013).

47 *Methanex Corporation* v. *United States of America*, (2005) 44 ILM 1345 Final Award of the Tribunal on Jurisdiction and Merits, (3 August 2005), para. 6

Taking the likelihood of invocation of trade obligations in Investor-State Arbitration into consideration, it is thus necessary to explore the merits and demerits of such invocation.

4. PART IV: ENFORCING WTO OBLIGATIONS VIA INVESTOR-STATE ARBITRATION: A SLIPPERY SLOPE?

Trade and investment are often believed to be different sides of the same coin – this stems from the following reasons, inter alia:

i. Promotion of similar objectives—globalization, economic integration, trade promotion, and investment protection;

ii. Embodiment in the same treaties, such as preferential trade agreements;

iii. Incorporation similar substantive protections, particularly the rules against discrimination and protectionism.[48]

Thus, the question that looms in the present context is – how fruitful would a practice of enforcing trade obligations through Investor-State Arbitration and Umbrella Clauses be?

4.1. Arguments pro-enforcement:

Narrow umbrella clauses are unlikely tools to secure international trade rights in Investment Arbitration. The widely worded clauses, however, as discussed above, may allow for such a possibility.

The most important crisis that such enforcement would tackle is the uniformity in Investor-State Arbitration jurisprudence[49]: tribunals in Investor-State Arbitration are plagued by conflicting awards, as elucidated through aforementioned cases, concerning interpretation of

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[48] A. Newcombe & L. Paradell, *Law And Practice Of Investment Treaties: Standards Of Treatment*, 436-478 (1st ed., 2009); M. Sasson, *Substantive Law In Investment Treaty Arbitration: The Unsettled Relationship Between International And Municipal Law* 193-94 (2010); M. Sallas, *Do Umbrella Clauses Apply to Unilateral Undertakings*, 490 in *International Investment Law For The 21st Century: Essays In Honour Of Christoph Schreuer* (Christina Binder et al., eds. 2009).

[49] Kurtz, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20, European Journal of International Law 749 (2009), http://ejil.oxfordjournals.org/cgi/reprint/20/3/749 last seen on 14/07/2016.

Umbrella clauses, thereby defeating any opportunity to develop a uniform set of legal practices. Au contraire, the WTO has proved to be exponentially successful in following the consistent practice of 'stare decisis' in its decisions. Enforcement of trade obligations in Investor-State Arbitration would also ensure adherence of tribunal to the uniform jurisprudential principles developed by WTO Panels and Appellate Body – consequently resulting in uniformity in Investment Arbitration jurisprudence.

More pertinently, in overlapping regime of trade and investment, inter-regime cross cutting and contradictory judgments can hamper positive jurisprudential growth. Accounting for enforcement of trade obligations via Investment Arbitration would allow the mutually-dependent disciplines to grow simultaneously and symbiotically, thereby leading to a more uniform approach to trade and investment in the global scenario.

In addition, the possibility of compensating and mitigating damage to investors by a sovereign through awarding of unilateral trade remedies may be made possible without approaching the WTO, which restricts any grant of unilateral trade remedies.

Lastly, this may discourage the practice of party-shopping: the same disputes shall not be taken up by State parties and Private/Contracting parties separately or simultaneously before arbitration forums and WTO to seek multiple redressal on the same investment related issue.

4.2. Arguments contra-enforcement:

Intention of Law is the paramount consideration across legal disciplines. World Trade Organization (WTO) Member countries proposed the inclusion of international investment in the next Round of WTO negotiations, attempting to bring investment within a multilateral regulatory forum in December 1999 The lack of consensus on this issue is indicative of the distinctiveness between trade and investment – and thus demands to be respected.[50] It must also be noted that the power to interpret WTO law and State obligations arising out of the same is solely

[50] A. Oxley, *Sharing the Blame for WTO Wash-out*, The Australian 15 (06/12/1999).

vested in the WTO Dispute Settlement System i.e. the Secretariat, the Panel and the Appellate Body.[51]

The multitudes of problems that are invited by such enforcement are further aggravated by the possibility of exploitation of this enforcement mechanism –By way of illustration[52]:

4.2.1. Treaty shopping:

Attempts by parties to invoke obligations under multiple treaties by wide Umbrella Clauses to avail remedies - irrespective of the remoteness of such remedy.

4.2.2. Relief Shopping:

Parties may bring trade disputes before Arbitral Tribunals in the attempt to secure better remedies than simply rollback of restrictive policies [which is the remedy generally preferred in trade disputes before the WTO]

This would further allow investor-state arbitration to circumvent the traditional barriers to initiating a WTO dispute - Diplomatic espousal, which is a procedural check to ensure that merely meritorious claims are raised for enforcement of WTO agreements would be rendered insignificant since parties would be free to enforce the same through means of Investment Arbitration. A consequential result would also be the resounding defeat of the purpose of WTO agreements and trade obligations contained therein – to protect the interest of member states and not private or contractual investors. This would also, by way of a chain reaction, incentivize private interest protection over sovereign interest and secures monetary benefit for private investors in cases of violation of obligations owed to and by sovereigns, thereby violating the basic tenets of International Law.

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51 A. Hertz, *Shaping the Trident: Intellectual Property under NAFTA, Investment protection Agreements and at the World Trade Organisation*, 23 Canada-United States Law Journal 261, 278 (1997); S. Frankel, *The Legitimacy and Purpose of Intellectual Property Chapters in FTAs*, 185, 195 in *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential, and Regional Agreements* (R Buckley et al, 2008).

52 S. Puig, *The Merging of International Trade and Investment Law,* 33 Berkeley Journal of International Law, http://www.berkeleyjournalofinternationallaw.com/wp-content/uploads/2015/09/The-Merging-of-International-Trade-and-Investment-Law.pdf, last seen on 14/07/2016.

It is additionally significant to note Article 23 of the Dispute Settlement Understanding of the WTO in this regard: Article 23 provides that Member States "shall not make a determination to the effect that a violation has occurred … except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding." This establishes the sole right and prowess of the World Trade Organization to interpret and uphold trade obligations and remedies, a largely established principle of international law which would be vitiated by initiation of investor-state arbitration for enforcement of WTO rights and obligations.

Another important consideration is the nature of remedies afforded by the WTO and Investment arbitration: the former are prospective in nature, while the latter may be retroactive. While the obligations of WTO dispute settlement is to ensure conformity of Member States with trade obligations, investment arbitration seeks to espouse the principles of state responsibility contained in international law – that is, to remove the consequences of the illegal act and restore the situation as would have existed in the absence of such illegal act. The confluence of these two mechanisms with differing goals and remedies might thus be a foolhardy attempt.

Lastly, it is noteworthy that not a single decision where an investment tribunal has held a broad umbrella clause to cover obligations resulting from international trade agreements of the host states can be demonstrated in the vast body of ICSID's work.[53] The authors believe that this demonstrates the following: the ICSID's unwillingness to encroach on WTO jurisdiction, its conservative approach in extending the scope of Umbrella Clauses beyond BITs and investment contracts, and its practice of distinguishing trade obligations of states from the ambit of 'investment'.

5. PART V: THE INDIAN MODEL BILATERAL INVESTMENT TREATY AND ENFORCEMENT OF TRADE OBLIGATIONS

The recently published Indian Model Bilateral Investment treaty avoids

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[53] R. Alford, *The Convergence of International Trade and Investment Arbitration,* 12 Santa Clara Journal of International Law 35, 55-57 (2014), http://digitalcommons.law.scu.edu/scujil/vol12/iss1/3 last seen on 14/07/2016.

the complexities and scope of enforcement of trade obligations under investor-state arbitration mechanism largely – due to the absence of an Umbrella Clause in the BIT. Such is further cemented by the following article of the BIT:

"Article 2.3: This Treaty shall not impose any obligations on the Parties other than that which are explicitly set forth herein…."

This is reflective of the practice increasingly adopted by the United States and ASAN States to exclude Umbrella Clauses as sovereign rights take precedence over investor interests in an era of wildly expansive Umbrella Clause interpretation.

However, it may be pertinent to note, in this regard, the following provisions of the Indian Model BIT:

Article 19.1: This Treaty or any action taken hereunder shall not affect the rights and obligations of the Parties under existing Agreements to which they are parties

Article 3: Each Party shall not subject investment of investors of the other party to measures which constitute:

5.1. Denial of justice under customary international law:

Thus, the scope of enforcement of customary international law obligations is still envisaged by the Indian BIT, which does not prejudice obligations of the Indian state under any other agreement to which it is a Party. Status of WTO Obligations as customary international law having been confirmed by leading jurisprudence, the same may thus be sought to be respected even within the ambit of the model Indian Bilateral Investment Treaty. Despite having avoided the hurdles of an umbrella clause, investor-state arbitration in India could still be tripped up by its other widely worded clauses – thereby inviting the complexities of enforcing trade obligations in investor-state arbitration, as discussed in Part IV.B.

CONCLUSION

The concept explored through the paper is the plausibility and the efficiency of enforcement of public rights through a private dispute

settlement mechanism. The theme of the paper extensively explored the overlapping regimes of trade and investment and the results of a conflation of the two under the wide of ambit of Umbrella Clauses as envisaged under Bilateral Investment Treaties.

The conclusion that the above discourse seeks to expound is the demerits of affording an unnaturally extensive interpretation to an Umbrella Clause in a BIT – leading to private parties infringing on the domain of rights of a Sovereign. A narrow construction of such clauses thus seems more prudent; it is pertinent to note that the authors do not suggest a narrow interpretation to merely restrict and Umbrella Clause to contractual obligations.

However, the intention is to avoid construction of Umbrella Clauses in a manner so wide as to allow importation and enforcement of State Obligations under other multilateral treaties or international obligations owed to other States. Such an expansive construction would have multifarious effects on the trade regime – including but not limited to frivolous litigation, breach of the WTO's exclusive right to address disputes arising of its trade agreements, private investor-initiated arbitration to enforce obligations owed by sovereigns to sovereign, et al. And this is a slippery slope that will not cease to fumble relations between the trade and investment sector for several decades to come.

SCOPE OF MFN CLAUSE IN BITs- CHANGING PARADIGMS

- *Mandavi Mehrotra* & Aavieral Malik***

ABSTRACT

The article seeks to give to entail the importance of the Most Favored Nation Clause in any Bilateral Investment Treaty along with its genesis in international investment arbitration law. The paper deals with the inception story behind the M.F.N. clause and the way it gained prominence when it transcended from being a part of treaties to becoming an intrinsic part of the modern day Bilateral Investment Treaties. Maximum number of claims that are filed in the realm of International Investment Arbitration pertain to the Most Favored Nation Clause, so the reason to henceforth the reason to study and analyze the in-principle relevance of the clause. The paper seeks to trace the development of the Most Favored Nation Clause viz-a-viz its substantive and procedural application in the light of settled judicial pronouncements of the ICSID and the UNCITRAL. In the process of discussing the application of the MFN clause in Bilateral Investment treaties by various States, the paper attempts to maintain key focus on the feature of jurisdictional expansion of application of the clause as rationae materiae jurisdiction. Thus, the paper discusses and interprets the scope and purview of the clause as a natural corollary. Finally, the paper concludes by suggesting a standard test for invoking MFN clause, the need for mutual reciprocity to maintain the general equilibrium of the basic treaty.

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1. MFN: MEANING AND INTRODUCTION

Most Favoured Nation treatment (MFN, hereafter), apart from national treatment, is as entrenched a central pillar in economic law and global trading as is its historical antiquity. The meaning of MFN may simply be understood as a measure to increase trade between any two countries by providing certain trade advantages like reduced tariffs to one of the two countries. MFN means an equal, non-discriminatory trade policy which facilitates easier, smoother, hindrance-free trade between two countries. MFN clause must not be understood to create a relationship of exclusivity but of equality between two countries. MFN clauses may be of two kinds: conditional and unconditional. Illustrative of the widespread use of the MFN Provision, the Havana Charter, in its seminal stages, included it as an essential duty of its members. The members had to keep in due consideration the need and desirability of invoking the MFN Clause, so as to prevent any unfair treatment and discrimination, if they are meted out to the foreign investors while they are investing in the domestic country.

2. BACKGROUND AND DEVELOPMENT OF THE CLAUSE IN BIT'S

MFN clause is a gradual and natural incorporation in any bilateral investment treaty, which are more than 2700 in number. Dating back to the 12th century, investment law and BITs (Bilateral Investment Treaties, hereafter) between Host-States and Investor States serve mutual economic interests of the individual/private investors as well as the States. A guarantee to the procedural rights of the parties to a BIT enshrine with the MFN clause for conferring likewise positive conditions to the counterparty as to outsiders to the treaty, is the in-principle feature of the MFN proviso. However, often beyond the original contemplation of the States to address dispute settlement duties arising from tailor made BITs with MFN proviso, the shaky flexible harmony between the parties is likely to surface during Investor-State arbitration. Thus, the extent of application of the MFN clause/proviso to dispute resolution looms large which is a crucial part of discussion in the paper. Unless expressly negated or impliedly warned against utilization of the MFN proviso to secure procedural rights of dispute settlement to the recipient of the MFN clause, it is largely a matter of fact.

The course of the scope of provisions which can be incorporated through MFN clause from third party BITs in the basic treaty, in order to grant most favorable treatment to the contracting parties, is still developing. As logically construed, one of the most convenient goals of the Contracting parties to a BIT will be that the third nation investors' rights, their ambit and that the dispute settlement takes place through international investment arbitration rather than legal organs of the Host State. Henceforth, application of MFN provision invariably continues. In any case, the inherent feature of MFN provisions to mould and substitute for the provisions of the basic treaty in terms of working and freedom of the State and the rights of the investors, very few cases have been decided upon on the manner in which the MFN clauses operate specifically in the investment arbitration tribunal's jurisdiction. Conversely, non-application of the MFN provision is a rarity in a responsibility loaded competitive arena of investment arbitration amongst States.

Zachary Douglas critically comments on the application of MFN clauses viz-a-viz dispute settlements that:

> "*The MFN clause does not, in truth, operate automatically to 'incorporate' provisions of a third treaty so that all that remains for a tribunal to do is to interpret the amended text of the basic treaty. It is not an exercise in the construction of a static legal text that has been modified by an invisible hand prior to or upon the commencement of arbitration proceedings. The MFN clause operates to secure more favorable treatment for the claiming party; it does not operate to rewrite the terms of a treaty in respect of which the claimant is not even a signatory…. It is the 'treatment' represented by these documents that can be invoked by the investor claiming through the MFN clause in the basic treaty.*"[3]

MFN treatment, etymologically, was recognized only recently whilst trade expansion continued even before its formal acceptance as early as the twelfth century.[4] The MFN clause proliferated with the expansion of

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[3] Z. Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation off the Rails*, 2 Journal of International Dispute Settlement 97, 105 (2011), available at http://jids.oxfordjournals.org/content/2/1/97.full.pdf+html, last seen on 15/06/2016.

[4] M.F. Houde, *Most- Favoured-Nation Treatment in International Investment Law*, OECD Working Papers on International Investment, 4, Working Paper Number OECD/WP/2004/02, Organization for Economic Cooperation and Development, (2004).

trade in the fifteenth and sixteenth centuries, and by the 1900s, was frequently found in many treaties, particularly in Friendship, Commerce and Navigation treaties, the precursors to the modern BIT.[5] So widespread was the use of the MFN Provision that the Havana Charter in its seminal stages included it as an essential duty of its members, who had to keep in due consideration the need and desirability of invoking the MFN Clause and "to give due regard to the desirability of avoiding discrimination as between foreign investors"[6], so as to prevent any unfair treatment and discrimination, if they are meted out to the foreign investors while they are investing in the domestic country.

Sadly, the MFN provision has not been appropriately implemented since its inception as also during the due course of its history till the present times. Taking cue from the example of the United States of America while comparing it with other countries, U.S.A. adopted a restrictive MFN Clause in its trade agreements before the happening of the World War 1, now opposed by many countries. As regards such a restrictive MFN Clause, if a country accords an economic leverage to another country in return for a specific compensation, the country according the leverage need only grant the same leverage only to those countries which also pay the same compensation.

As against an unconditional MFN provision, a sound rationale behind incorporating conditional MFN clause aimed at a barter and bargain of corresponding concessions and privileges to other countries without requiring similar corresponding compensation. However, such a conditional MFN clause arguably "destroyed the equality . . . [the MFN clause] was intended to secure."[7] The United States, however, changed its tune post-World War I with the expansion of its export economy and the realization that it could not penetrate international markets as effectively without an unconditional MFN clause.[8] The MFN clauses in the General Agreement on Tariffs for Trade (GATT) and the General Agreement on Trade in Services (GATS), call for MFN treatment to be

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5 Ibid.

6 Ibid.

7 See S. Vesel, *Clearing a Path through a Tangled Jurisprudence: Most-Favoured-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 The Yale Journal of International Law 125, 125 (2007).

8 Ibid, at 130.

accorded "immediately and unconditionally", US abandoned conditional MFN clause and aligned it with the international trends.[9]

A sizeable chunk of BITs, which assure the investors of the MFN treatment, have resulted in a plethora of claims as regards the International Investment Arbitration. A notable point is that investment arbitration invites the maximum number of disputes settlement suits, out of which arbitrators have to entertain claims pertaining to the MFN Clause more often than usual compared to other international courts or tribunals pertaining to arbitration which make it even more imperative to study and analyze its relevance and jurisprudence in the modern world. The nature and essence of international investment arbitration holds so much relevance today of that it needs to be further studied and analyzed so that so that its importance can further be gauged. The subject matter of this paper shall aim to analyze and assess the importance of certain specific features of MFN in international investment arbitration jurisprudence as regards their *locus standi*. The paper also aims at highlighting that why due regard needs to be given to the MFN Clause by the investment tribunals when deciding cases pertaining to investment arbitration. International investment arbitration has had evolved in the methods for interpreting the MFN treatment standard.

3. CASES AND DISPUTES INVOLVING MFN CLAUSES

The paper aims to establish that the conflicting, varying application, by tribunals, of general rules for interpretation of treaty as per the Vienna Convention on the Law of Treaties and case specific interpretations not only make investment law devoid of a uniform pattern but also contradictory and incorrect interpretations in the light of the general international law jurisprudence.

Mafezzini v Spain[10], a first of its kind case, imported dispute settlement clause from another treaty to which Spain was a party on using the

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9 See J. Kurtz, *The Delicate Extension of MFN Treatment to Foreign Investors: Maffezini v. Kingdom of Spain*, 523, 527 in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Todd Weiler 1st ed., 2005).

10 *Emilio Agustín Maffezini* v. *The Kingdom of Spain*, ARB/97/7 (International Centre for Settlement of Investment Disputes).

MFN clause from the basic treaty, thereby relieving the claimant from submitting to Spanish courts spanning a period of eighteen months prior to utilizing international arbitration method. An outlay of the MFN clause in Spain- Argentina BIT in its Article IV states that:

"In all matters subject to this Agreement, this treatment shall not be less favourable than that extended by each Party to the investments made in its territory by investors of a third country."

The investor, Mafezzini invoked the MFN provisions of Article IV to invoke and apply Article 10(2) of the Chile-Spain BIT which did not require eighteen month period for domestic courts to resolved disputes before submitting to arbitration. Article 10(2) of the Chile-Spain BIT required only six months period for negotiations.

Confronting arguments on the extent of the applicability of the MFN clause, the respondents had contended its application limited to substantive protection contemplated in BIT rather dispute settlement clause. Mafezzini tribunal held that access to arbitration represents a part of substantive protection of investors so that MFN was equally applicable to both substantive and procedural provisions of the BIT despite the lack of explicit reference in the MFN clause to dispute settlement provisions.[11] Mafezzini case was relied upon by a number of investment tribunal such as ICSID[12] and the UNCITRAL.[13] In *Plama v Bulgaria*[14] case, the tribunal held that *"an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them."* The case indicated that application of MFN provision in a basic treaty cannot be said to include jurisdictional aspects simply because MFN is not an agreement to arbitrate. However, as held in National Grid Transco PLC v. Argentine Republic, the tribunal concurred with the Mafezzini ratio to allow the investor to borrow from UK-Argentina BIT application of a more favourable dispute resolution mechanism by bypassing the local

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11 Ibid.

12 *Siemens AG* v. *Argentine Republic*, ARB/02/8 (International Centre for Settlement of Investment Disputes).

13 *National Grid Transco PLC* v. *Argentine Republic*, (United Nations Commission on International Trade Law).

14 *Plama Consortium Ltd.* v. *Bulgaria*, ARB/03/24 (International Centre for Settlement of Investment Disputes).

Argentinian court's jurisdiction. Thus, National Grid is one of the judgments in which claimants have sought to use MFN clauses to avoid litigating the dispute in local courts before submitting it to international arbitration.

Tribunals followed the Mafezzini rationale[15] employing the MFN clause in multiple ways such as strictly following *via* exclusion of 18-months local remedies requirement; extension to broadly worded dispute settlement clauses (including expropriation claims) with implicit objects of wide jurisdiction, rationae materiae.[16] True example of the latter construction of the Mafezzini rationale was found in *RosInvest v Russia.* A fit example of wide reliance on the MFN in the basic treaty is *Garanti Koza v Turkmenistan*[17]. Establishing jurisdiction of ICSID, way beyond the original intent and contemplation of arbitration agreement, it borrowed the choice of arbitration forum from another BIT. This case testifies that MFN has become a powerful tool for investors in not only removing procedural requirements for access to arbitral courts but also to create new arbitration agreements.[18] However, there is no uniformity in following the Maffezini rationale. In *Plama v Bulgaria* case stands on the forefront of dissenters to Maffezini and has a respectable number of its own followers[19] including the *Telenor*[20] and *Tpa Shum*[21] *cases* of ICSID. Expanding MFN clause to BIT procedural provisions can indeed be criticized on many levels. For example, Zachary Douglas persuasively counteracts expansion of MFN clause to dispute settlement clauses.[22] The application of the MFN provision in the basic treaty for the incorporation of the Dispute Settlement Mechanism requires complete

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15 *Daimler Financial Services AG* v. *Argentina*, ARB/05/1 (International Centre for Settlement of Investment Disputes).

16 *RosInvest Co. UK Ltd.* v. *The Russian Federation*, V079/2005 (SCC).

17 *Garanti Koza L.L.P.* v. *Turkmenistan*, ARB/11/20 (International Centre for Settlement of Investment Disputes).

18 M.S. Dragana, *Fork-in-the-Road Clause*, 48 in *Proceedings of Novi Sad Faculty of Law* 491, 513 (2014).

19 *Salini Costruttori SpA and Italstrade SpA* v. *The Hashemite Kingdom of Jordan*, ARB/02/13 (International Centre for Settlement of Investment Disputes).

20 *Telenor Mobile Communications AS* v. *The Republic of Hungary*, ARB/04/15 (International Centre for Settlement of Investment Disputes).

21 *Tza Yap Shum* v. *The Republic of Peru*, ARB/07/6 (International Centre for Settlement of Investment Disputes).

22 See Z. Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation off the Rails*, 2 Journal of International Dispute Settlement 97, 104 (2011).

absence of any doubt as to the intentions of the Contracting Parties to the contrary. The requirement of interpretation of clear intentions as to the rebuttable presumption of the dispute settlement mechanism or arbitration clause was principally recognised by the *Plama*[23] tribunal.

Once MFN gained importance in matters of admissibility and jurisdiction, with optimistic promises for expanding rationae materiae jurisdiction, or even creating new arbitration agreements, the original purpose of the MFN to provide substantive protection was changed to a litigation tool. MFN has thus become more important for the post-breach or post-dispute phase than for the substantive protection of investment itself. MFN clause does not operate by default rather be claimed to create rights for the beneficiary. Not in consonance with the rationale of Maffezini, a bold proposition of incorporation of MFN benefits into the basic treaty represents only a "post hoc intellectual construct" is a practical impossibility.

The tribunal treated provisions of Kuwait-India treaty (other treaty) as obligation of India to invoke them via MFN clause from the Australia-India treaty (basic treaty) to resolve issues of Australian investment for effective judicial resolution. The tribunal made the provision effective from the moment of investment rather than claim submission. [24] Denying claims of denial of justice by the White Industries, the tribunal retroactively effected specific obligations on Indian State.[25] The theory of automatic operation of the MFN is equally implausible here too since it was beyond reasonable contemplation of the White Industries to invoke Kuwait-India BIT provisions, more precisely, at least not until post domestic proceedings. The tribunals erred, as in a number of other cases approving procedural benefits to the claimants, when it assumed that MFN automatically incorporates benefits from third party treaties.[26] Enjoyment of the benefits of "effective means" clause ought to have required submission of the claim to such effect. Implication-wise, such an artificial, inadequate approach not only for effective substantive investment protection but also construction of State responsibility led

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23 Supra *note* 16.

24 *White Industries Australia Ltd.* v. *The Republic of India*, (United Nations Commission on International Trade Law), 30 November 2011.

25 Ibid.

26 P. Acconci, *The Most-Favoured-Nation Treatment and the Law on Foreign Investment*, 363, 372 in Oxford *Handbook of International Investment Law* (2008).

India to amend its model BIT bringing substantial changes including the MFN clause.[27]

4. CHALLENGES IN THE MFN LANDSCAPE

Ejusdem Generis principle, concerning the extent of application of MFN provision, is a more specific rule of understanding. The quagmire as regards of the extent of the advantages that can be taken out from the third party treaty by enforcing of an MFN clause brings about the use of the ejusdem generis principle. The application of the principle is not as easy as it seems lucid. According to this, "An MFN clause can only attract matters belonging to the *same category of subject* as that to *which the clause itself relates*". The interpretation and use of a particular MFN clause must be taken into account based on what is inscribed in the text of the provision and as per the general norms of interpretation as entrenched in Article 3.1 of the Vienna Convention. The principle enshrines a common understanding that runs through the reasoning deployed in their decisions despite little reliance on the principle by the tribunals who rendered judgments on MFN provision and dispute resolution.

If the main subject of the MFN provision in the basic treaty is restricted to substantive questions of law, then the provision cannot be applied so as to take the benefit of procedural rights as regards the third party treaty. The more onerous question is whether the person who is to be benefitted by the use of the MFN provision that does relate to procedural provisions may opt and select which procedural benefits could be more reliable than others. To address this, while the *International Law Commission's 1978 Draft Articles* on *Most-Favored-Nation Clauses* give out a much generalized point of view, they are not specific enough to aid in solving the problem at hand that arises in the investment treaty context. Draft articles 9 and 10 pertain to the beneficiary State being entitled to rights or treatment "within the limits of the subject-matter of the clause." The commentary goes on to suggest that the phrase "within the limits of the subject-matter of the clause" contains an implicit reference to a concept of likeness. The investment law tribunals are still exploring the jurisprudential notions of 'likeness' as

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[27] A. Ray, *New Indian Model BIT on the Anvil*, Kluwer Arbitration Blog, available at: http://kluwerarbitrationblog.com/2015/01/09/new-indian-model-bit-on-the-anvil/ last seen on 7 April 2016.

regards the extent of application of MFN provision in a third party treaty.

Incorporating legislative as well as substantive aspect, MFN clause, however, has made it's a noticeable presence only in the realm of international realm of law on the procedural front rather than the substantive one. As a matter of fact, the foundation of the Most Favored Nation Clause was done on the substantive basis while outside the scope of the investment arena, the benefits of the substantive aspect of the MFN Clause are still given foremost importance. Although there are plethora of illustrations which depict that MFN has been successfully mooted in cases to entail substantive advantages as regards the third party treaties, but in some of these of these cases, the reasoning rendered by the tribunals endorsing the MFN Clause does not seem to be apt, reason being that they follow same assumption of automatic inclusion of the MFN Clause and its benefits, and do not pay due heed to the consideration of the facts of the case.

Expanding the fair and equitable clause on the basis of MFN clause, the tribunal in *MTD v. Chile*, by borrowing the more precise FET guarantees from Chile-Denmark, Chile-Croatia BITs arguing a receptive nature of the Chile- Malaysia BIT so as to encompass substantive guarantees from other BITs mandated consequential legal obligations. In the environment where local remedies are excluded, where complex investment structures can hide both the nationality of beneficiaries and international origin of an obligation, it is not plausible to argue State responsibility for an obligation which has not been made known to the State, and for which the State will unlikely be given a chance to correct. The assumption of automatic operation of the MFN clause creates precisely such scenario, risks absurd results and ultimately amounts to retroactive application of a norm from another treaty.

Could there have been any other situation under which India and Chile could not have been at fault and held liable for the breach of a provision taken from somewhere else? If the investor filed a suit for granting them the permission by taking the MFN proviso in due consideration, the Chilean authorities would or would not have seceded to it. There would have been a scenario where they would have complied with it, when the investor would ask for the enforcement of the effective clause in the Indian Courts. Only in that scenario, would it have been apt and cogent to expect from the state to agree with such a duty. Treaty shopping invoking MFN clause affects investment treaty arbitration. Either a

limited application or its removal was meant to be a priority in the new BIT Model drafted based on the suggestions of the 246th Law Commission Report.

There is a fundamental distinction between what ensued in the case of *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile* as compared to *Asian Agricultural Products Ltd v Sri Lanka,* and *MS Gas Transmission Company v Argentina.*

In the MTD case, the sole reason as to why even though there was no mention of a prescribed FET Standard, the Tribunal decided to incorporate it from the BIT's of Croatia and Denmark because both of them incorporated a duty to grant the fundamental permit subsequent to grant of an investment. The Tribunal endorsed that, as regards the essence of the Treaty's MFN clause, even though such obligations were not explicitly part of the FET standard under the Chile-Malaysia-BIT, the Tribunal held them to be implicitly so and therefore held the state liable.

Whereas, in the case of *Asian Agricultural Products Ltd v Sri Lanka,* the reason why the Tribunal didn't rely on the Sri Lanka-UK BIT was that first of all there was no standing BIT between China and Sri Lanka and even though the claimant tried to construe the general provision embodying the "full protection and security" standard in Article 2 of the BIT, as "strict liability", the Tribunal didn't buy their argument, because it was nowhere stated in that BIT, and since there was ambiguity thereto.

The same was the case in the situation of *CMS Gas Transmission Company v Argentina,* where neither the parties, nor the provisions of the BIT had opted a particular law which could be applied in case of a dispute (in addition to the rules of the BIT itself).

Under the ICSID Convention, in such situations, as what is stated in the Article 42(1) of the convention, *"The Tribunal shall apply the law of the Contracting State party to the dispute […] and such rules of international law as may be applicable."*

So on comparing, it can be deduced that If there is ambiguity not only the BIT between the concerned parties but also in the borrowed BIT, then the Tribunal on its discretion can, use the concerned International and the Domestic Law of the Contracting Parties to that effect.

The concept of self-operation of the MFN Clause does not provide the requisite impetus to initiate the substantive protection of the investments in the due course of their implementation and operation, as it may appear at the primary instance. On the contrary, it rather gives way to the usage of the MFN Clause as an instrument for litigation with the only objective to put forth and build the state responsibility. Had it been opposite to the aforesaid, investors would have, then, initiated a suit, keeping in mind the MFN Clause. Thereafter, the tribunals would have prohibited the automatic operation of the clause upon initiation of the claim.

The more settled dialogue is the expansive application of the MFN clause to receive either a more favorable substantive protection or opt for a more convenient procedural requirement. However, the issue of application of the clause to invoke key treaty definitions from another BIT has received only a negative response from the international investment arbitration judicial agencies. In a nutshell, the MFN clause in BITs does not have an unlimited application. The limited role of MFN clause was clarified in the case of *Vanessa Ventures Ltd v. Venezuela*[28]. In this case, the application of the MFN clause by the party States so as to rely upon and invoke the basic jurisprudential criteria such as treaty definitions of 'investment' or 'investors' from another BIT was checked and rejected.

In fact, in the case of *Société Générale v. Dominican Republic*[29], the tribunal rejected the application of MFN provision on the jurisprudential and foundational concepts and key definitions of the basic treaty.

'Each treaty defines what it considers a protected investment and who is entitled to that protection, and definitions can change from treaty to treaty. In this situation, resort to the specific text of the MFN Clause is unnecessary because it applies only to the treatment accorded to such defined investment, but not to the definition of 'investment' itself.'

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[28] *Vanessa Ventures Ltd* v. *Venezuela,* ARB (AF)/04/6 (International Centre for Settlement of Investment Disputes).

[29] *Société Générale* v. *Dominican Republic*, UN 7927 (London Court of International Arbitration).

5. CONCLUSION

Evidently, MFN cannot be conveniently invoked to expand the key definitions of BITs merely to evade the more onerous responsibility of investor party States. Thus, the more challenging jurisdictional issues do not follow the consistent set of line of application of the MFN clause. In fact, most of the judgments by tribunals rely upon a consistent, common ground of reasoning that the test for application of MFN clause in BITs is whether the provision for which a more favorable standard is sought can be considered a precondition to the BIT being applied.[30]

There is no universal meaning prescribed to MFN clauses but varies according to its contextual application. It is only when the requisite treatment meted out to the investor is not fulfilled, then the claim under the clause can be initiated. Investment Tribunals set a precedent when they interpreted the MFN Clause in such a way that it broadened its ambit on both the procedural and the substantive front. The increased importance of the MFN clause to either create new agreements or delimit the rationae materiae jurisdiction drifts main purposes of substantive protection by MFN to a potent litigation tool by the States. MFN has, thus, become more relevant for the post-breach or post-dispute phase than for the substantive protection of investment itself. The changes in both the substantive and procedural aspects have completely transformed the original stance and the way the MFN Clause was perceived by changing its place and locating it from the arena of international duties of the States which they were expected to follow when they had to deal with the international investments in the process of their establishment and future working and limited it to only an arbitral claim in the field of investment arbitration, completely bereft from the original duty that the State Parties had to comply with under the IIA.

The dim aspect of the application of MFN provision in a basic treaty is that the process of negotiation gets succumbed to the effects of replacement of provisions by the application of the MFN provision. Apart from shaking the general equilibrium of the basic treaty, an unconditional MFN clause also creates legal difficulties due to zero

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[30] Louise Barber, Cart before the Horse: Can MFN Clauses Expand the Key Definitions in Investment Treaties?, *Kluwer Arbitration Blog, available at: http://kluwerarbitration blog.com/2014/09/02/cart-before-the-horse-can-mfn-clauses-expand-the-key-definitions-in-investment-treaties/,* last seen on 15 July 2016.

reciprocity of most favorable treatment by the beneficiary State to the granting State. Thus, the changing paradigm in the purview of application of the MFN provision to BITs, perhaps, demands a sound after-thought. The propositions of renewed importance of conditional MFN provisions with limited, narrow meaning unlike what an unconditional, ever expansive and unchecked MFN provision endorses is not at all a worthless idea. In fact, the general equilibrium of any bilateral investment treaty can only be achieved by either legal bar or a strict judicial scrutiny of the unbridled application of MFN provisions on the touchstone of a unanimously standardized test. One such suggested standard test by the authors of the article is that the application of the MFN provision ought not to compromise with the minimal onerous responsibilities of the beneficiary State entailed in the basic treaty expressly or impliedly while seeking substantive protection or procedural convenience. Although the test is not new to the concept, however, the present legal difficulties caused by the unclear limits to the application of MFN provision require a fresh thought. Also, there is an urgent need to develop the concept of mutual reciprocity to enable the granting State equally enjoy the fruits of such a provision.

[SHORT NOTE]

ADVERSARIAL PROCESS PROBLEMS: THE NEED FOR MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM

- *Anirudh.R*[1]

There are different processes through which disputes can be resolved. The most common dispute resolution process is the "adversarial process". Simply put, we go to court and argue in front of the judge and explain as to why you deserve to win more than the other. This is what is called as the win-lose situation.[2] But it is only fair to point out that this is not an easy process. It is rather a time consuming and an expensive process involving complex procedures to be followed. One has to go through various steps of the process to get the so called *deserved justice* and the final step to achieve this justice is to head to the Supreme Court. Importantly, it would affect relationships of the parties. This is an aspect which many don't give much importance to. While this may be a well-known process, it is definitely not the easiest process. This is one of the sole reasons for why there is a call for other ways to administer justice. Therefore, over the period of years, various alternative dispute resolution processes like arbitration, mediation and conciliation were established.

The problem with the adversarial process is that this it ends up pointing out who is right and who is wrong as per the legal and contractual rights mentioned under the law. But, what this system fails to see is that most often there is a hidden conflict which is masked by an apparent conflict. The adversarial system focuses more on the apparent conflict rather than the hidden conflict. Therefore, it is necessary to ask: Isn't it obvious that for a dispute to occur there must be a reason for why this dispute has occurred in the first place? The true reason for a dispute

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2 DAVIS, DOUGLAS, *MAKE PEACE NOW: FOR GOD'S SAKE, STOP THE BICKERING!*, AUTHOR HOUSE. (2014).

often lies in the hidden conflict. But, this reason in the hidden conflict is rarely addressed in the adversarial process.

For example, say a father and a son together own a partnership firm. But the father seems to dictate terms to the son and this angers the son. Finally, when the son is not able to take orders, he calls for winding up the firm and asks for the profits. Now, if this matter were to go to court, the court can simply order the father to share the profits and then wind up the firm.

The Court would not address the relationship conflict between the father and the son. The Court would instead address the provisions of partnership law and the son's legal entitlement to wind up the firm. Looking further, this case would probably take a long time to get resolved and it may end up at the Supreme Court. It results in both parties spending a lot of money to pay court fees and among others. Importantly, relationships can get strained. And adversarial process will produce a winner and a loser. In a process like mediation, there is a high chance that both parties can achieve a win-win solution without having to strain their relationship.[3]

Mediation is a unique process because it is voluntary meaning which parties cannot be forced into mediation without their free consent. The parties have the option of choosing their mediator. A mediation process can be tailor-made, in the sense, there is no exact procedure which a mediator must follow like a lawyer would be following the Civil Procedure Code or the Criminal Procedure Code etc. Further, non-legal issues (relationship issues, for instance) can be discussed and examined in a mediation process which is not so typical in a judicial process. Mediation process encourages parties in dispute to directly participate through communication and actively make decisions to resolve disputes between each other. In contrast, this is clearly not true with arbitration or a judicial process where only the judge or the arbitrator has the exclusive right to make decisions.

However, this is not to say that there are no risks involved in mediation. Although, it is voluntary, the mediation process can be used as a delaying technique by either party. A party may deliberately delay the process and terminate it after achieving his end. Whatever is said and

[3] Robert M. Cover, "Violence and the Word", *Yale Law Journal,* Vol. 95, No. 1601, 1986.

done in mediation is confidential, however the disclosure made in mediation process can be used by a party to assess strengths and weakness of the other party and to strategize litigation. However, a skilled and an experienced mediator would try to find a way to avoid or minimize these risks. As earlier said, mediation process can be terminated but in contrast, a judicial process or arbitration cannot be terminated unless the parties enter into an agreement.

Mediation aims at identifying the conflict and resolving the conflict rather than faulting and blaming the parties for the mistakes done.[4] It makes the dispute as the problem to be solved rather than making the parties as the problem. This is the reverse concept which happens in the adversarial process which assigns the blame and culpability of the parties. Mediation has the capability to resolve disputes very quickly with the cooperation of the parties. This means that parties can save a lot of time as well as money. The role of a mediator is to facilitate the communication between the parties and not argue for either of the parties or be biased towards one party. A mediator can further bring out the strengths and weakness of their positions in an adversarial process as a means to offer better solutions through mediation. By examining the weakness and the strengths of the parties, a mediator can provide to the parties the BATNA (Best Alternate to a Negotiated Agreement) and WATNA (Worst Alternate to a Negotiated Agreement).

If the situation warrants, the mediator rather looks into the relationship of the parties and the reason for why the relationship is being strained. In many of the cases, two parties enter into the mediation room aggressively but towards the end of the session, both parties may leave satisfied.

In most judicial or arbitration process, parties are often represented by their lawyers and therefore, direct communication between parties is absent. The parties are unable to explain what they really want or why they want something in these processes. But in a mediation process, both parties are communicating with each other face to face which helps both the parties understand what they really need or want.

A mediator asks questions in such a manner that it hits both parties emotionally and mentally. The concept of cross-examination comes in

[4] Lee Jay Berman, "Tools for Resolving Conflict in the Workplace, with Customers and in Life", *BRILLIANT RESULTS MAGAZINE*, November 2004.

an adversarial process. During the cross-examination, a lawyer may pose questions which can be hurtful, accusatory and can potentially affect relationships. In an adversarial process, there is very little room for mistakes and such mistakes can be considerably costly. But, in mediation, mistakes are not as damaging or expensive when compared to the adversarial process. In fact, there is a need for the parties to open up and communicate more to resolve the dispute. In the case of mediation, the mediator does not cross-examine and only encourages the parties to communicate and address the conflict. If at all a mediator is to ask questions, it would be to resolve a dispute and to arrive at a win-win solution.

A feature of mediation is to make the parties trust the mediator and in turn they are more comfortable in explaining the problem. Comfort of the parties is not an objective in the adversarial process. In mediation, the mediator is required not to use harsh words and it gives the mediator a duty to explain this aspect to the parties as well. This factor is absolutely necessary to make the process smooth.

But imagine if the mediation process is able to assist in resolving a number of disputes which, in courts, would take years to adjudicate. This could also mean another thing. If the mediation process is able to assist in resolving many disputes, several cases which go to the court will decrease. This also means that the cases which come to the judges can be efficiently handled by them. Mediation is flexible enough that parties can choose the mediator and ultimately the decision making is in the hands of the parties. But, in the case of a judicial process parties do not have the right to choose a judge nor have a say in the decision making. Although, in arbitration, the parties have the right to choose an arbitrator, the parties do not have control over the decision maker.

To look at the procedural part of mediation, it always begins with the point of the mediator introducing himself before the parties. Sometimes, the party will not require the mediator to explain this part, but as a procedure to make the process smooth and flexible, he will be required to provide the introduction to the parties. As a mediator, it is his or her duty to make both the parties as comfortable as possible and to gain their confidence in him. This enables the parties to provide more information than what they would have done if they were in court.

But what happens if some kind of information which was told in mediation was used against one of the parties, supposing the mediation

does not work. This is one of the essential attributes of mediation. Confidentiality is one of the most valued aspects in the mediation.[5] And similarly, the mediator, as well, is bound by this factor. The mediator cannot be asked to come to court and testify against one of the parties. This is again to point out another feature of mediation.

But can a dispute be solved in different ways? Is there only one answer to the dispute? Is it only the law which we need to follow to solve a dispute? This is true if the parties are to pursue the judicial process. But in the case of mediation, there are different ways of looking at a conflict. If the problem comes to a court, *what will the court do*? They look at precedents or look at the provisions of a particular law and hence give a judgment. But, in the case of mediation, a mediator has so many ways of assisting the parties to solve the disputes because, on communication, he would understand that there is an underlying conflict rather than an apparent conflict. He could find ways to solve a problem. This method is also known as the *lateral thinking method*. This method asks us to think out of the box. For instance, if there is a glass and paper with a small hole. The question is: *how do you push the glass through the hole without making the hole bigger or without breaking the glass*. A more realistic example is: "*Who does the orange belong to?*" In a court, the lawyers and the judge would try to ascertain on who is entitled to this orange. But, in a mediation process, a mediator would try to find out why the parties want the orange. The mediator soon finds out that one party wants the peel of the orange while the other party wants the pulp of the orange. And as simple as that, both parties get what they want. This is the win-win situation which a mediator aims at getting. You just have to think outside the box to get the answer. This is something which seems to be lacking in the adversarial system.

But, it all diverts to one question. *What kind of cases can be resolved through the mediation process?* The case of *Afcons Infra v Cherian Varkey*[6] provides for the kind of cases that cannot be approached through the mediation process. They include issues ranging from criminal offences, serious fraud or coercion cases to disputes concerning election to public offices. But strictly speaking, these are not to be taken as a criterion or a

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[5] CIArb, *Practice Guidelines: Confidentiality in Mediation* (September 7th, 2007), available at <https://www.ciarb.org/docs/default-source/practice-guidelines-protocols-and-rules/1-guidelines-on-confidentiality-in-mediation.pdf?sfvrsn=2> (last accessed on 6th July 2016)

[6] *Afcons Infra v. Cherian Varkey*, Civil Appeal No. 6000 of 2010.

requirement for a dispute to be considered in mediation. But, it is important to note the point that anything that is going against public policy should not be entertained through mediation. In fact, earlier in a case, a court in India referred a rape case for mediation but later the Supreme Court refused to accept this judgment and ordered that rape cases cannot be sent to mediation.[7] But, if in the mediation process, if the parties are being very uncooperative or has confidential information which is likely to affect the other party if not disclosed, the mediator has the right to send this case back to court.

From the above pages, the very concept of mediation has been explained and why there is a need for mediation as an alternative dispute method. But, it is necessary to discuss about the mediator's characteristics, his role as well as the lawyer's role in mediation.

A mediator, as earlier said, is supposed to be impartial in mediation process. This specific characteristic is a similarity between this process and the adversarial process. But, out of all this, the mediator must make sure he facilitates communication which involves *asking the right questions at the right time*. While, this may be commonly heard and is often not given much thinking about, *active listening* is one of the most important requirements for a mediator. If there is no listening on his part, he very often asks the wrong questions to the parties. The other requirement is that a mediator is not to do *reactive listening*. The mediator's job is to facilitate communication between the parties. It is not his duty to take decisions on their behalf. The main problem with reactive listening is that *mediators sympathise and not empathise*. Sympathy often leads to giving preference to one party's opinion over another. For instance, in the father-son partnership example, a mediator is not to sympathise with the son or the father by either saying that *the father should not have bossed around, is this how a father should be? Or the son should get used to it because it is after all his father*. This is a main problem which mediators must step away from.

But what can a mediator do if the mediation process has reached an impasse?[8] Remember the time when the concept of *think out of the box* or several solutions is possible. This is the right point to use these concepts

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[7] Utkarsh Anand, "Supreme Court says no to Compromise, Mediation in Rape Cases", *THE INDIAN EXPRESS*, 8 July, 2015.

[8] JOHN. W. COOLEY, *THE MEDIATOR'S HANDBOOK: ADVANCED PRACTICE GUIDE FOR CIVIL LITIGATION* (2nd ed. 2006) p. 241.

in mediation. When the parties have reached a stop and that the parties don't agree anymore on an agreement, the mediator can attempt to brain storm more ideas and solutions for the parties which the parties can look into. The mediator may, however, bring out another technique to make the mediation proceed. The mediator may ask both the parties for the best alternative to a negotiated agreement and the worst alternative to a negotiated agreement. This can help the parties to settle somewhere in between both of their alternative agreements. These are simple characteristics and the role of mediators.

An interesting question is *what would be the role of lawyers during the mediation process*? A lawyer is not only useful during the mediation process but even before the mediation process has begun. The lawyer can explain to his client about this process and therefore, this allows a client to participate in this process in much more consistent way. A lawyer can advise the client on the timing of the entry into mediation process.[9] A lawyer can contribute to the mediation process by highlighting the strength and the weakness of the client's position. Further, a lawyer can assist the client as well as a mediator by coming up with the *Best Alternate to Negotiated Agreement* and the *Worst Alternate to Negotiated Agreement*. This allows the client to arrive at an informed decision. Further, a lawyer can advise the client on substantive law to widen the scope of solutions to resolve the conflict.[10] In most cases, the parties seem to trust their lawyers. So, when two parties approach a third party (the mediator), they require the trust of this third party. But, if they are with their lawyers, the parties are more confident in most scenarios and hence cooperation can be achieved.

But amongst all these characteristics, there are always problems with the lawyers alongside the parties. One reason is that very often the lawyers argue for what they want rather than what the parties want. This reason makes the process much harder. Second reason is that there have been several criticisms towards mediation by lawyers themselves because they believe that this process disrupts a lawyer's profession. The third reason is that lawyers sometimes refuse to cooperate with the mediators. But, it is always safe to say that nothing is without its own limitations.

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[9] Geetha Ravindra, "Role of Attorneys in Mediation Process", American Bar Association available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/role_of_attorney_in_mediation_process.authcheckdam.pdf. (last accessed on 1 July 2016).

[10] Ibid.

This finally concludes to the point of negotiations and hence settlement. For the mediation process to be concluded it can be terminated at any point of time by the parties or they can head towards negotiation and settle thereafter. If negotiation does happen, it needs to be in writing. There needs to be a mediation report made by the mediator and a mediation agreement which states the *what, when, how, who and whom*. And of course, the agreement should be enforceable. But, if closely noticed, there is no *why*. The reason is to recollect the earlier paragraphs. It was said that aim of mediation is to solve the conflict and not the person themselves. It is not to say why the parties have agreed to settle. But, it is important to remember this point as well. A party can leave at any point of time because it is voluntary. So, a party is at the liberty to leave even before a page in the agreement is not signed. While, this has been a problem before, it is still fair to say that such situations have been rare. Although, mediation is voluntary, in some jurisdictions, there exist precedents where mere refusal to participate in alternate dispute resolution processes or where the outcome is no better off than the offer arrived at during mediation can be subjected to sanctions including cost sanctions.[11]

But, to finally put this to rest, it is necessary to remember that reaching a settlement is not the only thing mediation aims for. But, it is to see if they have left satisfied and their relationships have been secured.

One of the best mediators in India once told that a good mediation is when the parties, after settlement, ask the question: What did the mediator do?

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[11] *Halsey* v. *Milton Keynes General NHS Trust ETC*, Civ. 576 EWCA [2004].

[CASE COMMENTS]

EROS INTERNATIONAL MEDIA LIMITED V. TELEMAX LINKS INDIA PRIVATE LIMITED- A STEP AHEAD?

- *Vidhi K. Tiwari* & Suman Shetty***

ABSTRACT

The expansion of global trade in the commercial world is the most vital contribution in the factum of preference of arbitration over other adjudication methods. This aspect is not fully developed in India and hence embodies many questions of law unaddressed. One of such questions is regarding arbitrability of Intellectual Property Rights. The Bombay High Court in its significant pronouncement recently held that, in the presence of an arbitration clause in a contract, the disputes arising out of the same involving rights in personam are amenable to arbitration. The Court while delivering the verdict focused on the remedy sought by the parties and as a result gave a distinct approach towards the issue. This commentary proceeds by laying out the facts of the case, identification of the key issues and stating the judgment passed by the Court. In this commentary, an attempt is made by the authors to critically examine the verdict on jurisprudential premises and difference with respect to the existing approach. To conclude with, the authors have made a comparison with the practice followed in different countries in contrast with probable Indian approach.

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1. INTRODUCTION

On 12th April, 2016, a single judge bench of the Bombay High Court in a landmark decision upholding the arbitrability of trademark and copyright infringement claims arising out of Commercial Contracts held that, Intellectual Property rights though specials rights are a species of property rights which relate to actions *in personam* and thus are arbitrable in nature.[3] This verdict laid down a different notion from that of Supreme Court and other High Courts with respect to arbitrability.

2. LEGAL HISTORY AND EVOLUTION OF ARBITRABILITY OF IP INFRINGEMENTS

Arbitration in India is not a new trend. The decisions regarding arbitrability of matters have been subject of discussion in Indian courts on many occasions. The issue was addressed in many cases by different High Courts and each of them has expressed different view. The method of adjudication through courts was majorly replaced by alternative dispute resolution methods especially after 2002. One of the major reasons for the change in trend was the enforcement of TRIPS and amendment in Civil Procedure Code. The discretion of referring a matter to alternative dispute resolution methods was conferred upon the courts through enforcement of section 89 of the Civil Procedure Court. An appreciated response can be seen in the statistics where in more than 300 cases were adjudicated by the Supreme Court in a short duration of 2004-2007. Similarly, Delhi high Court adjudicated over 600 cases.

The matter of arbitrability of matters got an opportunity to be adjudicated by the Supreme Court. Few cases where the subject of arbitrability was dealt by the various courts are *K. E. Burgmann A/S v. H.N. Shah and Ors.*[4], *Hero Eco Tech Ltd. And Ors. v. Hero Cycles Ltd. and Ors.*[5], *Ram Krishan and Sons Charitable Trust v. Shaurya Educational Institute /Society and Ors.*[6] and *R.K. Productions Pvt. Ltd. v. M/s. N.K. Theatres Pvt.*

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3 *Eros International Media Limited* v. *Telemax Links India Pvt. Ltd. and Ors.*, Notice of Motion No. 886 of 2013 (Bombay High Court, 12/04/2016).

4 *K. E. Burgmann A/S* v. *H.N. Shah & Ors.*, 2011(4)ArbLR248(Delhi)

5 *Hero Eco Tech Ltd. & Ors.* v. *Hero Cycles Ltd. and Ors.* MANU/DE/1075/2016.

6 *Ram Krishan & Sons Charitable Trust* v. *Shaurya Educational Institute/Society*, (2011) 1 ArbLR 34(Delhi).

Ltd.[7] In all these matters courts gave decision on various subject matters regarding arbitrability of matters including Trademark, Patents and others. However the first landmark case in which an effort was made by the Supreme Court was *Booz Allen Hamilton v SBI Home Finance*[8]. Bombay High Court has recently refused to follow the test laid down in the Booz Allen Case in two cases. *Booz Allen* case laid down a test which was the first and only instance where Supreme Court dealt with the matter of arbitrability criteria. The court had laid down the test on the basis of the nature of right in question. It stated that right *in rem* can't be adjudicated through arbitration. Only disputes relating to violation of right *in personam* can be adjudicated through arbitration.

The court went to ahead to explain the jurisprudence behind the concept of right *in rem* and right *in personam*. It held that right *in rem* is concerned with a particular thing or status which makes that right enforceable against the world at large whereas a right *in personam* is enforced against a person. Traditionally, right *in rem* can't be rendered arbitrability because of a reason that it is a right available as a member of civilized society and hence can't be restricted to a method where society can't get involved. However, if a matter is interconnected between both right *in rem* and right *in personam* it may be arbitrable. Hence a matter involving infringement of rights can be arbitrable if there involves a breach of contract. Court provided a non-exhaustive list of matters where arbitration is not possible due to the gravity of matter. Few of them are family disputes with regards to the determination of status of a person, guardianship, constitutional matters etc. The court also observed along with above reasoning that the rule is not inflexible. Arbitrability of sub-ordinate rights which arise from ambit of right *in rem* is non-disputed. The crux of test lies on the nature of the right in question and action taken by the parties.

Bombay High Court has given different notion to the whole question of a matter being arbitrable. In case of *Rakesh Kumar Malhotra*,[9] it gave a verdict that if the nature of the relief sought was taken into consideration the matter would not be arbitrable which was not a factor of consideration in application of *Booz Allen* test. Hence a case of oppression and mismanagement would be arbitrable due to the actions

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7 *R.K. Productions Pvt. Ltd.* v. *M/s. N.K. Theatres Pvt. Ltd.,* (2014) 1 ArbLR 34 (Madras).

8 *Booz Allen Hamilton* v. *SBI Home Finance*, (2011) 5 SCC 532.

9 *Rakesh Kumar Malhotra case*, (2015) 192 CompCas 516(Bom).

which are specifically taken be the company which affects the interest of shareholders if *Booz Allen* test was applied. The reasoning given was that the relief sought is *in rem* and not *in personam*. In such case, the method of arbitration would be ineffective. Court gave an illustration of Companies Act 1956, where due to lack in capacity of the arbitration authority to grant relief under Sec 402 of the same. Bombay High Court focused on the relief sought which made its verdict differ from *Booz Allen* approach.

Once again in the present case, the Bombay High Court got an opportunity to adjudicate the matter in context of the intellectual property rights.

3. BACKGROUND OF THE CASE

The Hon'ble Supreme Court in *Booz Allen* case[10], while deliberating on the term 'arbitrability' held that, the term has a contextual meaning and there are several facets of arbitrability which relate to jurisdiction of the arbitral tribunal. The court observed the facets as, whether the dispute is capable of arbitration, considering the nature of the dispute whether it can be resolved by a private forum or it falls within the exclusive jurisdiction of a court and the most vital, whether the dispute is covered by the arbitration agreement. The arbitral tribunal is a private forum chosen by both the parties for settlement of disputes and every commercial dispute even though contractual or non-contractual, is amenable to be adjudicated and resolved by an arbitration tribunal unless the jurisdiction of the tribunal is excluded. The Court further observed that except certain cases relating to right *in rem*, which are mentioned in the statute as non-arbitrable, other cases which are actions *in personam* are arbitrable in nature.

The Bombay High Court in the present case referred the above discussed case and deliberated on arbitrability of suits relating to actions *in rem* and *in personam*. The Court looked into other authoritative decisions and delivered the judgement in favour of the defendant which will leave no room of doubts in the minds of such parties with regard to the arbitrability of disputes relating to rights *in personam*.

[10] Supra *note* 6.

4. FACTS OF THE CASE

The plaintiff, who was a producer, distributor and exhibitor of several feature films through various media and various modes, had assignment, exclusive licenses and copyright on several feature films. In March 2012, the defendant had approached the plaintiff for grant of content marketing and distribution rights in respect of its films for which it offered ₹ 1.5 crores as a non-refundable minimum guarantee amount. Considering the defendant's sufficient expertise in the business of content distribution to manufacturers, on June 2012, a term sheet was executed between the parties. The term sheet contemplated an exclusive licensing contract along with the execution of a 'Long Form Agreement' which would replace and override the terms and conditions stated in the term sheet. Prima facie the arbitration clause refers to disputes arising out of the Term Sheet and does not limit to disputes arising out of the Long Form Agreement. The plaintiff had filed a suit for copyright action under section 62 of copyright Act [11] claiming exploitation of the copyright by the defendant and challenging the arbitrability of the dispute.

5. ISSUES BEFORE THE COURT

The key issues for adjudication before the court were:

5.1. Whether the Copyright Act ousts the jurisdiction of the Arbitration Panel?

5.2. Whether a copyright infringement claim is an action *in rem*?

5.3. Whether the dispute is of a contractual nature?

6. CONTENTION OF THE PARTIES

6.1. Key Arguments placed by the Plaintiff:

[11] Section 62, of the Copyright Act, 1957.

The plaintiff contended that a copyright infringement claim is inherently a non-arbitrable dispute, as it is not a right which purely arises out of a contract and hence there should be a finding on whether there is a copyright infringement and such adjudication is only within the sphere of the court. To substantiate this argument, the counsel relied on *Management of Montfort Committee of Senior Secondary School*[12] case, when a statute provides for a right and a remedy, it is an exclusive remedy and on such a matter the jurisdiction of the Civil Court cannot be ousted. Further relying on the decision in *Steel Authority of India Ltd.*[13], the counsel contended that a suit for relief in infringement of copyright is not within the jurisdiction of the Arbitrator, disputes relating to copyright infringement and passing off are non-arbitrable the reason being that these are actions involve rights *in rem.*

6.2. Key Arguments placed by the Defendant:

The defendant contended that there is no specific bar on arbitrability of a dispute relating to copyright infringement, disputes mentioned in the Term Sheet and the Arbitration Agreement are amenable for arbitration. The counsel for the defendant referring to the decision in *Booz Allen,*[14] submitted certain cases which are non- arbitrable in nature and argued that the present dispute does not fall within the ambit of such cases. The dispute does not involve actions *in rem,* the reason being that the remedies sought are claims against an individual which are *in personam*. The counsel relying on the judicial pronouncement by the Hon'ble Supreme Court in the case of *V.H Patel & Co.*[15], contended that the power of an arbitrator to decide a dispute depends on the arbitration clause in an agreement. Based on the above submissions, they argued that the arbitrability of a dispute cannot be ousted in the presence of an arbitration clause.

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12 *Management Committee of Montfort Senior Secondary School* v. *Shri Vijay Kumar and Ors.*, AIR 2005 SC 3549.

13 *Steel Authority of India Ltd.* v. *SKS Ispat & Power Ltd. & Ors.*, www.indiankanoon.com, https://indiankanoon.org/doc/187619824/, last seen on 31/07/2016. Citation not provided

14 Supra 1.

15 *M/s. V.H. Patel and Company and Ors.* v. *Hirubhai Himabhai Patel and Ors.*, (2000) 4 SCC 368.

7. JUDGEMENT

The petition was dismissed by the Court. Based on the below mentioned reasoning the Court rejected the contentions by the plaintiff and upheld the arbitrability of the dispute.

7.1. Section 62 of Copyright Act does not oust the jurisdiction of Arbitral Panel:

The Court after analysing section 62 which corresponds with section 134 of Trademarks Act[16], rendered that the interpretation of the text does not propose ousting the jurisdiction of an Arbitration panel on disputes of infringement or passing off. The bench observed that even though Intellectual Property rights are special rights conferred by statutes, but they are a species of property and there is no material distinction between the proprietor of a mark and the owner of a land. These provisions do not propose to infer any exclusivity of a court on finding of a copyright infringement, which is a fact finding and an arbitration panel is capable of the same.

7.2. Suit is not an action In Rem:

The Court while adjudicating the second issue, held that the action in a copyright infringement and the remedy sought are *in personam*, the reason being that a proprietor holder of a copyright and an owner of a trademark have a right against the world at large, a claim for copyright infringement is against an individual and only binds that particular party. The Court held that the suit is *in personam* as the remedy sought is against a particular party.

7.3. Dispute in question is purely Contractual:

Once it was settled that the suit filed is an action *in personam*, the Court went on further to ascertain the arbitrability of the dispute. The Court accepted the defendant's contention that the dispute arises out of the Term Sheet and is of a contractual nature, an arbitrator has the same powers as a civil court has and the relief sought by the plaintiff is of damages and injunction which can be well granted by an arbitrator. Further, the Court discussed the decision laid down in *V.H Patel &*

[16] Section 134 of the Trade Marks Act, 1999.

Co.[17], wherein the arbitrator issued an injunction restraining others for the use of trademarks, the award was never challenged on account of non-arbitrability of a trademark dispute and the Supreme Court upheld the arbitration as competent. The Court relied on the principle laid by the Hon'ble Supreme Court in the case of *Booz Allen*[18], held that when there is a contract between the parties to refer disputes arising out of the same, to a private forum there is no question of the disputes being non-arbitrable.

8. CRITICAL ANALYSIS OF THE JUDGEMENT

Justice Patel delivered the judgement that the matter at hand concerning copyright disputes. The rationale behind the judgement in this case was based on the nature of remedy sought. The reasoning behind the judgement can be divided into three parts. First part would consist of the upholding of that any remedies available on the part of claimant can't be taken away by an arbitral tribunal in case of copyright disputes. Second part would be the reasoning that the right between two claimants for actions regarding passing off or infringement of copyright or trademark will always be action *in personam* and the remedy sought will also be *in personam* and not in rem. Third extraordinary rational upheld was that holding otherwise would create different other repercussions in terms of commercial transactions.

It is respectfully submitted that the judgement given has few flaws. The distinction made was on the basis of nature of the rights. The difference between right *in rem* and right *in personam* was the basis of the verdict. The explanation given by Salmon is the jurisprudential reference which can be made to understand the incoherency in present situation. The classic text on jurisprudence by Salmond explains the origin of right *in rem* and right *in personam* has been a derivation from action *in rem* and action *in personam*. Action *in rem* was to be understood as the restoration or recovery claim made by a plaintiff. It can also be called restoration of status. Action *in personam* refers to a claim for enforcement of a certain obligations against the defendant. Action *in personam* generally included payment of money, specific performance of a contract etc.

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[17] Supra *note* 6.

[18] Supra *note* 1.

8.1. Jurisprudential Analysis:

Salmond made further distinction in terms of the scope of enforceability. He states that a right *in rem* can be enforced against the world whereas right *in personam* can be enforced only against a specific person. In other words, a right *in rem* endures a liability on the world at large and a right *in personam* is protection of interest against on specific person. The influence of this distinction is very evident in all legal systems. If a conflicting situation occurs then law prefers right in rem. Protection against world at large prevails over against few specific persons. Drawing the analogy, Rights of an intellectual property holder can be considered to be more valuable. [19]

If a related remedy is unavailable, the entire concept of right *in rem* ceases to hold ground. It results in being meaningless. It is can't be said to be justified to confer a person with a right against world which can't be enforced. A person may have rights related to a property against the world at large and it is not correct to say that the enforceability can be restricted to only a few.

Rights have been categorized on many bases and one of them is it being right *in rem* or right *in personam*. Intellectual Property rights have been considered to be right in rem. The reason of the same is because such rights bind third parties. These are enforceable against world at large. Law confers certain exclusive rights to the intellectual property right holder. This right confers validity to an action which arises from violation of such rights by any person who does not have authority of law. Arguments have also been made that if intellectual property matters were governed by the concept of ownership then contractual performance containing infringement can also be resisted.[20]

It has also been argued that if an unauthorised interfering/infringing act can be resisted by virtue of the ownership status, then the performance of a contract which constitutes or contains such an infringing act, can presumably also be resisted on the same basis.

The Hon'ble court overlooked the authorities which were present to prove that intellectual property rights are right in rem. No reference has

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[19] Fitzgerald, *Salmond on Jurisprudence*, 12th ed.., 235, Universal Law Publishing, Delhi

[20] A. Rahmatian, 'Contracts infringing intellectual property rights', Intellectual Property Quarterly, Vol. 444, 4, 2003.

been made to the existing Madras High Court precedent *Super Audio Madras P. Ltd. v. Entertainment Network India (P) Ltd.*[21] where sound reasoning was given that copyright related rights are right *in rem* and not *in personam*.

8.2. A Comparative Analysis – Approach by Different Countries:

Arbitration in intellectual property rights is not an alien concept on international level. It can be said to be a by-product of convenience that intellectual property related disputes are considered to be arbitrable in most part of the world.

If we take example of United States of America, there is a law backing the issue of arbitrability of intellectual property law. Though this law codified under 35U.S.C. § 294 only covers patent disputes. For copyright related disputes, reliance can be placed on few case laws decided by various courts. Most prominent reference would be made to the *Kamakazi Music Corp. v. Robbins Music Corp.*[22], where it was held that copyright disputes can be considered to be arbitrable. Exception was made in this case only with regards to the disputes where validity of copyright was not part of the issue in question. There are other verdicts to uphold the same.[23] In recent trends courts have gone to the extent of allowing arbitration in copyright matters despite the validity being an issue if matter gets its extension from a licence suit. Remedies were also given consideration on a few occasions.

Supreme Court of Canada has upheld the view that copyright issues are arbitrable in nature only if the orders do not create liability on any third party.[24] Similar position has been upheld by English courts.[25] If we refer to legal situation of arbitrability in Switzerland in case of Intellectual Property related disputes, the general notion is in favour of arbitrability of issues especially related to copyright.

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21 *Super Audio Madras P. Ltd.* v. *Entertainment Network India (P) Ltd.*, (2011) 1 LW 611 (Mad).

22 *Kamakazi Music Corp.* v. *Robbins Music Corp.*, 684 F.2d 228 (1982, 2nd Circuit).

23 *Saturday Evening Post Co.* v. *Rumbleseat Press, Inc.,* 816 F.2d 1191, 1198-99 (1987, 7th Cir.).

24 *Desputeaux* v. *Éditions Chouette,* [1987] Inc. 2003 SCC 17.

25 MUSTILL & BOYD (2001).

Arbitrability issue of Intellectual Property rights has never been adjudicated by Singapore court. The expansion of ambit of intellectual property rights to the arbitration would require examination of governing laws regarding. However, given the expansion of international trade and commerce Singapore is most likely to follow the approach of the United States.

9. CONCLUSION – THE INDIAN SCENARIO

Based on the interpretation given by the Supreme Court and Bombay High Court it can be inferred that there are two tests to decide matter of arbitrability of any issue. The test given by the Bombay High Court has been already critically examined. Examining the alternative Booz Allen test it is respectfully submitted that it has a disadvantage on technical levels. A party can pray for a relief which is outside the power of the arbitrator. The Bombay High court has expressed its concern regarding malafide intentions of the parties if such a generic test was applied.[26] Moreover, the emphasis to prove the malafide intension becomes very heavy to carry for one party. In addition, determination of enforcement of the clause governing arbitral process is a very difficult prospect. The factum of proving the prime arbitrability of the relief sought by one party falls on the other party which is unfair being against the basis of arbitration which is agreement.

Booz Allen approach has two main flaws in application. First is its generic nature which leaves many issues unaddressed. Another problem is when the relief sought is by nature arbitrable but if the nature of rights were relied upon, it becomes conflicting. Supreme Court itself has accepted that this test can't be applied as a rigid rule. However, both the test remains equally ambiguous in different contexts. This unbalanced set of approach leaves boundaries of arbitration uncertain.

[26] Supra *note* 7.

RICK V. BRANDESMA- LESSONS IN FAMILY MEDIATION WHERE SPOUSE IS MENTALLY UNSTABLE

- *Mayank Samuel*[*]

ABSTRACT

The author has studied the judgment of the Supreme Court of Canada in Rick v. Brandesma, a divorce dispute, where the Settlement agreement entered into between the parties was challenged on grounds of unconscionability. The settlement agreement in question was formulated and agreed upon by the parties in the course of mediation with two different mediators. The author has used this case to comment upon mediation in family disputes where one of the parties is mentally unstable; the wife questioning the validity of settlement agreement in Rick was a victim of domestic violence and suffered from mental infirmities.

The main analysis can be divided into two parts; while the first part defines the mediator's approach in similar cases to ensure that each party gets what is right amicably, the second part can be further divided into two heads- firstly, mental capacity of parties to mediation and secondly, making mediation more accessible to people with mental illnesses. The paper concludes with a small paragraph on the job that family mediators can do to keep the children unaffected and untouched from the tussle which ensues between their parents.

The paper aims to generate awareness in the Indian mediation academia by taking cue from the failure of mediation in family dispute in a country which has made it a crucial part of its dispute resolution mechanism.

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1. INTRODUCTION

Rick v. Brandesma is a 2009 Canada Supreme Court (SC) judgment on the distribution of family assets and the element of unconscionability which crept in the separation agreement entered into by the husband and wife. This matter, coming on appeal from the British Columbia Court of Appeal, involved mediation to give effect to the parties' intent to divide their assets equally; however the husband, aware of his wife's fragile mental health, provided misleading financial information during mediation ultimately resulting in unequal asset distribution. An instance of mediation failing to fulfill its real purpose-achieving finality in the dispute-blame can easily be attributable to the experienced, commercially astute husband who concealed material information; however there are lessons to be learnt as a mediator from this case.

1.1. Facts:

The parties in this case, married for 29 years with five children, had acquired a dairy farm together along with other real property and vehicles. On divorce, the parties hired their respective lawyers and engaged the services of a mediator for negotiations on the separation agreement. During mediation, the husband provided false information on assets and liabilities of the dairy farm for asset distribution. As per the MoU prepared by the mediator, the husband was to keep the dairy farm businesses while the wife would receive the family house and a sum of $750,000. On repeated requests by the wife's lawyer, the husband provided the Form 89 financial statement during the fall of 2001 when mediation commenced with a second mediator. The Net Asset Value (NAV) of Brandy Farms as per the statement was a value approximately $300,000 higher than the value presented in the first mediation, which was used to arrive on the $750,000 equalization payment. A second MoU was then agreed upon and signed by the parties in October 2001; however no substantial amendments were made therein. The wife also informed the second mediator about her two-pronged approach, that first she would sign a separation agreement to meet her basic needs and subsequently, obtain justice. A year later, in March 2003, the wife sought to set aside the separation agreement on grounds of unconscionability and misrepresentation and subsequently, claimed relief under Section 65 of the Family Relations Act.[2]

[2] *Family Relations Act* 1996, s.65, (Canada).

The agreement was found to be unconscionable in the Trial Judge's opinion since the husband had deliberately concealed crucial information concerning the farm's net assets during mediation, taking undue advantage of the wife's fragile mental health of which he had prior knowledge. In spite of the parties' express intent to divide their assets equally, misrepresentation on the husband's part meant that the resulting equalization payment failed to meet the requirements under British Columbia's Family Relations Act. The Trial Judge after considering the peculiar circumstances of the case awarded the differential amount to the wife. The Court of Appeal reversed this finding to conclude that even though the wife suffered from mental infirmities, it had been effectively compensated for by the availability of a counsel to assist her throughout the process. However, the Canadian SC reversed this finding and agreed with the Trial Judge's observations while allowing wife's appeal, acknowledging the special care that needs to be taken in distribution of assets arising from a former relationship so that the same is free from informational and psychological exploitation. [3] Since the present agreement is in substantial deviation from the objectives enshrined under the Family Relations Act, the same was held to be unconscionable and hence, unenforceable by the SC.

2. BACKGROUND

Under the Canadian law, the spouses have been given the freedom to enter into separation arrangements like spousal support and asset division on separation; however the judiciary intervenes when such an arrangement is unfair to one of the spouses. *Rick* was one such instance of judicial intervention in an otherwise private affair, where the SC appreciated the difference between a separation agreement and commercial contract in terms of the power relations and gender vulnerabilities. There are no hard-and-fast guidelines determining grounds for judicial intervention in a separation agreement; however the spouses' financial position, power dynamics and informational access are some of the relevant factors which the courts generally look into. In *Rick*, the Canadian SC gave two reasons for declaring the separation agreement unconscionable[4]:-

[3] *Rick* v. *Brandsema*, 2009 SCC 10 (Supreme Court of Canada).

[4] Ibid.

i. Husband taking undue advantage of wife's mental troubles.

ii. Husband concealing material information about finances.

This case is peculiar and thus, requires a second look for another reason. Breakdown of spousal relationships is a time of intense emotional, mental and personal turmoil, which might leave both the husband and wife extremely vulnerable.[5] The situation worsens when there are inherent power imbalances in the relationship. Keeping this in mind, the Canadian SC in *Miglin*[6] recognized the need to treat separation agreements differently from commercial contracts which are often negotiated between parties of equal strength.

The courts have tried to limit their intervention in private matters by giving way to negotiations between parties to arrive at a mutually amicable solution. However, what has happened more often than not in these negotiations is a blatant suppression of the woman's interests due to various socio-economic factors which shape gender roles in the modern world.[7] For instance, a wife in order to maintain a cordial relationship with her children and in some cases, the separating spouse may not take a rigid stance regarding her property and other rights to which she is entitled. It is here that the role of the mediator assumes paramount importance; he, as a neutral, unbiased third party, has to ensure that the weaker party in negotiations isn't bogged down by the gender and family dynamics and is freely able to assert his/her position.

Will is one of the core concerns of contract law; the will theory is based on the notion that contractual duties become binding on a person as they have been freely assumed by him/her. Hence, 'free consent' of both parties is one of the essentials for a valid contract, that is to say parties must agree upon the subject matter of the agreement in the same sense. The law further infers that any agreement induced by fraud, misrepresentation, coercion or mistake would fail to satisfy the 'free consent' test; such contract will be a voidable contract. It is very important to ensure that the separating spouses fulfill their duty of

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5 Ibid.

6 *Miglin* v. *Miglin*, 2003 SCC 24 (Supreme Court of Canada).

7 Case Comment: Rick v. Brandsema, Separation Agreements and Rural Women', OWJN, available at http://owjn.org/owjn_2009/component/content/article/44-rural-women/319-case-comment-rick-v-brandsema-separation-agreements-and-rural-women, (last accessed 24 July 2016).

providing full and honest disclosure of all relevant information to the mediator. At the same time the mediator should, in order to ensure finality in such disputes, keep persuading the parties to divulge by posing questions time and again; this is also important in order for the settlement agreement to become a legally enforceable contract.

A meeting of minds of the parties is of utmost importance in such cases, to ensure that both parties divide their assets equally through a judicious application of their mind, without any constraints of fear, hesitation or gender dynamics. Where misrepresentation happens pertaining to the financials of a company during negotiations over settlement agreement, it becomes impossible to conclude a bargain acceptable to both the parties, which ultimately hampers the finality of a dispute

All facts in a nutshell, the separation agreement entered into between the separating couple was questioned by the wife on the ground of misrepresentation by husband in the financial statements of the dairy business. She is also mentally unstable and hence, as observed by the Trial Judge and subsequently affirmed by the SC, the wife can't understand the commercial nitty-gritties. Precisely this was sought to be exploited by the husband during negotiations, which ultimately led to the judiciary intervening in the wife's favor. In this factual background, the author seeks to explore the ideal approach for the concerned mediator in similar circumstances specifically, and generally in instances of misrepresentation by any/both spouse(s).

3. MEDIATION WITH THE MENTALLY UNSTABLE- LESSONS FROM *RICK*

Mediation, one of the mechanisms of Dispute Resolution, is widely used in family law and property cases in India and throughout the world. It is a process where the separating spouses, either alone or along with their lawyers, meet a neutral facilitator (mediator) to resolve their conflict amicably. The author decided to study *Rick* for two reasons, first, it is different from other mediations in the sense that the wife herein was mentally unstable; hence the circumstances and subsequent judicial intervention on grounds of informational and psychological exploitation are peculiar. Second, the case provides an opportunity to argue for making mediation equally accessible for the mentally challenged. Mediators aren't exactly best-equipped to decide whether a party has the

mental capacity to participate in mediation, hence it is mostly a value-based judgment. However before making such judgment, it is absolutely essential to have an accessible mediation practice, that is to say, a mediator should discuss the access needs with parties suffering from mental disorders before the commencement of mediation.

Before moving on to the main discussion, it is necessary to bring to the reader's attention that the author doesn't intend to examine the SC's decision or opine if the same was right or wrong. The present case has been studied to the extent of picking up relevant facts for the purposes of this paper and the reasons for judicial intervention, since it essentially pointed towards the failure of mediation in the present dispute. The author intends to use the facts of this case as a stepping stone to formulate guidelines for mediators mediating in similar cases, while also placing due reliance on personal experience and limited literature available on this issue.

The first most important thing for the mediator to understand in such cases is the emotionally charged environment following the disintegration of a marriage which forms the backdrop for the negotiation of the separation agreement. Since mediation, post-split, would be the only place where separating spouses would sit down across a table, it would quite often lead to expression of emotions and frustration from both sides. At that time, it becomes extremely important for the mediator to provide a controlled environment for such discussions, since excessive show of frustration by one party might deter the other from negotiating, which will ultimately be a failure of mediation. Such an environment would also ensure that the underlying concerns of the parties are discussed freely which would provide the mediator with an improved perspective of the dispute.

The mediator's role is to facilitate the information exchange between parties as well as explore the various settlement alternatives after identifying the issues and the underlying interests of the disputants. The biggest benefit of mediation is the high client satisfaction rate with the settlement, especially when the parties actively participate in the discussions. Over the course of such mediation, the mediator has to get the parties to think beyond merely securing a personal victory over the other since, more often than not, the biggest casualties in a divorce are the children.

Coming back to the specifics of *Rick*, what can a mediator as a neutral third-party do to ensure that the distribution of assets during negotiations between the spouses is free from informational and psychological exploitation? In the present case, the SC found the settlement agreement to be unconscionable and, as a result, unenforceable since the same was hampered by informational asymmetry. Going back to the mediation in *Rick*, the parties' intent to divide their assets equally is evident. It is also evident from the facts that the MoU prepared by the first mediator kept the equalization payment at $750,000, after placing reliance on the financial information provided by the husband on the dairy farm's assets and liabilities.

On reviewing the MoU, the wife's lawyer made repeated requests for the production of the Form 89 financial statement, however the same was provided much later after the commencement of mediation with a second mediator; this statement listed the company at a value which was $300,000 higher than the one presented in the previous mediation. Though a second MoU was agreed to and signed, it was mostly the same as its previous version along with the $750,000 equalization payment. This anomaly could partly be attributed to the second lawyer who failed to appreciate the inequalities in what was supposed to be an equal distribution of assets.

What can a mediator do in similar situations, instances where one of the parties is a victim of domestic violence, mentally unstable and easily exploitable? First of all, the mediator has to exercise a great deal of caution and carefully strategize for every session since he will be required to maintain a neutral position at all times, even though he might empathize with the wife. However, once it is evident that one of the parties is trying to conceal some crucial information during negotiations, the mediator can 'lose his neutrality' to the extent of getting out all information on the table in order to enable the other side to make an informed decision, with due assistance from the legal counsel available.

One might argue that it is easier said than done. One might also argue that losing neutrality during mediation would be detrimental to the proceeding itself as parties might lose confidence and view the mediator as a partial, biased personality. All these arguments can be refuted two-fold: first, losing neutrality herein doesn't mean that the mediator would favor one party over the other during negotiations but only do so to get crucial information out and avoid any informational asymmetry. Losing

neutrality in a restricted sense becomes necessary since a mediator is a facilitator whose job is to ensure the closure of such disputes. The same can be done by having private sessions with both sides; where the mediator feels that a party is trying to conceal information, attempts should be made to make the party see the logic in not doing so. For example, the mediator can try explaining the drastic consequences of the same, one of which is judicial intervention in cases of unconscionable agreements as in *Rick*, where mediation proved to be a failure since it couldn't provide for the closure of the dispute. At the same time the mediator should ensure, while having a private session with the other party, attendance of counsel as and when required; this is important as a woman who has been a victim of domestic violence and suffers from mental infirmities might be exploited by her husband due to the gender dynamics at play.

At all times, the mediator should keep in mind the circumstances in which the parties have come for mediation. Divorce is the death knell not only for a couple's marriage but also for the hopes and dreams they had shared and seen together, hence parties are on an emotional roller-coaster[8]. Parties in this stressful period feel abandoned and emotionally drained, which eventually gives way to fear, loneliness and vulnerability. Parties turning to the mediator to advice and counsel them through this tumultuous period is common in mediation sessions; hence it becomes very important to choose a mediator who can not only get the parties to amicably settle their differences but also enable them to get their lives back on track.

Such counseling can either happen during a caucus with the parties in one or multiple turns or in the joint session itself, however it is advisable that the role of legal counsels for both parties should be limited to negotiating a fair and equitable settlement. There are multiple approaches which a mediator can adopt for counseling and guiding parties; an effective way to do so is asking open-ended questions which would provide an outlet for the pent-up emotions of the parties. Doing so would not only make the parties more comfortable during mediation but also remove the barriers that have been blockading effective negotiations. Needless to say, the mediator should provide for breaks in his valued judgment if the parties get too emotional during the session.

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8 What is ADR (Alternative Dispute Resolution) and Mediation in Texas?', HG.org, available at https://www.hg.org/article.asp?id=5802, (last accessed 24 July 2016).

However, the mediator should at the same time be aware that such open ended questions during joint session would only lead to mud-slinging and further deterioration of the relationship between parties. In order to avoid the same, the mediator can conduct caucus with individual parties and disclose the statements of one party to the other with the permission of the former.

3.1. Party's capacity to use mediation for settlement:

Time and again, experienced mediators have observed that dispute resolution through mediation may not be that good an idea for the mentally unstable, especially when the law on contracts clearly states that one of the four elements to a contract is the mental capacity of parties.[9] In other words, a person must be mentally capable to enter into a binding legal agreement with a full understanding of its terms. Though there are mediators who double as mental health professionals and thus, have the competence to determine if a particular party is mentally capable to knowledgably enter into a legal agreement, a significant chunk of mediators in India lack the requisite expertise. In this light, it becomes important to have some criteria for mental capacity and guidelines for the mediator to determine the same. This is necessary since the very purpose of having mediation is to arrive on a 'mutually acceptable' solution; achieving this purpose might be hampered where a party suffers from mental infirmities. Where one of the parties is mentally incapable to participate in mediation, the resulting power imbalance would lead to unequal bargaining power in the negotiations. Since a mediator can only act as a facilitator, not much can be done by him in the aforementioned cases where the party itself isn't in a position to decide upon their best interests.

However, let's focus on the issue at hand here. Clearly, not all mediators would be able to determine the status of a party's mental health; however, what is important to ensure for the success of mediation is that the party is able to participate meaningfully in the joint sessions and caucus. A party might state during mediation that he/she is being treated for mental infirmities; however the mediator should steer clear of forming assumptions on the basis of such statements. As long as the party understands the discussions during mediation as well as speaks out his/her mind on his/her own freely, then it can be safely assumed that mental infirmities wouldn't be a roadblock in mediation.

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[9] 'Determining 'Legal Capacity in Mediation', Mediate.com, available at http://mediate. com/articles/linden16.cfm, (last accessed 24 July 2016).

The mediator often assists the parties in determining their self-interests; however the main job in this respect is to be done by the parties themselves, that is, they should be able to put forth their demands in the session and the relevant issues arising therefrom. The power of self-determination is an important component of any mediation proceeding; the mediator is under ethical obligation to ensure that parties have the same. It basically means that parties have the power to determine what is acceptable; the mediator can in no event opine on the acceptability of an agreement formulated in the mediation at hand. Where the mediator is of the opinion that the party(s) will be unable to indicate their acceptability after taking into account their self-interests, then such mediator is under an obligation to impasse the mediation.[10]

Where a party reveals that he/she suffers from mental illness-such a revelation would mostly happen in caucus-the mediator should make an attempt to find out the reasons behind such disclosure. Questions like "How do you think this might impact our conversations together?", "How do you imagine I might be helpful differently, knowing this?"[11] will come in handy, since such disclosure might have been made to the mediator for a specific reason.

To decide whether a person has the mental capacity to participate in mediation is an 'on-the-spot' issue; only psychiatrists and psychologists are best equipped to decide upon the same. However, a mediator, before making a judgment on the mental capacity of a party, should ask three questions[12]:-

i. Does the party receive all information in totality?

ii. Does the party integrate the above-mentioned information rationally?

iii. Is this party able to communicate the results to the mediator?

There are several approaches for determining the mental capabilities of the disputing parties in mediation, such as educational[13], multiple

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10 Ibid.

11 Ibid.

12 Ibid.

13 Educational Theory- Persons entering into a contract must possess knowledge, comprehension and application (decision making).

intelligences[14], critical thinking[15], decision-making[16] and legal[17]; these theories assist the mediator in deciding whether mediation should be continued with or not. Where a party is unable to care for his/her person or property due to mental infirmities, then such party can be said to be legally incompetent to enter into a contract; mediation can't be employed for dispute resolution in such cases.

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[14] Multiple Intelligences- Developed by psychologist Howard Gardner, the theory suggests seven ways in which people perceive and understand the world. Each of these ways constitutes a distinct "intelligence", a set of skills allowing individuals to find and resolve problems they face.

[15] Critical Thinking- Angelo (1995) characterizes critical thinking as "*the intentional application of rational, higher order thinking skills, such as analysis, synthesis, problem recognition and problem solving, inference, and evaluation*". According to Beyer (1995), "*Critical thinking . . . means making reasoned judgments* ".

[16] Decision-making theory- Morton Deutsch, a social psychologist (2000) observes that decision-making is … *to decide on well-considered, well-understood, realistic action toward goals every member wishes to achieve*. Making a decision is just one step in the general problem-solving process of goal-directed groups—but it is a crucial one. To ensure high-quality decision making, each alternative must firstly, receive a complete and fair hearing and secondly, be critically analysed to reveal its strengths and weaknesses.

[17] There are four legal conceptual models:-

(i) The Roth, Meisel, & Lidz Formulation- This model, developed by a psychiatrist, lawyer, and sociologist lays down five different criteria for determining legal capacity:-

(a) Showing choice

(b) Outcome of choice is reasonable

(c) Choice based on "rational" reasons

(d) Ability to Understand

(e) Actual Understanding

(ii) The President's Commission Study- Decision making capacity primarily requires three elements: (1) possession of a set of values and goals; (2) the ability to communicate and understand information; and, (3) the ability to reason and deliberate about one's own choices.

(iii) The Sliding Scale Model- The more serious the mental condition, the more stringent is the capacity considered (Weyrauch, 2000). Accordingly, the standards are higher for the decisions requiring more serious care.

(iv) The MacArthur Treatment Competence Study- The study which began in response to criminal law defenses of insanity sought to determine adjudicative "capacity". Its social contribution was a test to determine "legal insanity."

4. *Making mediation accessible to people with mental infirmities*

This section of the article is the most important section, especially since the main intent of authoring this paper was to talk about how mediation can be made more accessible in India, with specific focus on people with mental disabilities. Due to this very reason, the author chose to analyze *Rick* since it involved mediation where one of the spouses was mentally unstable. The main theme of the paper can be summed up in the following words:- There is no difference between differently abled and ordinary people except for the disability of the former; they are equally likely to find themselves tangled in a kind of dispute where mediation would be the best way forward. Hence, all mediators should understand the nuances of mediation involving mentally challenged people, irrespective of their specialization, in order to have a truly accessible mediation practice.

One of the first lessons in this respect is to have a direct interaction with the differently abled person to discuss access needs rather than making assumptions on what would be most effective. During this interaction, the mediator would explain to the party the manner in which the mediation session would proceed, for him/her to be able to talk about how the same can be made more accessible. This interaction, which can be termed as the planning phase, gives the mentally challenged people an opportunity to have a say on matters impacting their ability to participate in the sessions. For women like Ms. Brandesma, with a history of marital violence and a present marred by mental illness, the mediator should inquire into their ability to deal with stress during mediation. Though access needs are required to be dealt with on a case-to-case basis, prior experience and background knowledge are always helpful for it empowers the mediator to have an effective session. This can be suitably demonstrated with the help of an example.

Catherine is married to Joe. After their relationships hit a few roadblocks, love for each other gave way to bitterness, which forced them to separate. Both parties, along with their lawyers, engaged the services of a mediator to assist them in the negotiations and ultimately, in formulation of the settlement agreement. Now, Catherine suffers from a bipolar disorder due to which she speaks very quickly, jumping from one issue to another, in her manic phase. Her counsel, aware of her disorder, chose a mediator Mr. X who had prior experience in facilitating discussions with such parties. Mr. X gained Catherine's confidence during mediation by summarizing her version frequently

to ensure that she didn't miss something; this also showed that the mediator attached considerable importance to her story.

For parties suffering from stress-related disorders, the mediator should also arrange for a retiring room where the concerned party can retire, in order to get back to normalcy. Certain mental injuries impact the social skills of the affected party, so much so that such party might say something offensive; hard feelings can be avoided in such cases by sharing information on disability with other parties, however only after obtaining an explicit waiver of confidentiality. Often, there are cases where a person doesn't identify himself as having a disability though makes a disability-related request; in such cases it is absolutely necessary for the mediator to take such requests seriously.[18] A failure to do so would have a two-fold impact: not only would the mediator lose the party's trust in him and the process but also jeopardize his/her health.

People with mental infirmities might understand the discussions at a considerably slow pace; to make the session equally accessible for such people the mediator should speak slowly and clearly and use simplified terminologies. Where a party faces difficulties in participating in the mediation session, especially with hidden psychiatric disabilities interfering with such person's ability to comprehend and communicate effectively, the mediator should provide assistance by breaking down complicated ideas into different components.[19] Caucus can be utilized by the mediator in such cases to find further steps that can be taken to facilitate more effective communication between the parties.

Where the party suffers from a severe psychiatric disability, the mediator can arrange for a co-mediator having experience as a mental health professional; this would ensure equal accessibility as well as repose such party's trust in the overall process. The author in the preceding section of the paper indicated that the power of self-determination lies with the parties and that the mediator can, in no situation, decide on behalf of a party; however a mediator can't just impasse the case on becoming aware of the mental illness of a party but rather should give equal access to them in their mediation session. Once equal access has been given, if the mediator is of the opinion that such a party lacks the ability to

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18 'Making Mediation Sessions Accessible to People with Disabilities', Mediate.com, available at http://www.mediate.com/articles/cohen.cfm, (last accessed 1 August 2016).

19 Ibid.

determine what's best for his/her interests, only then can he impasse the case.

5. Avoid 'scapegoating' the children:

Though the SC in *Rick* is silent on this aspect, it is nevertheless important to have a discussion on what the mediator can do to save the children, often the biggest sufferers, since their plight is ignored in the tussle between their parents. In the present case, the separating couple was married for 29 years and had five children; hence we can possibly work on the assumption that the children were mature enough to handle the situation effectively. However, not all cases are this rosy. Children of the separating spouses, especially the younger ones, suffer from immense emotional and mental trauma following the separation; enormous research on the impact of divorce on children and family point towards this bitter truth. According to Steven L Earll, a Professional Counselor specializing in family trauma, children believe that their parents are very competent people who can handle all sorts of troubles; divorce however shatters their basic belief concerning the parents' abilities of making decisions in their best interests.[20]

The first step in this regard that a mediator can take is to have caucus with husband and wife, in order to find out the 'real' reasons for their decision to go separate ways. It is often seen that the parties are hesitant in divulging information during the joint session; mostly since lawyers advise their respective parties to keep their cards close to the chest. In light of this, caucus becomes increasingly important for the mediator to get the real information out from the parties. After identifying the reasons for separation, the mediator should persuade the parties to not continue with their decision to separate, citing the short-term trauma [21] and long-term damage to their children. The concerned mediator can substantiate this point through reliance on literature available on the impact of divorce on children as well as appealing to the

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[20] 'How Could Divorce Affect My Kids? - Focus on the Family', available at http://www.focusonthefamily.com/marriage/divorce-and-infidelity/should-i-get-a-divorce/how-could-divorce-affect-my-kids#ref1, (last accessed 1 August 2016).

[21] Children whose parents are going through a rough divorce engage in behaviours which are designed to help them feel secure. Some of them are denial (especially in younger children), abandonment, anger and hostility, depression, immaturity and hyper-maturity, 'Psychological and Emotional Aspects of Divorce,' Mediate.com, available at http://www.mediate.com/articles/psych.cfm#reactions (last accessed 1 August 2016).

parents' emotions; make them understand the position they hold in their children's eyes, who believe that parents can never do anything wrong and possess superhuman abilities when it comes to safeguarding their interests.

However, this might not be possible in high conflict divorce cases. Successful divorce mediation is one where parents, with assistance from the mediator, contain their ego and emotional distress to focus on the issues that their children might face by virtue of their decision. Johnston and Roseby observe that mediation fails in a high conflict divorce involving highly conflicted couples who are unsure about their separation itself and have severe personality disorders.[22] Such failure can be attributed to the fact that traditional mediation relies on a rational decision-making process which is absent in high-conflict cases. Johnston and Roseby herein call for a different kind of mediation-'impasse-directed'[23] (hereinafter, **ID approach**). It is different from regular mediation in three respects:-

i. The ID approach combines mediation with therapy to get rid of emotional factors that prevent the parents from making rational, child-centered judgments.

ii. The approach educates the parents on children's needs and the necessity to keep them away from the spousal problems for their sound mental growth.

iii. The approach doesn't limit itself merely to the formulation of Settlement agreement but further extends to developing plans in order to help the family through divorce transition period.

Even the ID approach has its boundaries. Experts have probed the problems with usage of mediation in high-conflict situations; Mathis, for one, observes that some couples fight just for the sake of fighting.[24] According to him, mediators in such cases should seize firm control of

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[22] 'High-conflict Separation and Divorce: Options for Consideration', Department of Justice (Government of Canada), available at http://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/2004_1/p5.html, (last accessed 1 August 2016).

[23] Ibid.

[24] These are parents with low differentiation. These spouses are not adequately differentiated from each other in order to function effectively as individuals. Mathis describes them as 'poor candidates for mediation' and 'couples from hell'. Supra *note* 21.

the session immediately in order to address the issue of poor differentiation; Parkinson also argues for an early and active mediator intervention in such cases, along with a careful planning of all sessions.

6. CONCLUSION

What are the lessons one can take home from this case? Firstly and most importantly, it is very important to ensure finality in divorce disputes; parties employ mediation to settle their issues amicably and formulate a fair settlement agreement. However, where mediation fails to achieve the desired purpose, judiciary intervenes which defeats the whole purpose of settling the outstanding issues 'amicably'. Finality can be ensured through various ways; one of the lessons learnt herein is that the mediator has to put extra effort to get out all material information in order to avoid informational and psychological exploitation of any party. The author's observations on party's mental capacity to use mediation for settlement, power of self-determination, making mediation accessible to people with mental disorders and protecting children from spousal struggle might not be exhaustive; however it still provides a number of guidelines for the mediator's consideration which would ensure finality in disputes and make mediation as such more accessible.

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