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Can the ICSID Convention be a Model Law for Investment Dispute Settlement? : A Persistent Series of Questions — *Akhil Raina*

Arbitrability of Fraud in India — *Dheeresh Kumar Dwivedi*

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The Arbitrary Nature of Investment Arbitration : The Emerging Issues in — *Bhagirath Ashiya*

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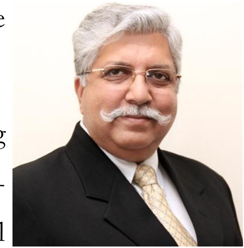

I am happy to say that the RGNUL Financial and Mercantile Law Review Volume III Issue I is ready and being released.

The present volume aims to provide a better understanding of various complexities and nuances between law and economics to a wide range of readers such as academicians, legal practitioners and students. I sincerely believe that this volume would add to quality research.

This volume contains articles covering different aspects related to International Commercial Arbitration. In this era of rapid globalization, the constant growth of laws regulating various related activities are highly desirable. However, it is essential to strike a balance between regulating by the force of law and fostering an environment to ease the carrying on of such activities. We, therefore, hope that this initiative will play a pivotal role in bringing clarity in the aforementioned field of law.

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

Professor (Dr.) Paramjit S. Jaswal

Patron-in-Chief

RGNUL Financial and Mercantile Law Review

PATRON'S MESSAGE

I am immensely elated to present the RGNUL Financial and Mercantile Law Review Volume III Issue I. I take this opportunity to proudly shed some light on the impeccable success this journal has achieved in the quest to promote legal education.

The objective of this journal is to understand the various nuances of law and business with more clarity and at the same time, a multitude of different perspectives. I sincerely hope that this edition proves to play a vital role in finding legal solutions and identifying key issues in this complex field of law.

The RGNUL Financial and Mercantile Law Review has reached great heights with contributions from highly regarded members of the legal fraternity, the high standards of scrutiny and time bound delivery – all of which has made this journal internationally renowned. I would appreciate the hard work of the students in making this journal a success.

I would like to express my gratitude to all the distinguished members of the Peer Review Board who have joined this initiative and provided valuable insight. I would like to congratulate and appreciate the efforts made by Dr. Anand Pawar, the Editor-in-Chief and the entire Editorial Board for having furthered this initiative with utmost dedication and sincerity. I sincerely believe that the research papers will receive appreciation from the readers and experts; and, will be beneficial to all concerned.

Professor (Dr.) G.I.S Sandhu

Patron

RGNUL Financial and Mercantile Law Review

FOREWORD

It is with great pleasure that I place before you the third edition of RGNUL Financial & Mercantile Law Review. This law review was an endeavour on our part to better understand the financial market and regimes of India and South East Asia and to promote discourse between academia in India, West and South East Asia. We also suggest engaging with the legal industry in India and wanted to lend our pages thoughts and opinions, so that we could better understand what the industry needs.

Needless, to say turning out the third edition has been a mammoth challenge but also, a very rewarding one. We got an opportunity all over the world who were encouraging and helpful to say the least and many went out of their way to help us and to contribute to our endeavour; special thanks to goes out at this point to the advisory board who associated with us not and lent their name to our enterprise and without whom this review who have dead at its very inception. We would also like to thank our referees and contributors whose commitment to this review sees the light of the day.

The third edition of RFMLR has concentrated on International Commercial Arbitration with papers received from all parts of India with enthusiasm. We wish the contributors continue to show us the dedication with future issues to come.

We hope the review makes for an interesting read and we would love to hear your opinions on how we can make it better. Please feel free to write in to us.

DR. ANAND PAWAR

EDITOR-IN-CHIEF

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ARBITRALITY OF FRAUD IN INDIA

DHEERESH KUMAR DWIVEDI[1]

Introduction.

Arbitration and Conciliation Act 1996[2] was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards[3]. The object of the Act was to bring the existing law on arbitration in conformity with UNCITRAL Model Law on Commercial Arbitration, 1985[4] and thereby fulfilling India's quest for economic prosperity which was only possible through making the existing legal regime in tune with international law on dispute resolution. Thus, *minimum intervention of courts*,[5]*severability of arbitration agreement form main contract*[6] and *principleofkompetenz-*

1 4th year, NLIU Bhopal.

2 Hereinafter referred to as "Act of 1996".

3 With the passage of Arbitration and Conciliation Act, 1996, three laws dealing with arbitration in India viz., The Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961were brought under one consolidated Act.

4 Preamble of Arbitration and Conciliation Act, 1996.

5 Section 5 & 8 of the Act read as follows:

Section 5. Extent of judicial intervention.—

Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

Section 8. Power to refer parties to arbitration where there is an arbitration agreement.—

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

………

6 Section 16 (1) (b) of the Arbitration and Conciliation Act, 1996 provides for severability of arbitration agreement from main contract. It reads as follow:

Section 16. Competence of arbitral tribunal to rule on its jurisdiction.—

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

kompetenz[7] were made the fundamental principles of arbitration jurisprudence in India.[8]

Although the Act does not expressly exclude any category of disputes as unarbitrable, by implication, it does exclude the certain cases which require determination of right *inrem*, as against right *inpersonam*, meaning thereby, except criminal proceedings, all disputes of civil nature and/or arising out of contractual relationship between parties are arbitrable.[9] However, the courts in India have tended to enlarge their jurisdiction by overlooking these fundamental principles and have held a certain class of private disputes to be unarbitrable or incapable of being settled by arbitration. One such subject of private/ civil dispute is arbitrability of fraud which, although not, expressly or by implication, excluded from applicability of the Act, has been held to be unarbitrable in a series of judgments.

The present paper analyses the law relating to arbitrability of fraud in India. In Part I of the paper, the author has critically delved into the theme with the help of the decision of the Supreme Court in *N. Radhakrishnan* v. *M/S Maestro Engineers & Ors*[10] and its ramifications on the law in force. In Part II of the paper, the diverging opinions of various High Courts have been discussed to highlight the ambiguity which persisted during the period of 2009-14 in field of arbitrability of fraud. Part III of the paper deals with the single bench decision of the Supreme Court in *Swiss Timing Ltd.* v. *Organizing Committee, CWG Delhi*[11] and its contribution to the debate relating to arbitrability of fraud. Part IV deals with the rather less discussed area of arbitrability of fraud in foreign seated arbitration. Part V and VI of paper discuss arbitrability of fraud in the United Kingdom and the United States of America. As a conclusion, the author highlights the difficulty which is being faced by lower courts

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7 Principle of 'Kompetenz-kompetenz' has been taken from Article 16 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 and has been incorporated under Section 16 of the Arbitration and Conciliation Act, 1996.

8 These principles have consistently been held by Indian Courts as fundamental principles of arbitration in India. See SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66; Swiss Timing Ltd. v. Organizing Committee, CWG Delhi, (2014) 6 SCC 677.

9 Booz-Allen & Hamilton Inc v. SBI Home Finance Ltd. & Ors, (2011) 5 SCC 532, ¶23.

10 N. Radhakrishnan v. M/S Maestro Engineers & Ors., (2010) 1 SCC 72 (hereinafter referred to as "N. Radhakrishnan").

11 Swiss Timing Ltd. v. Organizing Committee, CWG Delhi 2010, (2014) 6 SCC 677 (hereinafter referred to as "Swiss Timing").

after two contrasting decisions of the Supreme Court in the area and tries to provide a solution for the same.

Part I: The Frankenstein's Monster

The Supreme Court was posed with question of arbitrability of allegations of fraud in *N. Radhakrishnan* v. *M/S Maestro Engineers & Ors.*[12] In this case, appellant and respondents were partners in a partnership firm but later certain dispute arose among them as to contribution of each partner in the firm which was sought to be settled by arbitrator. Meanwhile, the respondent filed an application before the Court of the District Munsif at Coimbatore seeking an injunction against the appellant from disturbing the business of the firm and prayed that the appellant be declared retired from the firm. In response, the appellant filed another application before the same court under Section 8 of the Act of 1996, seeking reference of the dispute to the arbitral tribunal. The plea of the appellant was rejected by both lower court and the High Court of Madras. The issue before the division bench of the Supreme Court was whether matter involving serious allegations of fraud and misappropriation can be referred to arbitration. The Court held that the matter cannot be decided by an arbitrator and therefore, has to be referred to court of law. The Court highly relied upon its earlier decision of full bench in *Abdul Kadir Samsuddin Bubere* v. *Madhav Prabhakar Oak & Ors.*[13], wherein, the Apex Court, holding fraud unarbitrable, observed that if a party alleges fraud on part of another party, and if the party so alleged desires a public trial, courts would, as per Section 20 of the Arbitration Act, 1940[14], be competent to decline to refer the matter to the arbitral tribunal as that would amount to "*sufficient cause*" within the meaning of the Act. The court also relied on decision of Madras High Court in *Oomor Sait HG* v.

12 Supra note 9.

13 Abdul Kadir Samsuddin Bubere v. Madhav Prabhakar Oak & Ors., AIR 1962 SC 406 (hereinafter referred to as "Abdul Kadir").

14 Section 20. Application to file in Court arbitration agreement-

………

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

……..

(hereinafter referred to as "Act of 1940").

Asiam Sait,[15] wherein it was held that the power of civil courts to refuse to refer certain disputes to arbitration on certain grounds under the Act of 1940 continues to be available to the courts under the Act of 1996 and they would be justified in refusing to refer a matter for arbitration if the dispute involves complicated questions of law and requires *"detailed oral and documentary evidence"*.

Therefore the Court held that since allegation of fraud requires very *"detailed oral or documentary evidence"* to prove or disprove the allegation, the courts, and not the arbitral tribunal, are the appropriate forum to decide the same.

However, the author believes that in view of provisions of Section 8 of the Act of 1996, the reliance by the Apex Court on its earlier decision in Abdul Kadir[16], which was based on Section 20 of the Act of 1940, was misplaced. It is pertinent to note here that the courts could, under Section 20 of the Act of 1940, on "*sufficientcause*" being shown, refuse to refer the matter to arbitration while there is no such discretion on court under Section 8 of the Act of 1996[17] as the language of section 8 is peremptory.[18] Thus, if the subject matter of the dispute is within the scope of arbitration agreement, even if the existence of the arbitration clause itself is questioned, under Section 16 of the Act of 1996, the arbitrator is the sole authority to decide upon the issue and the courts are duty bound to refer the dispute to the arbitral tribunal.[19] The wording of Section 16, that the Arbitral Tribunal may rule "*on any objections with respect to the existence or validity of the arbitration agreement*" themselves shows that the power of the Tribunal under Section 16 is not confined only to the width of its jurisdiction, but goes to the very root of its jurisdiction[20] and in spite of there being an arbitration clause, refusal to refer the matter to arbitration would amount to failure of justice.[21]

15Oomor Sait HG v. Asiam Sait, 2001 (3) CTC 269.

16Supra note 12.

17Wimco Ltd. v. Sambhu Dayal Gupta, 1998 (2) ArbLR 118.

18Hindustan Petroleum Corporation Limited v. Pinkcity Midway Petroleums, 2003 (6) SCC 503 (hereinafter referred to as "HPCL"); Agri Gold Exims Ltd. v. Sri Lakshmi Knits & Wovens, (2007) 3 SCC 686.

19HPCL, supra note 17; See also Gajapati Raju & Ors. v. P.V.G Raju & Ors., [2002] 2 SCR 684 (hereinafter referred to as "Gajapati Raju").

20Konkan Railway Corporation Ltd. & Anr. v. Rani Construction Pvt. Ltd., [2002] 1 SCR 728.

21HPCL supra note 17, ¶ 25.

Also, the decision in *N. Radhakrishnan*[22] does not carry out the intention of the legislature which, by its wisdom, has made certain private disputes to be arbitrable without intervention of the courts[23]. Moreover, it will be wrong to assume that arbitrator is not capable of solving intricate issues involving allegations of fraud[24] as the sole reason for exclusion of applicability of general rules of procedure and evidence to arbitration proceedings[25] was to enable experts to resolve the dispute in hand without getting involved in the legal intricacies of the dispute. Further, plea of public defence in cases of allegations of fraud[26] cannot override the arbitration agreement.[27]

Part II: An Era of confusion

Despite clear wording of Section 16 of the Act, the Hon'ble Supreme Court rendered contradictory decisions in *HPCL*[28] and *Gajapati Raju*[29] on one hand and *N. Radhakrishnan* on the other hand and thereby created confusion regarding arbitrability of fraud in India. This unclear position of law has resulted into divergent opinions by the Supreme Court and various High Courts in subsequent cases which have been discussed below.

22Supra note 9.

23Section 5 of the Arbitration and Conciliation Act, 1996.

24Robert Merkin, Arbitration Law, P. 85-86, (Informa Law from Routledge, London; 3 Rev. Ed. (2004) (hereinafter referred to as "Robert Merkin").

25Section 19 of the Arbitration and Conciliation Act, 1996 excludes the applicability of Code of Civil Procedure, 1908 and Indian Evidence Act, 1872 in arbitration proceedings and empowers the tribunal to adopt its own procedure. It reads as follow:

Section 19: Determination of rules of procedure-

(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

26Decision of N. Radhakrishnan (supra note 9) was partially based on "the plea of public defence". However, origin of "the plea of public defence" goes way back to decision of the Court of Chancery in Russell v. Russell, (1880) 14 Ch. D 471.

27Robert Merkin, supra note 23.

28Supra note 17.

29Supra note 18.

The Apex Court in *Bharat Rasiklal* v. *Gautam Rasiklal*,[30] while deciding whether it is necessary for the court to look at the validity of arbitration agreement before appointing the arbitrator, held that since the existence of a valid and enforceable arbitration agreement is a condition precedent for appointment of arbitrator, the Chief Justice or his designate must decide preliminary issue of existence of valid arbitration agreement before appointing an arbitrator as this cannot be left to be decided by the arbitrator.[31] This was based on presumption that serious allegations of fraud, if proved, would go into the root of the validity of both underlying contract and arbitration agreement and thereby would render the entire proceeding fruitless.[32]

However, the stand taken by various High Courts has not been consistent as result of which different High Courts have given different decisions. Thus the Bombay High Court has held that where the serious allegations of fraud are *primafacie* demonstrable[33] or if the party against whom serious allegations of fraud are made desires to have public trial,[34] dispute cannot be referred to the arbitration.[35] However, the Punjab & Haryana High Court[36] refused to accept the view that mere appearance of expressions of fraud or undue influence will automatically render the dispute unarbitrable. On similar line, the Bombay High Court in *Rekha Agarwal* v. *Anil Agarwal & Ors*[37]held that though the courts still enjoy the discretion to deny a reference to arbitration, there is no bar on a reference to arbitration on account of allegations of fraud and the arbitrator shall enjoy jurisdiction to adjudicate upon the matter, even if an independent criminal trial is or may, in the future, be pursued before appropriate courts.

30Bharat Rasiklal v. Gautam Rasiklal, (2012) 2 SCC 144 (hereinafter referred to as "Bharat Rasiklal").

31S.B.P. & Co. v. Patel Engineering Ltd. (2005) 8 SCC 618; National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd., (2009) 1 SCC 267, ¶ 17.

32Bharat Rasiklal, supra note 29.

33Goldstar Metal Solutions v. Dattarao Gajanan Kavtankar , 2013 (3) ABR 529.

34Ivory Properties and Hotels Pvt. Ltd. v. Nusli Neville Wadia, (2011) 2 ArbLR 479 (Bom.).

35The view taken by Calcutta High Court has been more rigid and even cases where the party making charges of fraud desires public trial have been held to be unarbitrable. See General Enterprises Ltd. v. Jardine Handerson Ltd., AIR 1978 Cal 407.

36Hughes Communications India Ltd. & Ors. v. East West Traders and Anr., 2013 (3) ArbLR 283 (P&H).

37Rekha Agarwal v. Anil Agarwal & Ors., Arbitration Petition Nos. 257 and 258 of 2013, Order dated April 3, 2014 [Bombay High Court].

Part III: Holding fraud arbitrable- Swiss Timing Ltd. v. Organizing Committee, CWG Delhi 2010 [2013, Single Bench]

The law regarding the arbitrability of fraud saw an upside down shift after decision of the Supreme Court in *Swiss Timing* in which the single bench of the Apex Court held that the N. Radhakrishnan was *perincuriam* as it was contrary to well established principle laid down by the Apex Court in *HPCL* and *Gajapati Raju* and Section 16 of the Act of 1996.

Applicant, Swiss Timing entered into a contract with the respondent for providing timing, score etc. during the Commonwealth Games, 2010. Later certain dispute arose between parties where the applicant alleged that the respondent has defaulted in making payment to the applicant and invoked the arbitration agreement. When the respondent failed to appoint an arbitrator on its behalf, the applicant approached the Supreme Court under Section 11(6) of the Act of 1996 for appointment of arbitrator. Opposing the appointment of arbitrator, the respondent claimed that since the applicant have resorted to corrupt practices and therefore, as per the contract between the applicant and the respondent, the contract stands *void ab initio*. It was also contended by the respondent that since dispute involves serious allegations of fraud, it cannot be referred to arbitration. Further, the respondents claimed that since various criminal proceedings have already been initiated against petitioners, matter should not be referred to arbitration as it may lead to unnecessary confusion by two conflicting conclusions.

While rejecting the first claim of the respondent, the court placed its reliance on its earlier decision of seven judges' bench in *SBP & Co.* v. *Patel Engineering Ltd.,*[38] and held that since an arbitration agreement is severable from main contract, invalidity of underlying contract does not render it otiose.[39] For the purpose of appointment of arbitrator, it was held, courts are not required to undertake a detailed scrutiny of the merits and demerits of the case and are only required to decide preliminary issues such as jurisdiction to entertain the application, the existence of a valid arbitration agreement, whether a live claim existed or not.[40]

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38 SBP & Co. v. Patel Engineering Ltd., (2002) 2 SCC 388 (hereinafter referred to as "Patel Engineering").

39 See also Reva Electric Car Company Private Limited v. Green Mobil, (2012) 2 SCC 93.

40 Today Homes & Infrastructure Pvt. Ltd. v. Ludhiana Improvement Trust & Anr., 2013 (7) SCALE 327.

The court further observed that once parties have agreed to settle their disputes through arbitration, they cannot be permitted to avoid arbitration without satisfying the Court that it will be just and in the interest of all the parties to not to proceed with the arbitration. [41] Echoing the principle of the least interference, the court held that with the conjoint reading of Section 5 and Section 16 of the Act of 1996, it becomes clear that all matters including the issue of the validity of main contract can be referred to arbitration.[42] Thus the court clearly differentiated between term *void* and *voidable* and held that in cases, where it *primafacie* appears to the Court that contract is *void*, it would be justified in declining reference to arbitration. However, this is not open for court to decide where the contract is *voidable*.[43] Thus, since a contract affected by fraud is a voidable contract,[44] the courts cannot refuse to refer dispute to arbitration.

Rejecting the contention of the respondent that since dispute involves serious allegations of fraud, it should be decided by the court itself,[45] the court held that since *N. Radhakrishnan* was decided in ignorance of express provisions of Section 16 of the Act of 1996 and the decision of the division bench of the Hon'ble Supreme Court in HPCL and Gajapati Raju, the decision of the division bench of Hon'ble Supreme Court in N. Radhakrishnan is *perincurium* and does not lay down correct position of law.

Regarding the third claim of the respondent, the Apex Court held that the existence of dual proceedings; one under the criminal law and the other under the civil law is a well-accepted legal phenomenon in the Indian jurisprudence[46] and the possibility of conflicting decisions is not a bar against simultaneous arbitration proceeding and criminal proceedings.[47] Thus, existence of criminal proceeding of fraud cannot render a dispute unarbitrable as even if the underlying contract is declared void because of fraud and arbitral award is also passed, the aggrieved party has still an option to resist the *execution/enforcement* of such award under section 34 of the Act of

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41Swiss Timing, supra note 10, ¶ 26.
42Ibid.
43Ibid. ¶ 27.
44Section 19 of Indian Contract Act, 1872.
45N. Radhakrishnan, supra note 9.
46HPCL, supra note 17, ¶ 23.
47Swiss Timing, supra note 10, ¶ 28.

1996.[48] Conversely, if the matter is not referred to arbitration and the criminal proceedings result in an acquittal, it would have the wholly undesirable result of delaying the arbitration and thereby frustrating the very object of the Arbitration and Conciliation Act, 1996.[49]

Part IV: Arbitrability of fraud in foreign seated arbitration

The Arbitration and Conciliation Act, 1996 divides domestic arbitration and foreign seated arbitration in two different parts *viz.*, Part I and Part II and provides different mechanism for their application. Unlike domestic arbitration, in case of foreign seated arbitration, the domestic courts have no jurisdiction to entertain a dispute covered by arbitration agreement, unless the arbitration agreement, as provided under Section 44 of the Act of 1996, is *"null or void, or inoperative and incapable of being performed."* Therefore in all cases of foreign seated arbitration except those mentioned under Section 44 of the Act of 1996 the courts have to mandatorily refer the dispute to arbitration.[50]

The question of arbitrability of fraud in foreign seated arbitration came up for consideration before the Apex Court in *World Sport Group (Mauritius) Ltd.* v *MSM Satellite (Singapore) Pvt. Ltd.*,[51] wherein, relying on Section 45 of the Act of 1996[52], it was observed that since the role of courts in foreign seated arbitration is limited to enforcement of foreign awards;[53] they will have to refer a dispute for arbitration unless the arbitration clause is inoperative or where it is incapable of being performed or the arbitration agreement is null and void. Since the arbitration agreement does not become *"null and void"* or *"inoperative or incapable of being performed"*

48Ibid.; as per section 34 of the Arbitration and Conciliation Act, 1996, an appeal for setting aside an arbitral award can be made before court of law on the ground that the arbitration agreement is not valid under the law to which parties have subjected to themselves.

49Swiss Timing, supra note 10, ¶ 28.

50State of Orissa v. Klockner & Co., AIR 1996 SC 2140.

51World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pvt. Ltd., AIR 2014 SC 968 (hereinafter referred to as "World Sports").

52Section 45. Power of judicial authority to refer parties to arbitration.—
Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

53Section 49 of the Arbitration and Conciliation Act, 1996.

where allegations of fraud have to be inquired into, court cannot refuse to refer the dispute to arbitration.[54]

Part V: Position in UK

The judicial trend in the United Kingdom, too, has been in favour of severability of arbitration clause from main contract[55] and the arbitration agreement is treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement.[56] The court in *Harbour v Kansa*[57] held that the arbitration clause applied to a dispute even when the agreement in which it was embedded was void for initial illegality provided that the arbitration clause itself is not directly impeached. Once the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.[58]

Hence, under English law, unless the language of the arbitration clause specifically excludes the arbitrability of disputes related to validity of contract, the tribunal would have the jurisdiction to decide the dispute.[59]

Part VI: Position in the USA

Under the Federal Arbitration Act, 1925, court must grant a motion to compel arbitration if it is satisfied that the parties actually agreed to arbitrate the dispute.[60] Thus, once the Court is satisfied that the parties actually agreed to arbitrate the

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54World Sports, supra note 50, ¶ 29.

55Section 7(2) of the English Arbitration Act 1996.

56Premium Nafta Products Ltd. v. Fili Shipping Company Ltd. & Ors. [2007] UKHL 40, ¶ 17 (hereinafter referred as "Premium Nafta Products").

57Harbour v Kansa, [1992] 1 Lloyds Rep 81, at P.92

58Premium Nafta Products, supra note 55, ¶ 18.

59Fiona Trust & Holding Corporation v. Yuri Privalov, [2007] APP.L.R. 01/24.

60Section 3 of Federal Arbitration Act 1925. It read as follows: (No need of Quoting the whole section, just the section number and title of the section.)

Section 3. Stay of proceedings where issue therein referable to arbitration-

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

dispute, it is for the arbitration panel, not the court, to determine whether the underlying contracts in general is enforceable.[61]

The doctrine of severability of arbitration agreement from the main contract has been recognized by the courts of United States of America as well. The Supreme Court of the United States of America in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[62] ruled that arbitration clauses are separable from the contracts in which they are included and a claim of fraudulent inducement of the contract generally is a matter to be resolved by the arbitrator, whereas a claim that the arbitration clause itself is fraudulently induced would be for the court to decide because such a claim put the making of the arbitration agreement in issue.[63] This doctrine was further explained by the 11th Circuit Court[64] wherein the court held that under normal circumstances, "when there is an arbitration clause in a signed contract," the parties have at least presumptively agreed to arbitrate any disputes, including those disputes about the validity of the contract *in general.*

In *Bess v. Check Express*,[65] the court went one step further and held that even when the main contract is alleged to be *voidabinitio*, even then the arbitrator would be said to have the jurisdiction to decide the validity of the contract. Thus, the position in USA, too, is in consonance with the object of arbitration and minimum interference of the court.

Part VII: Conclusion

The decision of the Apex Court in Swiss Timing, given by single judge bench and contrary to its earlier decision of the division bench in N. Radhakrishnan, has caused confusion to lower courts as to which decision should be followed thereby leading to divergent views taken by different High Courts. Though, as per Article 141 of the Constitution of India decision of the Supreme Court is binding on all courts within

61Riverwalk Apartments, L.P. v. RTM General Contractors, Inc., 779 So. 2d 537 (Fla. Dist. Ct. App. 2000).

62Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967) (hereinafter referred as Prima Paint Corp); see also Burden v. Check Into Cash of Kentucky, LLC, 267 F.3d 483 (6th Cir. 2001).

63Prima Paint Corp, supra note 61.

64Chastain v. Robinson-Humphry Co., 957 F.2d 851 (11th Cir. 1992).

65Bess v. Check Express, 294 F.3d 1298 (11th Cir. 2002).

the territory of India,[66] decision taken by Chief justice of India or his designate under Section 11 of the Act of 1996 being judicial order of Chief Justice of India/ High Court or his designate[67] and not the decision of the Supreme Court[68] it does not have precedential value[69]. Nonetheless, the Bombay High Court[70] has rejected the argument that the Swiss Timing being a single bench decision cannot take precedence over a decision of higher bench in N. Radhakrishnan as it does not lay down any general or peremptory norm that allegation of fraud, in all cases, is incapable of settlement by arbitration. On the contrary, the Delhi High Court[71] has held that N. Radhakrishnan being the decision of higher bench judgement would prevail and bind lower courts and therefore, serious allegations of fraud still remains non-arbitrable under Indian law.

Therefore, in light of differing legal opinion on the subject, it is suggested that, to bring the law of arbitration in consonance with the scheme and object of Arbitration and Conciliation Act 1996, issue of fraud should, as suggested by the Law Commission in its 246th report,[72] be expressly made arbitrable by an amendment in section 16 of the Act. This will serve the purpose of the Act as if the courts are to determine the competence of the arbitrator to decide an issue, they may be fled with the cases with an oblique motive alleging fraud so as to prolong the litigation and frustrate the legitimate claim of the parties. While it is suggested and desirable that court should continue to retain some discretion to refuse reference to arbitration in certain peculiar case, this should be treated as an exception rather than general rule.

66Article 141 Law declared by Supreme Court to be binding on all courts-The law declared by the Supreme Court shall be binding on all courts within the territory of India.

67Patel Engineering, supra note 37.

68 Section 2(1) (e) of the Arbitration and Conciliation Act, 1996 defines "Court". Interpreting the provision, the Supreme Court held that "in exercise of his power under Section 11 of the Act, Chief Justice of India/ High Court does not represent the Supreme Court or High Court as the case may be." See State of West Bengal v. Associated Contractors, (2015) 1 SCC 32 ¶ 17.

69Ibid.

70Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd., Appeal No. 196 of 2014 in Arbitration Petition No. 1062 of 2012.

71RRB Energy Ltd. v. Vestas Wind Systems & Anr., C.S. (OS) No.999/2014, Decided on 15th April, 2015, ¶ 54.

72Law Commission of India, 246th Report on Amendments to the Arbitration and Conciliation Act 1996 (August, 2014) ¶ 52.

CAN THE ICSID CONVENTION BE A MODEL LAW FOR INVESTMENT DISPUTE SETTLEMENT? : A PERSISTENT SERIES OF QUESTIONS

AKHIL RAINA[1]

Introduction: Asking the right questions.

"*Small questions lead to small discoveries. Bigger questions lead to bigger discoveries. Some questions only reveal deeper mysteries. Asking enormous questions can create enormous problems, while asking too many questions can make you look ridiculous. And when you come across an unusual question, there's not much else to do, but to stick with the question and see where it takes you.*"

– Grant Snider.[2]

The proposed question for this study indeed struck me as an unusual one. The ICSID Convention (International Centre for Settlement of Investment Disputes)[3] as a "model law" for investment disputes? The idea of having something like a model law, at least according to me, was unheard of in the field of international investment law. In fact, I recalled having studied that the ICSID Convention, also known as the Washington Convention, was not very central to the investment law universe anyway.[4] In any case, wasn't the whole idea of the ICSID Convention to provide only for *settlement of investment disputes?* Isn't that distinct from a "model law", something that sovereign nations tailor their legislations on?

As it turns out, the proposed question was also an enormous one. What *is* model law? The notion of a model law was popularized through the UNCITRAL Model Law on International Commercial Arbitration, adopted in 1985.[5] Surely there existed

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1 5th year, National Law University, Jodhpur.

2 Grant Snider, Asking Questions, available at https://betterqs.wordpress.com/2015/09/08/asking-questions-by-grant-snider/

3 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 U.N.T.S. 159 [hereinafter referred to as the "ICSID Convention"]

4 Ankita Mishra and Disha Kapoor, ICSID – Numero Uno, Not Anymore? (2014) SIPL International Law journal, available at: http://www.spilmumbai.com/uploads/article/pdf/icsid-%E2%80%93-numero-uno-not-anymore-27.pdf

5 UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 1302 (1985) [hereinafter referred to as the "UNCITRAL rules"]

credible reasons why this particular instrument became accepted as a "model" in the field of commercial arbitration. *What could be the possible aspects of a law that contribute to giving it the status of a "model" law?*

This final question builds the central academic premise of my study. Once answered, it would clarify, in the very least, the questions we began with. It would seem that in order to find out whether the ICSID Convention can operate as a "model law" for investment arbitrations, a two-step methodology must be adopted. First, we must identify the constituent elements of a "model" law, the UNCITRAL rules being our primary source of reference.

And second, these factors must be juxtaposed with the ICSID Convention for comparison to see whether it can, in fact, operate as a "model" law for the world of investment arbitration. Interestingly, since the ICSID Convention from 1966 pre-dates the UNCITRAL rules, the question probably could also be: *is* the ICSID a model law for investment arbitrations?

In order to give context to this issue, I begin with a comparison between the two types of arbitrations that are under analysis here: commercial arbitration, the type governed by the UNCITRAL rules and investment arbitration, the type instituted under the ICSID framework. This would provide a basis for understanding how the UNCITRAL and ICSID operate in the fields of commercial and investment arbitrations. It also provides a greater perspective on the position, in terms of legal significance, that these two instruments hold in their respective regimes. In this regard, significant reliance has been placed on two excellent academic articles contained in a book titled *Pervasive Problems in International Arbitration.*[6] Both have been instrumental in shaping my understanding of the problem.One provided me the complete perspective regarding the relationship between the two branches of arbitration using a beautiful analogy and the other cautioned restraint with regard to excessive interaction between the two.

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6 Nigel Blackaby, Chapter 11: Investment Arbitration and Commercial Arbitration (Or the Tale of the Dolphin and the Shark) in Pervasive Problems in International Arbitration (Eds. Loukas A. Mistelis & Julian D.M. Lew QC), Kluwer Law International (2006), pp. 217-233 [hereinafter referred to as "Blackabay (2006)"]; Gabrielle Kaufmann-Kohler, Chapter 13: Interpretation of Treaties: How do Arbitral Tribunals interpret Dispute Settlement provisions in Investment Treaties in Pervasive Problems in International Arbitration (Eds. Loukas A. Mistelis & Julian D.M. Lew QC), Kluwer Law International (2006), pp. 257-261 [hereinafter referred to as "Kaufmann-Kohler (2006)"]

Hence, this work is in three parts. Part I introduces the problem at hand. Part II conducts the aforementioned comparison between investment and commercial arbitrations. Finally, Part III discusses the possibility of the ICSID Convention acting as a model law for investment arbitrations. Part IV concludes.

In the quest to find the answer to the initial proposed question, this work seeks to ask several subsequent questions, both big and small, hoping to unravel maximum number of mysteries with minimal ridiculousness. And where answers have not been so easily found, an attempt has been made to see where all these questions lead.

The Dolphin and the Shark: Comparing the two regimes.

i. Something fishy: Making the case against interaction

Blackaby invokes the image of a water-tanker at a zoo to explain the idea of interaction between the two classes of arbitration.[7] He asks whether it would be wise to put two seemingly similar species, the dolphin and the shark (depicting commercial and investment arbitrations, one way or the other), in the same water-tanker. His hypothesis is that if there exist concrete differences between the two, then they are two different species and it would be inadvisable to put them both in the tank together. His belief is that if commercial and investment arbitrations are indeed distinct genres of arbitration, then cross-adopting concepts and ideas between them would not be a good idea. His end conclusion is that the dolphin and the shark, much like commercial and investment arbitration, *are* different species and that too much interaction between the two is not in the interest of anyone.

The comparison in his piece begins by noting a rise of investment arbitrations in the beginning of the 20th Century. He describes: “(there was a rise in the) hitherto little-known species in the otherwise well-chartered waters of international arbitration…earlier protected by HMS Diplomatic Protection”[8] The scenic infusion in literature, describing the “sporadic catches” in the early 1990s, continues with this analogy:

7 Blackaby (2006), p. 217

8 Id.

"No doubt the increased catches by individual investors were due to their recent rights to sail in treaty claim waters formerly reserved for states alone. No longer did the claimant investor have to convince its home state to set sail from the safe harbor of international relations on its behalf. State claims were suddenly democratized and a small trickle of brave adventurers has eventually led to a small armada of private investors leaving port."[9]

ii. Two school of fish: Identifying the differences in the two species

Out of the several reasons given for distinction between the two regimes of arbitration, eight important ones will be discussed here. At least one significant conclusion will be drawn regarding the two regimes after the discussion of each distinction.

The first relates to the source of consent. In commercial arbitrations, the source of consent to arbitrate emanates either from the arbitration clause whose breach is under debate (*clause compromissoire)* or a specific agreement (also known as a "submission agreement") to refer a particular dispute to arbitration (*compromis).* Further, the disputing parties are the parties to the contract or submission agreement and the arbitration is limited to disputes that arise out of (or in connection with) the specific contract. Article 18 of the UNCITRAL requires equality of treatment between the disputing parties and the ability to present its case. In this respect, there is great clarity with regard to the dispute settlement process in commercial arbitrations. The same is not the case with the investment regime. These source their consent from a treaty signed by a sovereign state. However, this applies only to the state itself and the consent for the covered investor is exhibited through his or her submission of a request for arbitration. Under this wing of distinction, a sovereign state, though providing for a wide spectrum of possible dispute resolution options, is unaware of the identify of the litigant investor till the very end. This is the reason why investor arbitrations are known as "arbitration without privity".[10]

Before moving to the second distinction, it must be noted that the angle of 'impact on sovereignty' is only displayed in investment arbitrations. In its aim was to "depoliticize" the investment dispute settlement process, these arbitrations give the

9 Id.

10 Jan Paulson, "Arbitration without Privacy", 10 ICSID Review, FILJ 232 (1995) as seen in Blackaby (2006)

claimant the ability to directly institute a case against a sovereign state. This leads to the complete removal of a sovereign's diplomatic cover and as a feature, this is peculiar only to the investment regime. In this regard, Article 27(1) of the Convention provides:

"No Contracting Shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another contracting state shall have consented to submit or shall have submitted under this Convention unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute."[11]

Hence the import of the first distinction is that disputing parties, in commercial arbitration have a greater knowledge of their opponent's position because of commercial privity.

Further, the concern regarding concession of sovereignty is an issue particular to investment arbitrations because of the possible impact adverse decisions can have on the ability of a country to take regulatory steps. This can be evidenced by the famous *Methanex* case, where a ban on the sale and use of the gasoline additive known as MTBE (methyl tertiary-butyl ether) by the State of California in the US, lead to a claim for approximately $ 970 million.[12]

The next layer of distinction relates to the negotiating period. Investment arbitration agreements usually provide for a three to six month "cooling off" period before which arbitration cannot be imitated.[13] The parties are required to negotiate amongst themselves with the objective of reducing the possibility of actual arbitration. The probability of coming to a mutually agreeable solution increases as the state gets a chance to engage in discussions with the disgruntled investor. This fits perfectly into the parties' desire to avoid lengthy arbitral proceedings, which can tend to get quite expensive due to, among other reasons, the value of the investment itself.

However, it is noted with concern that this practice is not taken very seriously by the states and that it is being reduced to a mere formality. It has been held that failure to comply with the same would not lead to invalidation of the jurisdiction of an investment arbitration tribunal.[14] On the other hand, a provision for such a

11 Article 27(1), UNCITRAL Rules
12 Methanex v. United States (2005) 44 ILM 1345
13 Blackaby (2006), p. 220
14 Ronald S. Lauder v. The Czech Republic, Final Award, 3rd September 2001, paragraphs. 187 & 190, available at: http://www.italaw.com/cases/610

negotiating period is becoming increasingly popular in commercial arbitration. The debate regarding "multi-tiered" arbitrations has been accelerated on account of a flurry of recent cases on the matter.[15] Multi-tiered arbitrations are peculiar for containing what are now popularly known as "escalation clauses", which are provisions that envision a step-wise application of the various stages of dispute resolution. A typical escalation clause would obligate the parties to first engage in mediation and conciliation, *failing which* they would be allowed to arbitrate. This two-step structure results in the arbitration acquiring a "multi-tiered" character.

Thus, it can be seen that though this factor should play a pivotal role in investment matters, States choose to ignore it at their own detriment. Whereas the same is not required as such in commercial cases but parties are recognizing its importance and increasingly warming up to the idea.

The third distinction is founded on the *nature* of the two regimes, which is no doubt, unique to each. While commercial arbitrations mainly deal with the breach of commercial contracts by one of the parties, investment ones concern themselves with the violation, by one of the wings of the government, of international law commitments under investment protection provisions of a treaty.[16] It should probably be mentioned that the ICSID convention is not an "investment protection" treaty, in the sense that it does not provide for standards like the FET[17] (Fair and Equitable Treatment) and MFN[18] (Most Favored Nation) obligations, in the way that BITs (Bilateral Investment Treaties) do. In this sense, the UNCITRAL seems to have more significance for commercial arbitration, as opposed to its counterpart in investment arbitration.

The next distinction is a significant one and shall be discussed in Part III as well. It relates to the applicable law in commercial arbitrations as opposed to investment

15 Sulamerica CIA Nacional de Seguros SA and others v. Enesa Engenharia SA and others, (2012) EWCA Civ. 638; Wah and others v. Grant Thornton and others (2013) 1 Lloyds Rep. 11; Emirates Trading Agency LLC v. Prime Mineral Exports Private Limited (2014) EWHC 2104 (Comm.); International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and another, (2012) SGHC 226.

16 Blackaby (2006), p. 221

17 See generally: Kenneth J. Vandevelde, A Unified Theory of Fair and Equitable Treatment, 43 International law and Politics, pp. 44-106

18 See generally: Tony Cole, The Boundaries of Most Favored Nation Treatment in International Investment Law, (2012) Michigan Journal of International Law, Vol. 33 537-586

ones. In the former, the 'choice of law' (or "governing law") clause, *chosen by the disputing parties*, decides the law to be applied in order to resolve the dispute existing between them. The latter is subject to the principles of the VCLT (Vienna Convention on the Law of Treaties) and of public international law in general. The VCLT forms a common guiding principle for interpretation in all investment disputes. It must be remembered that there is a fundamental distinction in treaty interpretation, as envisioned under investment arbitration, as opposed to interpretation of contractual obligations under commercial arbitration. In this regard, it would be apt to reproduce the following two significant excerpts from the 2002 *Vivendi* decision:

"*In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions.*"[19]

"A treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard."[20]

More specifically, Article 42 of the ICSID Convention refers the parties back to the municipal law of the *state of the investment* where there is no contrary agreement. It is to be remembered that the ICSID's original purpose was to provide for "contractual" dispute resolution in "state contracts". This makes sense with respect to the requirement of an "open offer" by the sovereign state in order to initiate investment arbitration. The problem of course, is that municipal laws simply do not provide rules for deciding investment disputes.[21] There have also been cases that warn against an overly strict application of international law.[22] Thus, it can be seen

19 Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic, ICSID Case no. ARB/03/19, Decision on Annulment, 3 July 2002, available at: http://www.italaw.com/sites/default/files/case-documents/ita0210.pdf [hereinafter "Vivendi (2002)"], paragraph 96

20 Vivendi (2002), paragraph 113

21 See: LESI DIPENTA v. Algeria, ICSID Case no. ARB/03/08, Decision on jurisdiction, 10 January 2005, paragraph 24, available at: http://www.italaw.com/cases/323; MTD v. Chile, ICSID Case no. ARB/01/07, Award, 25 May 2004, paragraph 87, available at: http://opil.ouplaw.com/view/10.1093/law:iic/175-2005.case.1/IIC175(2005)D.pdf

22 SGS v. Philippines, ICSID Case no. ARB/02/06, Decision on jurisdiction, 29 April 2004, paragraphs 126-128

that applicable law in commercial arbitrations is more rooted in the ideology of party autonomy, whereas in investment disputes it is basically a treaty-mandated selection.

The fifth distinction concerns itself with the participation of sovereign states and 3rd parties in the dispute process. Though the former is a *sine quo non* in investment arbitrations, it is becoming fairly common in commercial arbitrations as well. It is to be noted that even when a state engages in commercial disputes, it is acting in sovereign commercial capacity *(jure gestionis)*. On the point of 3rd part participation, it is to be noted that both UNCITRAL[23] and ICSID cases[24] recognize its compatibility with their respective regimes. This proves that both the regimes are equally open to participative dispute settlement.

The sixth distinction is with regard to the how the two regimes interact with transparency requirements. As is the case, the impact of investment arbitration decisions is quite high, thereby necessitating greater transparency. This is because they have the ability to curtail the sovereign regulating powers of a state. Needless to say, this has severe implications.[25] In line with the same, the ICSID requires publication on its website of cases (and interested parties) along with the major procedural steps involved. On the other hand, there is a presumption in commercial arbitrations that confidentiality, between the parties and regarding the proceedings, reigns supreme. However, some commentators have argued otherwise.[26] It is apt to succinctly note that there is no requirement for public hearing under either the ICSID Convention or the UNCITRAL rules, a feature now reserved for BITs. It would be rare to have this situation in commercial arbitration in any case, where private interests are at issue. This shows that the ICSID has taken up the mantle to take care of transparency issues, which are an inherent feature of its regime. On the

23 Supra note 10 at paragraph 1, available at: http://www.italaw.com/cases/documents/1019

24 Vivendi (2002), Order in response to Petition for Transparency & Participation as Amicus Curiae, 19 May 2005.

25 See generally: S. D. Myers v. Canada (2000) 40 ILM 1408; Lise Johnson & Oleksandr Volkov, State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law, available at: http://www.iisd.org/itn/2014/01/06/state-liability-for-regulatory-change-how-international-investment-rules-are-overriding-domestic-law/#_ftn2

26 Alan Redfern, Martin J. Hunter, Nigel Blackaby and Constantine Perteridis, Law and Practice of International Commercial Arbitration, 4th Edition, Sweet & Maxwell Publishing (2004), pp. 27-34 as seen in Blackaby (2006)

other hand, due to the nature of the dispute involved, the UNCITRAL rules have not had to provide for the same.

The penultimate difference deals with the importance that the two regimes attribute to the *lex arbitri.* For commercial arbitrations, it obviously plays a pivotal role in challenging arbitral proceedings.[27] The basic approach under the UNCITRAL system is that the *lex arbitri,* the law applicable to the arbitration will be the law of the place where the arbitration takes place (*lex loci arbitri).*[28]Selection of a "seat" often leads to the arbitration being conducted in accordance with the laws of that country. However, the ICSID reduces *lex arbitri* to a secondary position in favor of a "self-contained system of international justice" where national courts of the place of arbitration have no "traditional role" in supervising the proceedings.[29] In this regard, Article 26 of the Convention provides:

"Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."[30]

Further, Article 52 requires that annulment of awards must also be within the system.[31] It is worthwhile to note that this leads to an associated problem since it leads to third states siting to adjudicate a dispute that would exonerate or condemn another state to arbitration. Even though the scope of review is limited this aspect still has massive consequences. For example in the famous case of *Metaclad* v. *Mexico,* the Supreme Court of British Columbia in a decision from 2001 partially set aside an award in favor of the claimant.[32] Also, in the *Occidental* case, the English Court of Appeals confirmed an earlier decision, again having huge geopolitical

27 Article 1(2), UNCITRAL Rules
28 Alastair Henderson, Lex Arbitri, Procedural Law and the Seat of the Arbitration, (2014) 26 SAcLJ, p. 890: http://www.sal.org.sg/digitallibrary/Lists/SAL%20Journal/Attachments/703/(2014)%2026%20SAcLJ%20886-910%20(Lex%20Arbitri%20-%20Alastair%20Henderson).pdf
29 Blackaby (2006), p. 230
30 Article 26, ICSID Convention
31 Article 52, ICSID Convention
32 Metaclad v. Mexico, (2001) BCSC 664

consequences.[33] This has lead to some calls for an amendment to the ICSID regarding the same.[34]

The final difference between investment and commercial arbitration is based in, what has been described as, "international legal effect". Blackaby explains that there is a difference in the enforcement stage for the two systems. In commercial arbitrations, a successful party can invoke the New York Convention of 1958 for enforcement of an award.[35] If the other disputing party were to object, Article V of the Convention would come into play. Failure to comply with the execution of the award would be a breach of the state's international obligations under the Convention. On the other hand, investment arbitrations provide for a narrower scope of review. The award is to be executed "without further analysis by domestic judiciary".[36] Thus a failure to execute the award would automatically become a breach of international obligations.[37] He concludes on this point by noting that this breach has severe consequences including diplomatic strain.[38]

After providing thorough analysis on both the regimes, Blackaby concludes that the two classes of arbitration are indeed very different. He underscores the public nature of investment arbitrations *vis-à-vis* the essentially private nature of commercial arbitrations. This distinction, in his opinion, is the main cause for differentiation since it has different implication on both regimes with respect to public transparency and accountability. He warns against importing concepts from one into the other, so as to prevent sacrificing of the proverbial dolphin.[39] This could perhaps be the basis for arguing against importing the idea of UNCITRAL's "model law" into the ICSID framework.

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33 Occidental v. Ecuador (2005) EWCA Civ. 1116, available at: http://www.italaw.com/cases/767

34 Supra note 26

35 "New York Convention", Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 ILM 1046 (1968)

36 Article 53 & 54, ICSID Convention

37 For an opposing point of view, see: A. Reinisch, Enforcement of Investment Awards, in: Arbitration under International Investment Agreements (K. Yannaca-Small ed., 2010), p. 671-697 as seen in Schreuer (2010)

38 For example: the "Hickenlooper Amendment" in the United States, which provides for blocking of financial aid to any country that expropriates American property without just compensation. See, generally: http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6513&context=penn_law_review

39 Blackaby (2006), p. 233

i. What the fish? : Investment arbitrations under UNCITRAL Rules

Though seemingly provocative, the above title aptly depicts the irony of the following short discussion. After extensive elaboration on the distinction between investment and commercial arbitrations, an uneasy truth of the investment law world must be acknowledged. In order to prevent confusion, it bears note that arbitration, at least under International Investment Agreement (IIAs), may proceed under the ICSID Convention (along with the ICSID Arbitration Rules) *or through ad hoc tribunals set up under the UNCITRAL Arbitration Rules (most notably, under the UNCITRAL Model Law rules).*[40]

To be sure, these two sub-sets of investment arbitration are also quite unlike, at least from a procedural standpoint. It is noted that they represent "two ends of the spectrum" in terms of the procedural options available to disputing parties.[41] The ICSID Convention and ICSID Arbitration Rules govern the former and there is no application of national domestic law. On the other hand, the procedural terms in the latter are governed by UNCITRAL rules. Also, unlike the UNCITRAL arbitrations, the ICSID Convention arbitrations are institutionalized in the sense that they have an administering body i.e. the ICSID Secretariat.[42]

This is known as "administered" arbitration; where this body provides administrative services to the disputants for a non-negotiable fee.[43] It has been noted with concern that review by domestic courts, in cases where the UNCITRAL rules are applicable, leads to "dilution" in international investment law and practice.[44]

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40 Karl Sauvant, Yearbook on International Investment Law & Policy 2009-2010, p. 342, available at: https://books.google.co.in/books?id=vuxMAgAAQBAJ&pg=PA342&lpg=PA342&dq=ICSID+convention+as+model+law+for+investment+arbitrations&source=bl&ots=-3ZQc2jOgU&sig=Hyq1tud8hAHuOCUiWUU3Aso6dQ8&hl=en&sa=X&ved=0CDoQ6AEwBmoVChMItPXH4uzNxwIVy1gsCh3p2wW4#v=onepage&q=ICSID%20convention%20as%20model%20law%20for%20investment%20arbitrations&f=falsev [hereinafter referred to as "Sauvant (2010)"]

41 Sauvant (2010)

42 R. Doak Bishop, James Crawford & W. Michael Resiman, Foreign Investment Disputes: Cases, materials and commentary (The Hague: Kluwer International, 2005), p. 435 (citing examples of other "administered" arbitrations like ICC and LCIA arbitrations), as seen in Sauvant (2012)

43 ICSID Schedule of Fees, issued pursuant to ICSID Regulation 16 on July 6 2005, as seen in Sauvant (2010)

44 Trakman (2012), p. 605

As may be slightly evident by now, this section has gone beyond the intended scope of merely providing a context to the question of having the ICSID Convention as a "model law" for investment arbitrations. It has also discussed the nuances of the two types of arbitration: commercial and investment-centric. But it must be remembered that the primary aim in this work is to access whether a concept from the former can find application in a prominent instrument of the latter.

The anatomy of a "Model" Law: Is it just an abstraction?

In my opinion, the concept of a model law is a mere idea. There are no legal qualifications, as such, that an international instrument must fulfill in order to be classified as a model law.[45] Thus, the original question has been engaged using logic rather than legal precedent. Though a possibly unorthodox approach, the approach followed in this work seeks to delve deep into the concept of "model" laws and hopefully will be successful in concluding our inquiry.

The issue of whether a particular instrument, in any given field of international law, is suited to be labeled as a "model" for the entire regime can be viewed in two ways. The first would require us to statistically judge the success or failure of a particular instrument in terms of adoption by member countries. This would show, empirically, that a certain number of countries have chosen to adopt the model endorsed by the instrument and agreed to the conditions mentioned under it – thereby giving it the status of a successful model. This, pseudo "critical-mass" approach,[46] to use phraseology from trade law, would prove that that instrument *has become* a model for all these countries.[47]

But at best, this approach would help us answer only the inquiry of *is* the ICSID Convention a model law for investment arbitration. The task at hand, however, seems to improve a deeper investigation – *can* the ICSID Convention be a model

45 Admittedly, none could be found in this study.

46 See generally: P. Gallagher and A. Stoler, Critical Mass As An Alternative Framework For Multilateral Trade Negotiations, 15 Global Governance, Issue 3 (2009), p. 383 as seen in ICTSD: The Future and the WTO: Confronting the Challenges. A Collection of Short Essays; ICTSD Programme on Global Economic Policy and Institutions, Geneva, Switzerland (2012) www.ictsd.org

47 Of course the idea of "critical mass" is slightly different; which proposes that a certain number of countries simultaneously undertaking trade liberalization is required for the success of any trade agreement.

law for dispute resolution in investment matters. Thus the mission of this work is to identify whether, *characteristically*, the ICSID Convention has suitable features to be a model law of investment dispute settlement.

This is why a second approach must be undertaken to tackle the problem. This approach endorses an inquisition into whether that instrument serves a certain set of basic purposes that one would expect a model law to fulfill. The latter approach is adopted in this study. In order to identify these "basic purposes" that a model law should have, we begin our examination of the UNCITRAL rules.

- *What makes the UNCITRAL Model Law so "model"?*

Often the best way to approach an inquiry is through a historic prism. Before formulating the rules, the UNCITRAL had intended to merely adopt a protocol to supplement and clarify the New York Convention of 1958. But instead it decided to adopt a full-fledged model law so as *serve as a basis for national arbitration laws*.[48] This identifies the first important aspect of a model law – that it should be intended to, and have the effect of, influencing the domestic legislation of members with respect to that area of law. This makes sense when one considers that the very idea of having a model law, logically, is to provide a reference point for the countries that sign up to its adoption. That must be the primary, all-pervasive purpose of a "model" law.

Apart from this, Hollering mentions that the UNICTRAL rules were intended to *harmonize and promote uniformity in the practice of international commercial arbitration*.[49] As mentioned in the UN General Assembly Resolution from 1985, all member states were under an obligation to give due recognition to the rules to achieve "uniformity of the law of arbitral proceedings".[50]

It also mentions that they were designed to address the "specific needs of commercial arbitrations."[51] As always, there is the proverbial distinction of substantive and procedural uniformity. The former relates to the adoption of a largely uniform legal regime for arbitration in domestic legislations. The latter relates

48 UNCITRAL, Report of the Secretary General, UND A/C/N/127 (1977), p. 1-3
49 Michael F. Hoellering, The UNCITRAL Model Law on International Commercial Arbitration, The International Lawyer Vol. 20, No. 1 (Winter 1986), p. 327
50 UN General Assembly Resolution, 40/71, 1985
51 Id.

to the usage of law in arbitral proceedings. This identifies the second important aspect – that a model law should promote uniformity in the practice of its field. A model law must contribute to the reduction in fragmentation of its field, resulting from varied perceptions of the correct position of law. Though such fragmentation is quite common in the international scenario,[52] a model law should seek to address this problem by acting as a unifying agent.

Another significant import of the UNCITRAL rules was that it freed the question of arbitral law from the grasp of legislation from any one particular country. Closely related to the fourth aspect, this feature of the rules sought to remedy a problem peculiar to the field of commercial arbitration, that of multiple (and differing) domestic laws on the subject. By providing the world a "model" for the question of which law is to be applied, the rules ensured that the applicable law would not be restricted to one nation's domestic law. Thus, a model law may be one that has the features of affecting positive change in the regime it finds itself in, possibly by alleviating issues characteristic of the regime.

This brings us to the fourth, and extremely significant aspect of *applicable law*. In essence, the UNCITRAL rules provide a framework for choosing the law to be applied for settling commercial arbitration disputes. Thus a significant aspect of a model law is that it provides for some sort of guidance on the choice of law principles to be followed in settling disputes.

Hence, four functionalities of a model law have been identified for analysis. These are: the ability to influence domestic legislation (A), the effect of promoting uniformity in practice (B) and ushering in change (C). Finally, a model law should have some bearing on deciding the applicable law in dispute settlement (D). The ICSID Convention will now be accessed with respect to this combination of four factors to find out whether it has the required characteristics or "credentials" to be a model law for investment arbitrations.

This will involve an inquiry into the nature of the convention, with special emphasis on its purposes and objectives as well as its substantive provisions. As mentioned

52 M. Sornahrajah, The International Law on Foreign Investment, 3rd Edition, (Cambridge University Press: 2010), p. xv, 31; See also: A. van Aaken, Fragmentation in International Law: The Case of International Investment Law (2008) 19 Finnish Yearbook of International Law, at 128.

earlier, there seems to be doubt whether the convention only serves to provide for dispute settlement and not with respect to requiring the modeling of national investment law. One must understand whether the ICSID even took up the responsibility of setting an example for domestic investment law.

- *Denunciations galore: ICSID's shaky situation*

To be sure, there has been some turbulence in the ICSID's universe recently with a public challenge to the institution in 2009 from the Presidents of Bolivia and Ecuador.[53] Venezuela has recently withdrawn from the Convention pursuant to an application under Article 71,[54] while countries like India and Vietnam have never been keen on acceding to it. Similarly Brazil has been left out of the ICSID fold. Though such denouncement by renegade nations has been criticized as counter-productive,[55] questions regarding its future remain unclear. On this less than optimistic note, we begin our final (and main) analysis of the possibility of an "ICSID Model Law on Investment Arbitration".

- *Answers? Or only more questions? : The curious case of IMLIA.*

Here I look at whether it would ever be possible to have an IMLIA: ICSID Model Law on Investment Arbitration.

i. Impact on domestic legislation: A Model Law must serve as a basis for domestic law

As mentioned earlier the UNCITRAL rules were accepted as a model primarily because of their intended purpose was to serve as a guidepost for domestic arbitration law in member countries. In the introductory note to the ICSID Convention, the only reference to the purpose of the convention is the following line:

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53 Leon E. Trakman, The ICSID Under Siege, (2012) Cornell International Law Journal, Vol. 45, pp. 603- 665, available at: http://www.lawschool.cornell.edu/research/ILJ/upload/Trakman-final.pdf [hereinafter referred to as "Trakman (2012)"]

54 Luis Britta Garcia, We have to get out of the ICSID, VENEZUELANALYSIS.COM(Jan. 24, 2012), http://venezuelanalysis.com/analysis/6766 , as seen in Trackman (2012)

55 See, generally: Diana Marie Wick, The Counter-productivity of ICSID Denounciation and Proposals for Change, The Journal of International Business and Law, available at: http://www.law.yale.edu/documents/pdf/11JIntlBusL239.pdf

"In accordance with the provisions of the Convention, *ICSID provides facilities for conciliation and arbitration of investment disputes* between Contracting States and nationals of other Contracting States. [Emphasis added]"[56]

Further, recitals two, four, five and six of the Preamble to the Convention exclusively deal with dispute resolution mechanisms. Relevant excerpts are as follows:

"Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States"[57]

"Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;"[58]

"Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development;"[59]

"Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with;"[60]

The primary objective of the ICSID, as can be identified from the above excerpts, is to facilitate dispute settlement in investment matters. Stretched to its maximum, the objective could be stated to be the furtherance of global economic development, which it achieves by promoting the foreign investment from developed to developing nations.[61]

Thus it can be seen that, intentionally or otherwise, the ICSID Convention does not provide guiding principles for domestic investment law. It is all-together another

56 Introduction, UNCITRAL Rules, p. 5; "in submitting the Attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it", as seen in Nasrullah (2012), p. 89 (See infra note 63)

57 Preamble, UNCITRAL Rules, p. 11, Recital two

58 Preamble, UNCITRAL Rules, p. 11, Recital four

59 Preamble, UNCITRAL Rules, p. 11, Recital five

60 Preamble, UNCITRAL Rules, p. 11, Recital six

61 Nasrullah (2012), p. 89

matter that ICSID cases, decided under the Convention, have the impact of restricting member's ability to make certain kinds of law. In that sense, ICSID *law,* so to speak,may influence domestic investment law, but the ICSID *Convention* does not.

ii. Promoting uniformity:

The Preamble, in its very first recital, mentions:
"Considering the need for international cooperation for economic development, and the role of private international investment therein."[62]
However, as discussed above, the intended role of the ICSID could be said to be the promotion of overall economic development around the world. In this regard, by providing for a comprehensive system of dispute resolution, it provides for a more suitable environment for potential investors. This is achieved by a body of ICSID law, emanating out of case laws, which seeks to establish a model of international investment that is stable, relatively risk-free and at the same time provides for effective resolution of disputes. In this sense, the ICSID does promote uniformity in the field of international investment law.

iii. Ushering in positive change

UNCITRAL's success in solving the problems inherent in commercial arbitrations has been discussed.[63] The ICSID also provides for a gamut of solutions for the problems plaguing investment arbitrations.
ICSID cases[64] have provided that where consent has been given to investor-state arbitration, there is no need to exhaust local remedies even though Article 26 provides that States *can* mandate it as a requirement.[65] This improves on the situation since it prevents the States from establishing hurdles in the institution of investment cases against itself.

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62 Preamble, UNCITRAL Rules, p. 11, Recital one
63 See Part III (i).
64 Helnan v. Egypt, Decision on Annulment, 14 June 2010, paragraphs 9, 28-57 as seen in Christoph Schreuer, Interaction of International Tribunals and Domestic Courts in Investment Law, Contemporary Issues in International Arbitration and Mediation, p. 73 [hereinafter referred to as "Schreuer (2010)"]
65 Article 26, ICSID Convention

It is to be noted with concern however, that this is again ICSID *law* (in terms of case law) that provides the positive change, whereas the Convention itself seems slightly restrictive in light of Article 26.

Another significant import of the ICSID Convention is that its regime is largely free from the "north-bias" school of criticism.[66] This feature was beginning to become a serious trend in several other arbitrations and the Convention was instrumental in providing neutral adjudication in investment disputes. Commentators believe that this has been a key element in the success of the regime as a whole. [67] Though the Convention has been found to exhibit a careful balance of rights between the investor and the State, it has been noted that "mending and correction" must be a continual exercise.[68] The procedural elements of this balance has been described as follows:

"The procedural arrangements made for this purpose include mainly the equal voting right of the participating state representative, renunciation of the right of diplomatic protection, investor's right to direct access to the arbitral forum, consent based jurisdiction, application of the law, formation of the arbitrators and the enforcement of arbitral award."[69]

Not to mention, the ICISD convention protects the rights of the parties by providing for interim measures under Article 47. To this extent, it can be said that for the investment dispute settlement the ICSID does usher in positive change.

iv. The ICSID Convention and Applicable Law

With regard to applicable law, the Preamble mentions:

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66 For an opposing view, see generally: Steve Josselon, Pro-North Bias Seen at ICSID, available at: Steve Josselen, http://tinyurl.com/4g2557 (" [ICSID] is biased toward corporations based in Developed World."); also Christian Teitje et al., Once and forever ? The Legal Effects of Denunciation of ICSID, (2008) 6 Transnational Disp. MGMT, 1 at 5, as seen in Nasrullah (2012), p. 91

67 Dr. K.V.S.K. Nathan, ICSID Convention: The Law of International Centre for Settlement of Investment Dispute, 1st ed. (JP Juris, New York, 2000) at 51 as seen in Nakib Nasrullah, FDI Related Dispute Settlement and the Role of the ICSID: Striking balance between Developed and Developing Economies, The International Law Annual (2013), available at: http://www.spilmumbai.com/uploads/article/pdf/fdi-related-dispute-settlement-and-the-role-of-icsid-striking-balance-between-de-22.pdf [hereinafter referred to as "Nasrullah (2013)"]

68 Nasrullah (2013), p. 88

69 Nasrullah (2013), p. 89

"Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain case"[70]
Though the general principle in investment arbitrations is that the parties are free to choose the specific law to be applied to their disputes. However, and as mentioned earlier, if the parties do not make this choice of law, the ICSID convention provides for the application of the law of the Contracting state party to the dispute and 'such rules of international law as may be applicable'.[71]The "Contracting state party" has, unsurprisingly, been interpreted to mean the host state. However, it must be remembered that domestic law applies only in conjunction with the rules of international law. In case of a conflict between the two, the latter will prevail.[72] The ICSID tribunal may also, as provided in Article 42(3), decide a case *ex aequo at bono* if the parties agree to do so. The usefulness of this has, however, been debated.[73] A finding of *non liquet* by the tribunal is prohibited.[74]
To this end, it can be said that the ICSID Convention does have a robust mechanism in place for deciding applicable law.

Conclusion: Even Einstein asked Questions

I began this work with a whole range of questions, which all sprang from the initially proposed question. In order to understand whether the ICSID Convention could operate as a model law in the field of investment arbitrations, a detailed study was required of the UNCITRAL, the ICSID, investment and commercial arbitrations in general and the nuances arising within them. All of the above has been done in Parts I & II. Part III addresses the inquiry at hand head-on and took on a completely ingenious approach. Through and through, the importance of asking questions, the right kind and the right amount, has been paramount.
In conclusion, the ICSID Convention was found to be largely conducive to the status of a "model law" having fulfilled three out of the four criteria laid out in this

70 Preamble, UNCITRAL Rules, p. 11, Recital three
71 Article 42(1), ICSID Convention
72 Amco Asia Corporation et al v. Republic of Indonesia, 1986, 25 I.L.M 1439, as seen in Nasrullah (2013), p. 92
73 Taslim Olawale Elias, The International Court of Justice and Some Contemporary Problems, 1st ed. (Martinus Nijh off, the Hague, 1983) at 14, as seen in Narullah (2012), p. 92
74 UNCTAD, Chapter 2.6: Applicable Law (2003), UNCTAD/EDM/Misc.232/Add.5, available at: http://unctad.org/en/docs/edmmisc232add5_en.pdf

work. The desirability of the same, with respect to the dangers of excessive interaction as discussed, however continues to be disputed.

THE ORIGINS AND LEGITIMACY OF ATLANTIC SHIPPING CLAUSES

ANIRUDDHA BHATTACHARYA[1] AND ARNAB ROY[2]

Introduction

In the modern day where commercial transactions take place every second of everyday, it is quiet pertinent that all parties that enter into such commercial transactions devise a speedy dispute resolution mechanism. Litigation is the most obvious choice but it is not the one most suitable for commercial transaction where huge sums of money are at stake. The reason why it is ill suited is pretty obvious as it is very time taking and costly process. The obvious choice for dispute resolution is commercial arbitration as it is one of the most expeditious and fruitful ways to settle a dispute. The reason why commercial arbitration has been so globally successful is because it caters to every need of the parties. Party autonomy is the most enticing feature of commercial arbitration as it allows for the parties to dictate how if in case a dispute arises the matter would be adjudicated upon. The parties get to select:

- The law governing the contract
- The law governing the Arbitration Agreement within the contract.
- The seat of Arbitration, which effectively means the choice as the Law of the Seat of Arbitration
- The law governing the arbitration proceeding.

It is very important that in order to progress with this paper we understand the basic underlying notion of arbitration. The notion of arbitration revolves around the idea that we are providing a platform for parties who are entering into commercial transactions to settle any discrepancies as they want to. Thus the onus is upon the parties to decide how they decide to design the framework of the dispute resolution mechanism. Once they have designed the framework of such dispute resolution mechanism then the parties are bound to follow it by virtue of the principle of estoppels which means that once a person has represented something to be true, he cannot go back on it.[34] While designing the framework the only limitation placed on

[1] 5th Year, RMNLU .
[2] 2nd Year, RMNLU.
[3] Indian Evidence Act 1872, § 115.
[4] Superintendent of Taxes v. Onkarmal Nathmal Trust, (1976) 1 S.C.C. 766.

the parties is that the designed framework should be within the parameters of the chosen laws. The choice of law as to 1), 2), 3) and 4) is not a whimsical choice or a mere formality which the parties have to cover. These choices of law lay down the canvas on which the framework for the entire process can be designed by the parties. In this paper we are going to discuss one such issue within the realm of arbitration and see whether the canvas of laws allows for the same to be incorporated by the parties in the framework of arbitration.

Such commercial contracts may contain "Atlantic Shipping" clauses, the name which has been popularised by the case *Atlantic Shipping and Trading Company Limited v. Louis Dreyfus and Company.*[5]The nature of such clauses is to make the reference to arbitration a time bound practice i.e. if one of the parties feels there is a dispute which requires the aid of arbitration then he has to do it within a specific period of time. If the party fails to refer such matter to the arbitrator within the specified period of time then he loses any claim over the same.Parties put these clauses in contracts so that unless and until the other party has referred the matter to the arbitrator, they will be deemed to have waived their right and thus will not be able to bring the dispute into adjudication. The purpose of this paper is to trace the origins of these clauses in the common law and then look at the Jurisprudence regarding the same in India. We will also try and take a look at the various corners of the law in India and see whether Atlantic Shipping Clauses pass the test of statutory laws in India. One of the major outlooks of this paper is trying to see whether the law of contracts as it stands today in India should allow for such clauses to exist in contracts because what they are doing in effect is reducing the limitation period from the one that is statutorily recognised under the Limitation Act to a much narrower time frame.

The Common Law On Atlantic Shipping Clause

The first instance that we find of a court adjudicating on the idea of such a clause which bars the time period for arbitration is in the case of *Atlantic Shipping And Trading Company Limited v. Louis Dreyfus And Company*[6]. In this case a contract had been entered into by the appellants and the respondents, the appellants chartered a

5Atlantic Shipping and Trading Company Limited v. Louis Dreyfus and Company, [1922] 2 A.C. 250.

6Id.

ship of the respondents which was to deliver a full cargo of linseed from Rosario to Hull. The contract among others contained an arbitration clause by which the parties were to refer the disputes to arbitration. It was stated that in the contract that any claim should be made in writing and an arbitrator should be appointed within three months on final discharge, or else it would be completely barred. A dispute arose with respect to some damage to the cargo, caused due to unseaworthiness, however, the respondents neither claimed arbitration nor did they appoint an arbitrator within three months of final discharge of contract. Later when such an action came up, in the King's Bench division, the court said that as the procedure was not complied with, the respondents had waived their claim. The Court of Appeal subsequently overturned the judgment saying that the clause was opposed to public policy as its effect was to oust the jurisdiction of the Court. The issue to be decided in the appeal put simply was whether an Atlantic shipping clause could oust the jurisdiction of all courts when there has been a breach of the terms of the contract resulting in claim for damage to cargo, such breech being caused due to lack of seaworthiness. On appeal the court decided that under the underlying provisions of the contract, there was an implied condition to provide a seaworthy ship. As the ship-owners did not comply with it, they could not seek the benefit of any exemption clause in the contract with respect to damages that arose because of the unseaworthiness of the ship to protect themselves from any liability that arose. The Court followed the decision of *Tattersall v. National Steamship Co.*[7] where it was held that no clause could limit the liability of ship-owners if such loss happened due to unseaworthiness of the ship. The Court while upholding the decision of the Court of Appeal said that as the damage was caused due to unseaworthiness of the ship, the *Atlantic shipping clause* as was made famous by this case could not limit the liability of the ship-owners and that the charterers did not lose their claim and could take the recourse to Courts in furtherance of the same.

The implication of this judgment is rather significant in our understanding of the court's approach in such issues. The court in other words accepted in this case that such a clause can be entered into between the parties which would limit the time for referring the matter to arbitration. They decided that such a clause in this case would be inapplicable as one of the underlying provisions of the contract had not been met with i.e. the seaworthiness of a ship. But suppose for the sake of argument let us

[7] Tattersall v. National Steamship Co., 12 Q.B.D. 297.

assume that such a condition had been complied with then would the claim be lost? The approach of the court seems to suggest an answer in the affirmative because they have accepted the fact that such clauses can exist in contracts. It was merely in this case that the ship was inherently not seaworthy hence the clause was deemed to be inoperative.

Further light on this issue was thrown by the case of *Czarnikow v. Roth, Schmidt And Company*[8]. In this case the contract between the appellants and the respondents for the sale of sugar was subject to rules of the Refined Sugar Association which stipulated among others, that the disputes arising out of the contracts including any question of law should be referred to arbitration of the Council of the association and no party would ask the arbitrator to refer any question of law in the form of a special case for the opinion of the Court. Subsequently a dispute arose, the buyers requested the arbitrator to state the award in form of a special case or to seek the opinion of Courts on certain questions of law that arose or allow them to apply to the Court to allow them to state a case. The arbitrator believing that he was prohibited to do so refused to comply with that request and gave an award against the buyers. The buyers moved to set aside this award. The issue which arose before the court was whether an Atlantic shipping clause ousts the jurisdiction of the Courts. The court in determining whether the agreement ousted the Court's jurisdiction proceeded to state that as long as a clause does not exclude the claimant from such recourse to the Courts, but only requires certain conditions as precedent to a valid claim, it does not oust the jurisdiction. However, if it went on to deprive the claimant of the protection of the Arbitration Act, 1889, it would amount to oust the jurisdiction of the courts and would not be enforceable. Thus the clause which said that once cannot take the recourse to Courts was declared invalid and opposed to public policy.

Thus here we are looking at a broader issue. The issue here seems not to be with the fact that whether the arbitrator has jurisdiction after the time period has lapsed but the issue seems to be that since the party has lost the claim before the arbitrator, can the same before be said about the recourse he would take before a court of law. Thus this is a case of the extent of applicability of the Atlantic Shipping clause. Again the court has not struck down Atlantic Shipping clause's as a clause. Their position seems to be that the clause in question was against public policy as it seeks

8Czarnikow v. Roth, Schmidt and Company, [1922] 2 K.B. 478.

to ouster the jurisdiction of the court. The court in effect thus is saying that one can enter into contracts with Atlantic Shipping Clauses which oust the jurisdiction of the arbitrator and vitiate the claim for arbitration after the specified time has lapsed but the same cannot be said to vitiate the claim in totality i.e. the party can still bring the claim before a court of law.

Another interesting read is the case of *H. Ford and Company Limited v. Compagnie Furness (France)*[9].A contract was entered into by H. Ford and Co. and Compagnie Furness in which the latter as agents of the owner of the ship were to provide the former a ship. The contract among others, contained an Atlantic shipping clause which stipulated that all disputes were to be referred to an arbitrator and every claim were to be made in writing and an arbitrator appointed within three months from the final discharge, else such claim was be barred absolutely. Loss to the cargo was caused due to unseaworthiness of the ship and cargo owners could not appoint an arbitrator within three months. However, the arbitrator passed and award in favour of the cargo owners owing to the loss being caused due to unseaworthiness of the ship. The applicants pleaded that as the cargo- owners had not appointed an arbitrator within three months of final discharge, it had waived its claim and subsequently the arbitrator had passed the award without jurisdiction. The issue left to deliberate upon was whether the arbitrator has the jurisdiction to pass an award in a matter where the time-limit for appointing an arbitrator provided in the Atlantic shipping clause had elapsed and he had not been appointed. In the view of the court the parties had agreed to the time-limit within which an arbitrator had to be appointed and it had elapsed, the arbitrator had thus no jurisdiction in the matter. *Atlantic Shipping Co. v. Dreyfus & Co.*[10] had bearing with the case as the question here was whether the arbitrator could assume jurisdiction or not after the time provided in the clause had lapsed. Thus the court decided that since the cargo owners had failed to appoint an arbitrator within the stipulated time, it results in a waiver of claim and the arbitrator had no jurisdiction to pass an award and owing to such conditions, the award passed by him was to be set aside.

Thus we can see the reliance that the court might have placed on the *Atlantic Shipping case.* It was obvious to them that the court had recognized such clauses previously and had upheld their veracity. The distinction was drawn between the

9H.Ford and Company Limited v. Compagnie Furness (France), [1922] 2 K.B. 797.
10Supra note at 3.

prior cases and this case because there was no question of seaworthiness involved. In the prior cases the seaworthiness of the ship was a condition precedent which had to be satisfied by either of the parties but in this case there was no such condition precedent. This case directly answers the fact that what would happen in case a party refers a matter for arbitration once the time specified in the Atlantic shipping clause. The answer seems to be that in such case the Atlantic shipping clause will be operational and that there would be no jurisdiction vested with the arbitrator.

The most recent case in this regard that we need to look at from a common law perspective is that of *Wholecrop Marketing Ltd v .Wolds Produce Ltd.*[11]In the case the parties had entered into an agreement for the supply of seed potatoes. The agreement was subject to and governed by the attached "*BPTA Terms & Conditions of May 2007"*. The British Potato Trade Association's Conditions of Sale for Seed Potatoes (English law version) contained an arbitration clause, which provided that:

"*Any dispute arising out of the Contract shall be settled by Arbitration according to the Arbitration Rules of the British Potato Trade Association in force as the date of receipt by the Secretary of the request for Arbitration referred to below, and all parties, whether members of such Association or not, shall by their respectively entering into the Contract be deemed to have full knowledge of such rules and to have elected to be bound thereby. A request for Arbitration must be addressed to the Secretary* ***within 12 months after receipt by one party of notice in writing*** *from the other party of the basis of the claim or dispute*".

A dispute subsequently arose between the parties. Correspondences took place between the parties' delays and ultimately a failed mediation before litigation finally commenced in March 2012. One of the issues that arose was that when did the dispute actually arise. Wolds applied for a stay of court proceedings. The Court after hearing the application refused the stay and commenced with the adjudication. In coming to the decision the court looked at earlier cases which would throw some light upon the matter at hand. The first was *Metalfer Corporation v Pan Ocean Shipping*[12] .A charter party contained the following arbitration clause:

"Any dispute arising out of this charter party to be referred to the London arbitrators within 30 days of completion of the voyage and English law to apply."

11Wholecrop Marketing Ltd. v. Wolds Produce Ltd. [2013] E.W.H.C. 2079 (Ch).

12Metalfer Corporation v. Pan Ocean Shipping, [1997] C.L.C. 1547.

The charterers in that case had failed to commence arbitration within 30 days of completion of the voyage, and came to court to seek a declaration that their claims were not time barred. The charterers argued even though it could no longer bring the claim in arbitration, the claim itself was not time barred and that they could still resort to litigation to settle the dispute. The charterers sought to argue that the claim could no longer be brought to arbitration only and that only the arbitration had been time barred.

The court did not accept this contention and held that the effect of such a clause was to bar the claim in totality and not merely the remedy of arbitration. The court relied on Mustill & Boyd "*Commercial Arbitration*"[13]and expressed their opinion that "*it is easy to understand why parties to a commercial contract should wish to bar a claim entirely that is not put forward promptly, but it is not at all easy to understand why, when they have troubled to stipulate that all claims should be referred to arbitration, they should go on to provide that a stale claim should be litigated rather than arbitrated*"[14]

Similar arguments were raised before the court in *Nanjing Tianshun Shipbuilding Co Ltd v Orchard Tankers PTE Ltd*[15]. In that case, parties had entered into a contract where the seller was entitled to dispute the buyer's cancellation of the contract by way of arbitration "*if such institution of arbitration is made within 30 days of the buyer's cancellation*". The seller as is obvious tried to take a matter regarding cancellation of contract to court. The sellers had argued that "*any failure to institute arbitration proceedings timeously did not bar the right to dispute the cancellation but merely barred the remedy to be obtained by way of an arbitral award*".

The court while deciding the matter expressed their opinion that *"It is difficult to discern any commercial purpose in granting the sellers an option either to be able to institute a private arbitration within 30 days or, whether by choice or indolence, be able to institute public litigation after 30 days but within 6 years"*. The court thus held it was not necessary for there to be express and unambiguous wording in the arbitration clause in order that the shorter time bar applied.

13MICHEAL J. MUSTILL & STEWART C. BOYD, COMMERCIAL ARBITRATION, (2nd ed. LexisNexis Butterworths1989).

14MICHEAL J. MUSTILL & STEWART C. BOYD, COMMERCIAL ARBITRATION, 203(2nd ed. LexisNexis Butterworths1989).

15Nanjing Tianshun Shipbuilding Co.Ltd.v. Orchard Tankers P.T.E. Ltd. [2011] E.W.H.C. 164 (Comm.)

After the discussion the court turned to the case at hand. In their opinion the arbitration rules of the BPTA themselves make it "*crystal clear*" that the expiration of the 12-month period time barred the claim itself. Thus once the parties had agreed to submit themselves to the BPTA rules it could no longer be questioned by either of time. Putting into perspective the previously decided cases as well the court saw no reason to change the position in law that had been arrived at and thus stated that since the stipulated time period had not been complied therefore the party had lost recourse to arbitration. The significant change that is observable from this case is that the court is saying that the parties have not only lost recourse to arbitration but cannot approach the court as well. That is to say not only the remedy of arbitration but all remedies get barred once the parties decide to fix a time limit on availing such remedies and the party seeking such remedy does not comply with the same. The logic seems to be that the courts in England are giving significant emphasis on the concept of party autonomy which is the crux of arbitration. They seem to think that because the parties had decided amongst themselves to fix arbitration as a remedy within a specified amount of time therefore it is the duty of the court to respect and extend the same obligation on the party with regard to litigation. In the eye of the court the effect an Atlantic Shipping Clause would have on a contract is not only restrict the limitation period with regard to arbitration but also reduce the limitation period with regard to litigation i.e. the clause would supersede the legislation regarding the limitation.

Indian Scenario

Let us start off firstly with the legislative recognition of such clauses in Section 28[16] of the Indian Contract Act, 1872 which is as follows:

Agreements in restraint of legal proceedings, void. —Every agreement, —

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) Which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.]

16Indian Contract Act 1872,§ 28.

Exception 1. —***Saving of contract to refer to arbitration dispute that may arise. —This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.***

Exception 2. — Saving of contract to refer questions that have already arisen. —Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

A plain reading of this provision shows us that it prohibits either of the parties from restricting the right of the other party to approach the court to enforce his rights in case any dispute arises amongst them. The reason why such a provision has been incorporated in the Act is to make sure that if either of the parties with a dominant position during the formation of the contract tries to take an unfair advantage of the other party and subsequently restrain the other from enforcing his rights so that the unfairness can never be contested, the same cannot be done as the contract would be void. Also it is the public policy of the nation that in case any dispute arises then it is the duty of courts to settle them. If one of the parties were to be barred from approaching the judicial body of the country, then we would be depriving him a right available to all citizens merely because of a contract. The doctrine of parens patriae[17], which embodies that the state's power as a sovereign to ensure the welfare of persons under disabilitythus is the basis for the legislature to deem such contracts as void.

Apart from that, this provision also forbids parties from limiting the time within which one can enforce his rights. This means that if the terms of the contract say that the claim has to be initiated within 30 days, and the other party does not or cannot commence with it within the deadline, the other party cannot take recourse to this term and allege that such a claim cannot be enforced after the specified time. This clause is void up to the extent it limits the time for enforcement of rights as it goes against public policy. The second part of the provision Isa corollary of the first

17Black's Law Dictionary 1269 (4th ed.1971).

as it goes on to say that any provision which goes on to limit the liability of a party according to any term of the contract or upon the expiration of a stipulated time in the contract shall be void to that extent. The interesting part relevant to our discussion comes next in form of the exception. It lays down that this provision regarding the stipulation as to time shall not apply to a contract in which both the parties have mutually agreed to settle the dispute by arbitration. The rationale behind this is also fairly understandable. The parties to avoid appearance before courts and evade spending on litigation can settle the dispute via arbitration where they get to choose a framework which suits them. Thus this is not a situation of no remedy for the party but is a situation where the parties have self-elected forum which can grant them a remedy.

While going through the case-laws discussed above, it can be fairly established that in England, in a case if an Atlantic Shipping clause exists in the contract and the reference to arbitration has not been sought within the stipulated time, it can have a twofold meaning:

- The first by virtue of which in which only arbitration claim is barred and
- The second by virtue of which both the arbitration and the litigation claim is barred.

However, if we were to compare this position to that of India, it can be seen that the exception in the Indian Contract Act, 1872 suggests that such a bar of claim can only be applied to an arbitration proceeding. One can reach this conclusion owing to the fact that the provision expressly declares that any agreement which limits the time for enforcement of any claim in ordinary legal proceedings and tribunals for that matter is void up to that extent save a proceeding for arbitration. One cannot read into the lines here to suggest that what the legislature intends to mean here is arbitration as well as litigation. Also in India, there is a Limitation Act. 1963 which expressly stipulates a time-limit before which a suit can be filed with respect to a claim is reminiscent that one cannot further limit the time by which the claim has to be filed. These two factors seem significant in determining what would be the effect of such clauses in the Indian Scenario.

When we look at the cases decided in India we only have a scant number to choose from. The first being *Planters Airways Pvt. Ltd. v. Sterling General Insurance Co. Ltd*[18]

18Planters Airways Pvt. Ltd. v. Sterling General Insurance Co. Ltd., A.I.R. 1974 Cal. 193.

where the appellant was a common carrier of goods and the respondents were an insuring company with whom, the appellant had time and again entered into insurance contracts for goods being carried. Among other things, the contract contained an Atlantic shipping clause which stipulated that in case the company disclaims liability, the other party had to start the arbitration proceedings within 3 months of receiving the same; else, its claim was to be assumed to have been waived and subsequently barred. In the course of another similar insurance policy, the appellant after paying the requisite amount of premium insured its goods against any loss and sent it for transportation. However, the truck carrying the goods was reportedly attacked and the goods were taken away by a vehicle which is presently untraceable. Accordingly, the appellant submitted its claim to the respondents for the loss of goods and filed a police complaint regarding the same. The respondent, on scrutinizing the final investigation report of the Barasat Police Station, thought that the claim had been declared by the police as false. On, 16th February 1973, the respondent disclaimed liability for the loss of goods. On 30th March 1973, the appellant asked for the grounds on which the same has been done. The respondent subsequently took 2 months to reply to this query and said that it could not add anything to its previous intimation. Meanwhile, the time to commence the arbitration proceedings had elapsed. The appellant aggrieved asked the court for extension of time period for the same. In broad terms the issue before the court was whether the time specified in the Atlantic shipping clause can be extended if the reason for the delay of commencing with the arbitration proceedings can be attributed to one the party against whom arbitration is sought.

The Court said that whether a case was fit for extension of time depended on facts and circumstances of the case. On the respondent's claim saying that the claim was false, the Court replied that such a question was to be decided by the arbitrator. With regards to the exhaustion of time in the arbitration clause, the Court said that one cannot take a benefit of one's own wrong doing. The respondent took a time of two months to reply as to under what grounds it had disclaimed liability thereby exhausting the time stipulated in the arbitration clause. Under such circumstances, it was not possible for the appellant to go into arbitration without knowing the grounds under which the respondents have disclaimed liability.

The Court while holding that the insurance company were themselves guilty in delaying the commencement proceedings extended the time to commence with the arbitration proceedings by a fortnight from the date of the judgment. The approach of the court is quiet simple enough to understand in this case. The court has not denied the fact that Atlantic Shipping Clauses have application and validity in India they have merely laid down that if the delay resulting in the invocation of such clause is the fault of the party against who arbitration is sought then it cannot be invoked. Just like the judgment in *Atlantic Shipping Case* the Indian Judiciary has also laid down one of the grounds in which such clauses will have no effect. The implication of the judgment thus is if there is no fault of the opposing part in the delay regarding reference to arbitration and the complete onus for the same is on the one seeking such reference, then the clause will have effect and arbitration cannot be sought. This judgment runs along the age old logic of the duty to prevent someone from taking advantage of his own wrong. *M/s. M.K. Shah Engineers & Contractors v. State of Madhya Pradesh*[19]is also a very insightful judgment as it throws light upon what are Atlantic Shipping clauses and when can a party avoid consequences of the expiry of a limitation period in an Atlantic shipping clause?

In this case the Government of Madhya Pradesh entered into two separate contracts with MK Shah Engineers & Contractors and Chabaldas & Sons, Contractors. Among others provisions in the contracts, it was mentioned that with regard to any dispute arising out of the same, the decision of the Superintending Engineer would be final and if any party was not satisfied with his decision, the same was to be communicated to him within a period to 28 days and arbitration proceedings for settling the dispute would commence. If the communication was not made within 28 days, the claim was to be barred. In the contract with MK Shah Engineers and Contractors, a dispute arose and it was referred to the Superintending Engineer for his opinion. He delayed the decision taking more than a year and when the appellant investigated into the delay, it found that the decision making process had been delegated to a sub-committee and submitted that the Superintending Engineer had rendered himself incapable of taking decision and requested arbitration. The government agreed and appointed an arbitrator. However, it contested the legality of the arbitration proceedings leaving the arbitrator to let the respondent approach the

19M/s. M.K. Shah Engineers & Contractorsv.State of Madhya Pradesh, (1999)2 S.C.C. 594.

Court to contest the same. Meanwhile, the arbitrator expired and the respondent got the application dismissed by the court as it had become infructuous. The appellant approached the High Court to appoint a new arbitrator, the Court obliged and the arbitrator made an award in favour of the MK Shah Engineers and Contractors. A similar incident happened with the other Chabaldas & Sons except for the fact that instead of the Superintending Engineer not giving any decision; this time around the Executive Engineer made a decision and the appellant unhappy with the same started the arbitration. The respondents moved to the Court to set aside these awards on the ground of lack of jurisdiction of the arbitrator as the Superintending Engineer had not made a decision.

The court while giving its decision on the merit of the claim discussed the fact that there are some arbitration clauses in a contract, which tend to limit the time after which one cannot proceed with the arbitration and thereby lose their claim. These are 'Atlantic Shipping' clauses. The consequences of expiry of time period (the claim becomes barred) after which one cannot commence with the arbitration proceedings can be avoided

(i) if the Court exercises its discretion statutorily conferred on it, to extend the period to avoid undue hardship;
(ii) if the arbitration clause confers a discretion on the arbitrator to extend the period and he exercises it;
(iii) if the conduct of the either party precludes his relying on the time bar against the claimant.

As the Superintending Engineer in this case took unreasonable amount of time and the fact that State of M.P. yielded to the appellants' demand by appointing an arbitrator, they had waived the requirement of the decision of the Superintending Engineer and could not contest the maintainability of the arbitration proceedings as no one can take the advantage of one's own wrong. Thus this is an improvement on the previous judgment and helps crystallise the notion of when Atlantic Shipping clauses won't have effect. Thus the case law which has been developed in India is on the issue of when would such a clause, not have effect. An issue such as that in England regarding the exact effect of such clauses has not been yet adjudicated

upon by the court. The Indian Courts place a significant amount of reliance of the English case when Atlantic Shipping Clauses are in question but it is difficult to see an Indian Court suggesting that once a party has not complied with the requirements of the clause all his remedies would be barred as we have discussed above.

Another interesting case worth looking at from the Indian Perspective is that of *State of Kerala and Ors. v. V.K. Natesa*[20]. In the case the respondents had entered into a contract with the appellants for work on National Highway 47 which constituted widening and strengthening of a single lane section to two lanes. The contract had an arbitration clause which provided that the in case of a dispute the same had to be referred within 90 days of the final payment or such reference to arbitration would be barred. There was a 5-month delay in the completion of work. However, payment was made and the respondents did not object. After more than 3 years, the respondents filed a petition to the Chief Engineer raising some objections regarding the payment and almost 1½ years later filed a petition before the arbitrator regarding the claim. The arbitrator taking recourse to the limitation clause passed an award rejecting the claim. The respondents appealed and the Court saying that the award being totally against the spirit the arbitration agreement set it aside and referred it to the Chief Engineer. The appellants appealed against this order. Thus the issue which cropped up before the court was whether a suit filed after the limitation period has ended in an Atlantic Shipping clause without first setting aside the arbitrator award is maintainable.

The Court holding that such a suit was not maintainable and the only remedy, if at all available to the respondents was to get the award set aside under section 30 of the Arbitration Act, 1940. It relied on *Atlantic Shipping Corporation v. Louis Dreyfus and Co.*[21], and held that such an agreement was perfectly legal. The court, reiterating the position of law that we have been discussing thus far the court recognized the fact that decision of the arbitrator was correct as it was based on the logic that the Atlantic Shipping Clause had not been complied with by the party and thus the claim to arbitration was in fact barred.

20State of Kerala and ors.v. V.K. Natesa, A.I.R. 1977 Ker. 277.
21Supra note at 3.

Thus, again in this case, the Court reiterated its previous stand saying that once the claimant period has extinguished his limitation period for filing the claim, and the arbitrator has rejected his claim citing the same reasons, the courts will not interfere in the operation of the award passed until the same has been set aside for reasons provided in the Arbitration Act.

When we are discussing the extent of judicial intervention that should be allowed in cases involving an arbitration agreement, it is essential that we look at the UNCITRAL Model Law and the corresponding Indian provision in India so as to throw light upon the matters. These provisions read as follows,

Article 5 - Extent of court intervention*-In matters governed by this Law, no court shall intervene except where so provided in this Law.*[22]

And,

Section 5-Extent of judicial intervention*- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.*[23]

The Indian law clearly is in tandem to the Model Law and both of them go on to suggest the same ideology, i.e. there should be minimal judicial interference on part of the court. The courts should only come into question and assert their jurisdiction where the *Indian Arbitration and Conciliation Act, 1996* allows for it. If we try and import this idea to our understanding of Atlantic Shipping Clauses as of now there should be only one ground under which such clauses should be disallowed i.e. if there is any statutory prohibition for the same in the Act. This is very significant because there is no prohibition as such. If the Indian Legislature was opposed to the existence of such clauses, then it would have prescribed for a prohibition against the same but the fact that they have not seems to suggest that they are in fact unopposed to it. It would be incorrect on part of the Indian Judiciary if they went out of their way to suggest that such clauses are against public policy or against the legal framework of arbitration law in India as their jurisdiction (as per the Act) is limited to the extent prescribed. Thus the position adopted by the judiciary till now

22 United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006 (Vienna: United Nations, 2008), available from www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

23 Indian Arbitration and Conciliation Act 1996, § 5.

seems to be well balanced as they have tried to trace the jurisprudence of Atlantic Shipping Clauses and also in order to balance it with the statute have opted for a position of minimal interference.

As has been discussed earlier, there are certain clauses called Atlantic Shipping clauses within an arbitration agreement which limit the time within which one can enforce his rights on a claim, or else, it would be assumed to be waived and subsequently barred. Now, the question that arises here is: What could have been the intent of the Legislature while inserting the exception while talks about recourse to arbitration? When such an exception was provided for in the Indian Contract Act, 1872, the Legislature was aware of the existence of Atlantic Shipping clauses which could limit the time within which one could enforce his claim and thus made space for as an exception to contracts which would be void due to Sec 28. This goes on to show that the Legislature deemed it legal and believed that such a clause was in consonance to the regime of arbitration in India and specifically provided for them by way of this exception. An argument cannot be raised thus in courts which suggest that Atlantic Shipping clauses are invalid as the legislature of the nation has provided for the same as being completely legitimate. Thus an argument of these clauses failing the test of public policy is therefore not tenable.

The Analysis

Looking at the cases decided by both the Indian Judiciary and the English Judiciary we can see that neither of them is negating the fact that such clauses which limit the time in which matters can be referred to arbitration are permissible in both jurisdictions. This practice in India is further highlighted by the fact that under Sec 28 of the Indian Contract Act a special exception has been created for such clauses. This obviously highlights the intention of the legislature in recognizing such clauses as valid as they have taken the effort to mention the same as not being void in accordance to Sec 28. The case laws from both the countries seem to suggest the same thing i.e. if two parties decide to incorporate an Atlantic Shipping Clause in the contract then such contract is perfectly valid and will be given effect by the courts if it meets the other necessary requirements of a contract to be valid (for e.g. public policy in India). In India, due to the saving effect of this exception which is carved out under Sec 28it seems pretty certain that no party would ever raise an argument against the same invoking public policy. Reason being, that if such argument were to

be raised before the court then the court would obviously point to the fact that there exists an exception created by the legislature for such clauses under Sec 28 of the Indian Contract Act. It is in furtherance of the public policy of India that such clauses be allowed to exist and hence the argument that arises that such a clause would be against public policy is not tenable.

The next thing that we have to look at is the issue that arises due to the English judgement in *Wholecrop Marketing Ltd*[24]. The judgment creates a complication by saying that the exhaustion of the claim is not only to the extent of the arbitration but exhausts the claim completely. What the court seem to mean hear by virtue of completely is that the party cannot seek a remedy even in front of the court if there was an arbitration clause with a time limit and the party did not refer the matter to arbitration. In a way the court is saying because you created an obligation upon yourself to have a shorter limitation period thus you are going to be bound it if you didn't approach the initial forum, the initial forum in this case being the arbitral tribunal. This might seem a very harsh approach but it is justified in some sense as the judgment seems to be based around the entire idea of party autonomy.

The court in this English decision seems to be respecting the fact that the parties agreed upon a shorter limitation period. Once the executed an agreement in furtherance of the same then it seems in the opinion of the court, the agreement would supersede the natural course of things. This is the most intrinsic feature of arbitration. We allow parties to create obligations and a separate legal framework for their transaction to function by allowing for such different choices of law. Thus what we are basically telling the parties is that you are free to create a legal framework as you please but once you have created the same then you are going to be bound by it. This is exactly what the courts in England did. They saw that by inserting the clause the parties had changed the approach to be adopted by them in case a dispute arises and this approach is different from the traditional method. The court respected the party's autonomous choice and thus said because you didn't comply with the unorthodox mechanism you created, you shall lose your claim. The rationale seems to be that if you go for an unconventional choice then you will be bound by it. This might seem to be a rigid approach to some but to others it might seem as an approach which is in consonance with the core of commercial arbitration.

24Supra note at 7.

The other stance is what might happen in the Indian Scenario. It looks as if in India that there might be a slightly divergent approach. Looking at the language of Sec 28 of the Indian Contract Act it seems that the extent to which the application of the Atlantic Shipping clause will have effect is that of Arbitration. It is highly unlikely that in India a similar position will be adopted to that of England, i.e. the effect of the Atlantic Shipping Clause would extend to the root of the claim and not allow the party to even approach a court of law. The reason is firstly the language that has been used in Sec 28. The language clearly seems to suggest that the operational nature of the clause can extend only to the domain of arbitration and not beyond. For imposing limitation periods on civil disputes the Indian Legislature has provided the Limitation Act. One might argue that similar statutory limitation for civil disputes is also present in England but the fact of the matter is that the courts in England seem to have adopted a position which suggests that their statute of limitation would have no application when the parties autonomously decide amongst themselves that they are going to fix a new time requirement for claims by way of the clause. No Indian court has yet provided any decision to suggest the same and thus it would be incorrect to suggest at this the court would decide in that manner. Thus it would not be a completely baseless notion to assume that in India the notion of Atlantic Shipping Clauses would extend only to the claim with regard to Arbitration and not the claim in totality.

Conclusive Remarks

In the beginning of our discussion we talked about two possible end of the spectrum. At one end, we have a situation where the operational mechanism of Atlantic Shipping clauses is given utmost priority, so much so that the entire nature of the claim gets regulated by virtue of the clause itself. Meaning thereby that party autonomy as a concept prevails over all elements of the transaction related to the limitation period for a claim which may arise during that transaction. The party autonomy in other words supersedes the statutory limitation period which has been prescribed for by the Legislature. At this end of the spectrum if the parties decide to enter into an Atlantic Shipping clause in the arbitration agreement then an obligation is cast on both of them to bring the claim to the arbitrator in that specified period. If the parties fail to follow this stipulation requirement, then they lose their claim not only in arbitration but also in litigation. In other words, once the time-period

lapses the claim becomes exhausted as the limitation as to time has not been met with.

Moving to the other end, the only change that we have is in regards to this exhaustion of claim. Once this time period lapses, it will not be the case that the claim gets exhausted not only in the arbitral tribunal but also in the courts of law. This end of the spectrum faces an inherent flaw. The correct logical position it seems should be the exhaustion of the claim in totality. This logic can be explained with a simple example. For the purposes of our example let us consider the situation where if a party approaches any court in case of a dispute and there exists a valid arbitration agreement with an Atlantic Shipping clause. The court should always refer back such matters to arbitration and not allow it to stand for litigation in order to fulfil the purpose of the arbitration agreement. On such redirection, the arbitrator would see that the matter is non arbitrable because the time requirement of the Atlantic Shipping clause has not been met with and thus the party would have no claim. Thus indirectly the claim would stand exhausted even if the courts don't seem to agree with the opinion that the limitation imposed by virtue of party autonomy would superimpose over statutory limitation.

We can conclude thus by realising the fact that Atlantic Shipping clauses are here to stay. They have been recognised in most jurisdictions in the world and the only debate seems to be on the exhaustion of the claim. Using our analysis above, we can see that the claim should stand exhausted no matter what the courts feel in regards to party autonomy and this should be the position of law adopted in any progressive jurisdiction because at the end of the day we are trying to fulfil one simple objective of settling the disputes as the parties decide among themselves.

THE ARBITRARY NATURE OF INVESTMENT ARBITRATION : THE EMERGING ISSUES IN BILATERAL INVESTMENT TREATIES

BHAGIRATH ASHIYA[1]

Introduction: The Domain of Investment Arbitration

"It would be strange indeed, if the outcome of acceptance of a bilateral investment treaty took the form of liabilities 'likely to entail catastrophic repercussions for the livelihood and economic well-being of the population' of the host state." [2]

The purpose of investment treaties has been to accord investor protection considering the unabated regulatory powers of the state. The international trade regime of the world has been built upon a multilateral basis, whilst the investment regime has been structured on a bilateral basis.[3] The realm of investment law also provides for contradictory theories on foreign investment, which propound a dichotomy to the host state's interests. The classical theory maintains foreign investment as wholly beneficial whilst the dependency theory advocates no economic development through investment.[4] Thus the calibrated impact on the host state's economy involves a combination of benefits and deleterious effects on the market forces of the economy. Similarly the investment arbitration regime has seen the schism of the public and private rights, through the ideological hostility of the regulatory space of developing countries. This scenario can be represented in the conflict between the United States and the Latin American States[5], disputing the Hull formula and the Calvo doctrine against the core issue of the limits of state sovereignty.

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1 4th year, School of Law, Christ University, Bangalore.

2 Ian Brownlie, Separate Opinion on the Issues at the Quantum Phase of CME v Czech Republic, 2003, p. 78 in Margaret B. Devaney, Remedies in State Arbitration: A Public Interest Perspective IISD Iss. 3. Vol. 3. 2013 p. 11-12.

3 Jeswald W. Salacuse, The Law of Investment Treaties, Oxford University Press 2010 p.3-4.

4 m. Sornarajah, the international law on foreign investment, cambridge university press, p.47-49 (3rd ed. 2010).

5 Id. at 124-125.

The aggrieved foreign investor tends not seek recourse under the domestic laws, due to the sceptical nature of fairness and quality of justice under the host country.[6] The customary nature of investor rights has evolved out of the law of state responsibility for the injury to alien property.[7] This has led to the creation of the international minimum standards, which reflect the obligatory duties of host states in exercising their regulatory powers.

The Vienna Convention on Law of Treaties clearly states that a State cannot invoke its municipal law to avoid international obligations.[8] The Calvo doctrine denies such an international standard on the basis of sovereign equality, where the aliens and nationals are entitled in principle to equal treatment.[9] The debate between the national treatment and minimum standard principles has evolved from theoretical analysis to impacting diplomatic relations.[10] As there is no customary international law allowing investor claims, the eventual remedy turns to the exercise of diplomatic protection. The end of the era of gunboat diplomacy has diluted the effectiveness of this redressal mechanism for investors, whilst being compounded with uncertainty.[11] Thus the apparatus for the resolution of investor- state disputes, resorting to arbitration poses a number of challenges to developing countries, due to the inherent flaws of contradictory decisions and the fluctuating investment jurisprudence. The varied decisions of the arbitration tribunals in the international arena have provided the raw material for the evolution of investor rights and its corresponding jurisprudence.

The majority of the BIT's concluded as of 2008 were between a developed and developing country.[12] The post-colonial confrontation posed by developing countries has been the crux of the issue, leading to jurisprudential challenges in

6 Jeswald W. Salacuse, The Law of Investment Treaties, Oxford University Press 2010 p.40-42.

7 R. Lillich, The International Law of State Responsibility for Injuries to Aliens 212 (Univ. Press of Va, 1983).

8 Article 27, Vienna Convention on the Law of Treaties United Nations, Treaty Series, vol. 1155, p. 331 1969.

9 Manuel R. Garcia-Mora, The Calvo Clause In Latin American Constitutions and International Law, Marquette Law Review Vol.33, p.206 (1950).

10 Jeswald W. Salacuse, The Law of Investment Treaties, Oxford University Press 2010 p.48-49.

11 Susan D. Franck, The Legitimacy Crisis in Investment Arbitration: Privatizing Public International Law Through Inconsistent Decisions, 73 FORDHAM L. REV. 1521, 1522-23 (2005) .

12 United Nations Conference on Trade and Development (UNCTAD), World Investment Report p.14-16. (2008)

international investment law. The primary question pertains to the legitimacy of the incremental emphasis on investor protection, leading to the perception by developing countries, as a major factor their 'underdevelopment and dependence on western countries.'[13] The White Industries Arbitration arising out of the India- Australia Bilateral Investment Treaty (BIT) raises a number of doubts over India's inherent policy adopted towards BIT's. The dilemma of developing countries towards balancing the public interest represents regulatory challenges, which often can be described under the guise of indirect expropriation, violating the fair and equitable standards of the BIT. The internal domestic law with regard to separation of powers within the constitutional framework is also affected due to the arbitral award.[14] This is based on India's inability to provide for 'effective means of asserting claims and enforcing rights', arising out of judicial delay. In the case of Azinian v. Mexico[15], the tribunal affirmed that the host state could be held accountable for denial of justice if the courts have caused undue delay. The solution requires India to re-evaluate its MFN and investment protection clauses in various BIT's and provide remedy to the delay by the courts, which hampers the constitutional separation of powers.

The Indian argument of the contract with White industries being a mere contract for supply of goods and services and thus not constituting investment was rejected by the tribunal. The problem lies in the broad definition of investment incorporated in most of India's bilateral investment agreements. The India-Germany investment agreement does not define fair and equitable treatment and full protection and security whilst the India-Australia agreement uses the term "enjoyment".[16] This widens the ambit of discretion exercised by tribunals in interpretation, detrimental to the interests of developing countries. The ICSID convention does not necessitate the exhaustion of local remedies for the investor, contrary to the fulfilment of this conditionality for the host-state.[17]

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13 Jeswald W. Salacuse, The Law of Investment Treaties, Oxford University Press 2010 p.68-70.

14 S.K Dholakia Investment Treaty Arbitration and Developing Countries : What now and What next? , Indian Journal of Arbitration Law Vol.II 1 p. 1-3 (2013).

15 Robert Azinian, Kenneth Davitian, and Ellen Baca v. Mexico, ICSID Case No. ARB (AF)/97/2 NAFTA Award (1999) p. 102.

16 Biswajit Dhar, Reji Joseph, T C James India's Bilateral Investment Agreements Time to Review ,Economic and Political Weekly Vol. XLVII no 52 p.115-16 (2012).

17 Id at 115-16.

Moreover the decision of the apex court has overruled the criterion for approaching the court in cases of awards given by foreign arbitration tribunals.[18] The Bilateral investment treaties with the lacuna in the status quo can be reformed through a progressive approach to delineating the regulatory space for government policy in the public interest.

Investor- State Arbitration – The Realm of Law Applicable:

Investor – State arbitration in its present form poses challenges to the manner in which jurisdictional issues are resolved through arbitration. The investor state disputes prevail under the domains of private and public international law. The conflict arises when bilateral investment treaties provide for jurisdictional clauses, whilst the private contract between the parties provides for an alternate forum or arbitration. In such situations the national of another state can invoke the bilateral investment agreement to decide upon the question of jurisdiction. Legal theorists have long recognized the problematic character of traditional public-private distinctions[19] and the ambiguous status of international investment law is the evidence of this breakdown in practice.[20] Thus to draw a distinction between public and private international law in this domain would hinder its evolution as a distinct paradigm with the international legal framework. The investor state arbitration procedures grant the investors the right to sue the host state, without requiring any prior contractual relationship between the parties.[21] This procedural position granted to the investor is to counterbalance the investor's subjection to territorial jurisdiction of the host state.[22] The distrust towards the domestic judicial entities is at the root of investor state arbitration[23], which deters the

18 Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical 2006 (1) MPHT 18 CG.

19 Chester Brown and Kate Miles, Evolution in Investment Treaty Law and Arbitration, Cambridge University Press, p. 98 (2011).

20 A. Mills, The Confluence of Public and Private International Law: Justice, pluralism and subsidiarity in the international constitutional ordering of private law, Cambridge University Press, p.94 (2009).

21 J. Paulsson, 'Arbitration without Privity', ICSID Rev. FILJ 10 p.232. (1995).

22 ROLAND KLAGER, FAIR AND EQUITABLE TREATMENT IN INTERNATIONAL INVESTMENT LAW, Cambridge University Press 2011, p.27.

23 FREYA BAETENS, INVESTMENT LAW WITHIN INTERNATIONAL LAW, Cambridge University Press , p.419 (2013).

investor from resorting to exhausting the local remedies and take jurisdictional protection under the BIT.

The lack of a coherent regime, concerning private agreements made between states, encompasses the scope of interpretation and applicability of principles in the light of private contractual agreements. The dualities in the law raise the question of whether the fair and equitable standards apply as per the treaty or in accordance with the concept of international minimum standard under private international law.[24] The standards applied in international arbitration to determine the jurisdiction and the violation of the agreement fluctuate in degree, whilst balancing the public and private interest espoused by the parties to the dispute. The ability of the private party to invoke the jurisdiction and diplomatic protection under the BIT, require the ascertainment of whether the party is an investor. The variation in the standards of determining violations under arbitration proceedings in the manner in which, cases with same facts and parallel proceedings have churned out contradictory verdicts. The contradiction can be found in the case of Argentina's economic measures, where certain arbitral panels accepted[25] the defence of necessity whilst others rejected the reasoning.[26] There is also the necessity to separate the portfolio investments, which do not contribute substantially due to the limited interest in the host state's economy.[27] The deterrent lies in explicitly remedying such transactions outside the demarcation of the scope of investment.

The argument raised by India in the White Industries Arbitration[28], on the grounds of non-fulfilment of the Salini test was rejected on the basis of the confinement of the test to ICSID arbitrations.[29] The inconsistency adopted by tribunals clearly lays down jurisprudential dichotomies, which do not serve the interests of developing countries. Moreover the tribunal in Salini did not limit the

24Chester Brown and Kate Miles, Evolution in Investment Treaty Law and Arbitration, Cambridge University Press, p. 114 (2011).

25 Continental Casualty Company v. Argentine Republic, ICSID Case No.ARB/03/09, Award, (2008).

26 FREYA BAETENS, INVESTMENT LAW WITHIN INTERNATIONAL LAW, Cambridge University Press p.420-23 (2013).

27 Aniruddha Rajput, Defining Investment- A Development Perspective, Indian Journal of Arbitration Law Vol.II 1 p. 16-17 (2013).

28 White Industries Australia Ltd. v. The Republic of India, (UNICTRAL), Final Award (2011).

29 White Industries Australia Ltd. v. The Republic of India, (UNICTRAL), Final Award (2011).

meaning of investment to ICSID cases alone, but laid down the test whilst referring to its autonomous nature.[30] Therefore the enforcement mechanism has ostensible clarity, but the judicial resolution of the conflicts through investor-state arbitration perpetuates ambiguity and the dispute of jurisdiction arising within such contracts.

The Question of Investment and Jurisdictional conflicts:

The jurisdiction is determined on the grounds of subject matter of the dispute or the rationae materiae. The question of proving that there exists an 'investment' has become the sole criterion for determining the jurisdiction of the proceedings before the arbitral tribunal. The Tribunal in *Salini v. Morocco*[31] laid down four criterions which must be must to constitute an investment. The Salini test used to determine the validity of the investment, stipulates the fulfillment of particular conditions such as the duration of the project, contribution to the host state development, contribution of the investor, and existence of operational risk.[32] In process of commercial arbitration under international contracts between parties also provides fluctuating outcomes, which distorts, dilutes and denounces the growth and stability of international transactions, affecting trade and investment. The competing interests and defenses that arise of the bilateral investment treaties consist of the sole effects doctrine and the police powers doctrine prevalent in international investment law. The second aspect delves into the question of the applicability of state laws and the legitimate expectations that are claimed thereof by the investor. The manner in which the white industries case has been dealt brings forth the requirement for India to anticipate the problems arising out growing investment.

The majority of India's investment treaties allow for a direct route to international arbitration without litigating before the domestic courts.[33]The

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30 Aniruddha Rajput, Defining Investment- A Development Perspective, Indian Journal of Arbitration Law Vol.II 1 p. 21-23 (2013).

31 Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco ICSID Case No. ARB/00/4, Decision on jurisdictio, p 52 (2001).

32 Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco ICSID Case No. ARB/00/4, Decision on jurisdictio, p 53-54 (2001).

33V. Inbavijayan and Kirthi Jayakumar, Arbitration and Investments- Initial Focus, Indian Journal of Arbitration Law Vol.II 1 p 32-33 (2013).

definition of investment shows a stark deviation from the Model law, widely explicit in treaties concluded with Mexico, Korea and Kuwait.[34] The India-France Bilateral agreement incorporates indirect forms of investment without definition, which can result the use of this provision by other parties to benefit their cause in investment arbitration through the MFN clause.[35]

The Prisoners Dilemma: The Exercise of Regulatory powers

The limitations that have been imposed due to investment treaties on the exercise of regulatory powers of the state have been the central issue of dispute in most investor- state arbitrations. This has led to some governments abandoning the entire mechanism as in the case of Australia, which excluded investor-state dispute resolution provisions in its trade agreements.[36] The Indian scenario does not require the extreme aversion to the entire concept of investor-state arbitration, but a belligerent reformulation of the Indian administrative and judicial set-up, to attune compliance with the global wavelength of international minimum standards. The response has also been hostile in nature wherein countries such as Bolivia, Ecuador and Venezuela, withdrew from the ICSID Convention[37], owing to the consistent undermining the host states regulatory policies.

It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the exercise of its police powers, they adopt regulations that are aimed at the general welfare.[38] The police powers doctrine legitimizes to some extent the manner in which the state overrides the investment breaches upon the international contract through its activities, which can be considered as direct or indirect form of expropriation. The mere loss of value does not suffice as an expropriation, as the investor still has full ownership

34 Biswajit Dhar, Reji Joseph, T.C James, India's Bilateral Investment Agreements Time to Review ,Economic and Political Weekly Vol. XLVII no 52 p.114 (2012).

35 Biswajit Dhar, Reji Joseph, T.C James, India's Bilateral Investment Agreements Time to Review ,Economic and Political Weekly Vol. XLVII no 52 p.114 (2012).

36 V. Inbavijayan and Kirthi Jayakumar, Arbitration and Investments- Initial Focus, Indian Journal of Arbitration Law Vol.II 1 p 47-48 (2013).

37 Aravamudhan Ulaganathan Ravindran, International Investment Law and Developing Economies: The Good, Bad and Comme CI, Comme CA, Indian Journal of Arbitration Law Vol.II 1 p 47-48 (2013).

38 Saluka Investments BV v. Czech Republic, UNCITRAL Arbitration Proceedings, p.255 (2008).

and control[39], but this mere loss amounts to expropriation under the sole effects doctrine. The standards applied by the arbitrators do not adhere to a uniform pattern that determines the legitimacy of the actions of the state and the claim of the private investor. In Sporrong case[40] the authorities had imposed a construction ban, which the court held was not sufficiently severe to amount to an expropriation. The tribunal in Tecmad case held that '…the State's exercise of its police power may cause economic damage to those subject to its powers as administrator, without entitling them to any compensation whatsoever is undisputable.'[41] Therefore the distinction factor between the police powers and sole effects doctrine eludes the concept of expropriation and the FET standard, which oscillate to the growing disadvantage of investment arbitration.

A measure only imposing some higher costs for the company, which does not have the effect of making the property more or less useless for the owner, will not amount to an expropriation.[42] Thus the curtailment of ownership rights itself qualifies as expropriation to constitute the invocation of the fair and equitable standard under the bilateral treaty, but the acceptability of this proposition does eventually provide for deciding the jurisdictional issue, which is based on the violation of the treaty rather than the international contract. The governmental measures that are irreversible only amount to an indirect expropriation.[43] Thus the permanency criterion has been substantially overwhelmed under the sole effects doctrine where even the slightest impact on the private investor which curtails the business, amounts to indirect or creeping expropriation.

The Dilemma of the Fair and Equitable Treatment Standard:

The most common standard of treatment found in investment treaties is the obligation, that the host country accord fair and equitable treatment.[44] The fair and equitable standard tends to create uncertainty and is without exaggeration

39 CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, p. 264 (2005).

40 Sporrong and Lonnroth v. Sweden, Eur.Ct.H.R., 23 September 1982, A 52 p. 264 (1982).

41 Tecnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, p. 119-120 (2003).

42 Dolzer and Schreuer, Principles of International Investment Law, p. 102–103 (2008).

43 Tecnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, p. 116 (2003).

44 MI Khalil, Treatment of Foreign Investment in Bilateral Investment Treaties FILJ (1992) 351.

'maddeningly vague, frustratingly general and treacherously elastic'.[45] The jurisprudential analysis also diverges with regard to its nature being merely an addition to general international law or an international minimum standard required by customary international law.[46] The legal experts do not completely agree as to its customary nature[47], whilst its abstract character of the principle undermines the requirement of certainty in commercial transactions. The model US-BIT by defining full protection and security creates certainty and predictability[48], as to the nature of the standard applicable, rather than providing scope for the applicability of a judicial standard.

The regulatory measures would not constitute a breach of the FET obligation unless the measures amount 'to an outrage, to bad faith, to wilful neglect of duty'.[49] The question of fair and equitable circumstances under normal circumstances does not hold in a situation of an economic and social crisis.[50] The objective interpretation of treaty provisions must contain a significant margin of appreciation for the State applying the particular measure.[51] The doctrine is a standard of deference given to the national authorities to assess a situation because of their better position to understand it. The tribunals in Methanex[52], Glamis Gold[53] and Chemutra[54] have followed the same approach. The assessment of the reasonableness takes into account not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. The present jurisprudence has emphasized that the legitimate expectations are based on the legal order of the host state as it stands at the time when the investor acquires the investment.[55]

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45 Jeswald W. Salacuse, The Law of Investment Treaties, Oxford University Press p.221 (2010).
46 Jeswald W. Salacuse, The Law of Investment Treaties, Oxford University Press p.222-223 (2010).222-223.
47 Daniel Bethlehem, Donald McRae, Rodney Neufeld and Isabelle Van Damme, Oxford Handbook of International Trade Law, Oxford University Press, p. 635 (2009).
48 Daniel Bethlehem, Donald McRae, Rodney Neufeld and Isabelle Van Damme, Oxford Handbook of International Trade Law, Oxford University Press, p. 636-37 (2009).
49 Neer v. United Mexican States, UNICTRAL p.4 (1927).
50 National Grid v. The Argentine Republic, UNCITRAL p. 180 (1976)
51 Continental Casualty v. Argentine Republic, ICSID Case No. ARB/03/9) p. 181 (2008).
52 Methanex v.United States, Award, Part IV 7, UNCITRAL p.101 (2005).
53 Glamis v. United States, Award, NAFTA Arbitral Tribunal, p.779 (2009).
54 Chemtura v. Canada, Award, NAFTA Arbitral Tribunal p. 133-134 (2010).
55GAMI v. Mexico, Award, 44 ILM (2005), p. 93.

Moreover Birnie, Boyle and Redgwell note in discussing the Ogoniland case that corporate crimes and breaches against human rights is a legitimate ground to deny an investor the protection of an international instrument.[56] These exceptions can be invoked for protecting habitat and conservation of exhaustible natural resources. The conflict of public and private international law becomes apparent in such situation, when the private investor tends to resolve the dispute through the bilateral investment treaty.

Therefore the ostensible allegation of violation of human rights tends to distort the investment dispute, whereby the host state pleads public interest in order to expropriate the private investors investment. The peculiarity of the circumstances in such a situation lead to the conflict of laws when the host state environment and human rights obligations under ratified treaties necessitates the indirect form of expropriation. In the Shrimp Turtle case[57] and EC-Asbestos case[58], the Appellate Body upheld the right of WTO members to legislate or take measures for the protection of natural resources. Each WTO member state has the right to establish whatever level of health and environmental protection it deems appropriate within its own borders.[59] The measures are applied in conformity with the requirements of the chapeau of Article XX.[60] The introductory clause termed the chapeau, that the exception would be illegal if the measure constitutes a) arbitrary or unjustifiable discrimination b) a disguised restriction on international trade. The necessity argument has also been precluded under certain arbitral awards, which have adhered to the sole effects doctrine, basing the decision on the investor's rights under the bilateral investment treaty.

The objectives of the BTA provide for the fair and equitable treatment to be accorded to the claimant. The violation of the FET standard[61] involves whether

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56 BIRNIE, BOYLE & REDGWELL, INTERNATIONAL LAW AND THE ENVIRONMENT, Oxford University Press, p. 327 (3rd Ed. 2009).

57 United States - Import Prohibition of Certain Shrimp and Shrimp Products, p. 171-172 WT/DS 58/AB/R Appellate Body Report (1998).

58 Appellate Body Report, EC-Measures Affecting Asbestos and Asbestos-Containing Products, 168, WT/DS135/AB/R (2001).

59 Pfizer Animal Health v. Council of EU, II ECR 3305 p. 151 (2002).

60 US- Standards for Reformulated and Conventional Gasoline, 35 ILM 274 (1996).

61 Saluka investments BV v. Czech Republic, UNCITRAL Arbitration Proceedings, p. 291 (2008).

the purported conduct was arbitrary[62] and against the investor's legitimate expectations.[63] The respect for the investors' legitimate expectations is the most predominant element of the fair and equitable treatment.[64] The tribunal in Tecmad,[65] awarding Mexico to pay compensation to the operator of the landfill, held that 'authorities should base their decision on the factors explicitly mentioned in the national environmental legislation'.[66] A stable legal and business environment is an essential element of the fair and equitable treatment, and suspension amounts to its breach[67].

A lawful expropriation requires the fulfilment of the four conditions to met:[68] public purpose, non-discrimination, due process as per the applicable treaty[69] and compensation.[70] Under the Sole Effects doctrine an expropriation may take place without or regardless of any intention to expropriate on the part of the host State.[71]The doctrine has been applied as the only determining factor of determining indirect expropriation.[72] Its application in a number of cases[73] represents it as a general principle of international law. The rule of law and the FET standard comprise of quintessential elements i.e procedural propriety and due process, which are indispensable to question of justice. The lack of notification of important legal steps[74] and the right to be heard[75] have been

62 Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2 Award (2000).

63Tecnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, p. 510-511 (2003).

64 Saluka investments BV v. Czech Republic, UNCITRAL Arbitration Proceedings, p. 301 (Final Award, (2008).

65Tecnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, p. 127 (2003).

66 Vattenfall Europe Generation AG v. Federal Republic of Germany, ICSID Case No. ARB/09/6, Request for Arbitration, p. 15-20 (2009).

67CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, (2007).

68OECD Draft Convention on the Protection of Foreign Property,1967, 7 ILM 117, Article3.

69 U. Kreibaum, Regulatory Takings, Balancing the interest of the Investor and the State, 8 The Journal of World Investment and Trade 731 (2007).

70 Antoine Goetz v. Republic of Burundi, ICSID Case No. ARB/95/3, Award, (1999).

71Norwegian Shipowners Claims (Nor. v. U.S.), 1 RIAA 307, Award, (1922).

72 U. Kreibaum, Supra note 71 at 724.

73 Southern Pacific Properties Ltd. v. Arab Republic of Egypt, 3 ICSID Reports 189, Award, (1992).

74 Middle East Cement v. Egypt, ICSID Case No. ARB/99/6 Award (April 12, 2002), ICSID Reports, p 143.

considered as a violation of the FET standard.[76] In the Waste Management case[77] the tribunal held that fair and equitable treatment is infringed by conduct, which involves a lack of due process. The investor is entitled to rely on the representations of the federal officials [78]. The FET standard can be violated even in a case, where there is no mala fides is involved[79] and the effects deprive ownership and benefits of the property.[80] Thus the actions of the state can amount to a violation of the bilateral investment treaty under the sole effects doctrine, when the investment is effected indirectly. Therefore the jurisprudential conundrum in defining the standard of the fair and equitable treatment under international law, has led to deviating principles, which alter the course of the jurisdictional question and raise questions as to the right forum to settle such international contract disputes. Thus the varied justifications granted on the basis of the sole effects doctrine and the police powers doctrine creates unpredictability and inconsistency in the international trade and investment. The threshold established varies with the decisions of the WTO Appellate Body and the ICSID, which have dealt with a number of investment disputes. The manner in which these disputes have been dealt illustrate the lack of consensus on matters of the regulatory powers of the host state and the investors rights of legitimate expectations, which do not adhere to a coherent and cogent stance in identifying breach of obligations enforceable upon the State.

The remedying potion to the ambiguity of the FET provisions lies in stipulating the extent of protection granted rather than contending an approach of interpretation, ostensibly a discretionary process in the arbitral mechanism. The FET provisions can specifically state that the investor has to prove the violation of a customary international law obligation, which 'may not be established solely

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75Tecnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, p. 162 (2003).

76 CHRISTOPH SCHREUER, FAIR AND EQUITABLE TREATMENT, Oxford University Press p.128 (2005).

77 Waste Management, Inc. v. United Mexican States ICSID Case No. ARB (AF)/00/3, Final Award, (2004).

78 Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1, Award, (2000).

79 Siemens v. Argentina, ICSID Case No. ARB/02/8 Award p. 299, (2007).

80 Tecnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, p. 70 (2003),

through arbitral awards or secondary sources.'[81] The UNCTAD has recommended the use of an exhaustive list of state obligations under the FET provisions.[82] The clean hands doctrine can also be applied which would consider the human rights obligations under international law. [83] The transgression from the human rights obligations would render the investor's claim against the state inadmissible.[84] This methodological approach creates an effective redressal mechanism in investor-state arbitration, fine-treading the contesting claims of private and public interest. Thus the corporate claim of FET standard violations can be harmonized with the exercise of regulatory powers in public interest, when the investor has acted in violation of international obligations.

The Arbitrary Nature of International Arbitration:

Although "correctness remains a vital virtue, at times the mission of law is sometimes to achieve certainty for certainty's sake and consistency for consistency's sake."[85]

Though the arbitration mechanism as well as international law do not explicitly provide for de-jure precedential value, [86] the effect permeates to future decisions based on principle consistency and predictability. The tribunal in *Saipem v. Bangladesh* clearly states the requirement of consistency and predictability in investment arbitration law as a necessity and furthermore as a'... duty to

81 Matthew C. Porterfield,A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals,IISD Iss. 3. Vol. 3. p. 4-5 (2013).

82 UNCTAD, World Investment Report 2012: Towards A New Generation Of Investment Policies, p.139. (last accessed 15th Oct. 2015) http://www.Unctad-Docs.Org/Files/Unctad-Wir2012-Full-En.Pdf.

83 Patrick Dumberry and Gabrielle Dumas-Aubin, The Doctrine of "Clean Hands" andthe Inadmissibility of Claims by Investors Breaching International Human Rights Law, Transnational Dispute Management Special Issue: Aligning Human Rights and Investment Protection 10 (2013).

84 Patrick Dumberry and Gabrielle Dumas-Aubin, The Doctrine of "Clean Hands" andthe Inadmissibility of Claims by Investors Breaching International Human Rights Law, Transnational Dispute Management Special Issue: Aligning Human Rights and Investment Protection 11-12 (2013).

85 Frederick Schauer, The Generality of Law, 107 W. VA. L. REV. 217, 233 (2004) in The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have A Bright Future, 12 U.C. Davis J. Int'l Law and Policy 47 p. 67 (2005).

86 Art. 59 Statute of the International Court of Justice, 1945; Art. 1136(1) NAFTA 32 ILM 289, 605 (1993).

contribute to the harmonious development of investment law".[87] This inherent jurisprudential tendency for consistency attached de-facto precedential value to arbitral awards. This analogous approach has led to the reliance by the White Industries tribunal on the controversial decision of Chevron-Texaco v. Ecuador[88] in arriving at the meaning of "effective means"at a crucial legal juncture in the arbitration.

The contradictory decisions of tribunals creates judicial discrepancies as the arbitral decisions act as de facto precedents, determining the rights and liabilities of the investor and state.[89] The legal inconsistencies affect 'foreign investment decisions, economic development, and foreign relations'.[90] The Lauder Awards[91] and the arbitral decisions in CMS v. Argentina[92] and LG&E v. Argentina[93] have reached diametrically opposed deductions based on 'factual and legal similarities'. [94]

The UNCTAD report has identified this scenario as 'problems inherent in the system of international arbitration'.[95] There also exists the view that the debate concerning contrary arbitral awards has ignored the essence of international arbitration, which makes it an attractive proposition to international economic actors.[96] The disagreements within the arbitration legal framework can lead to a

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87Saipem v. Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures p.67 (2007).

88 Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23.

89 Susan D. Franck, The Legitimacy Crisis in Investment Arbitration: Privatizing Public International Law Through Inconsistent Decisions, 73 Fordham Law Review, 1522-23 (2005).

90 Susan D. Franck, The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have A Bright Future, 12 U.C. Davis J. Int'l Law and Policy 47 p. 57 (2005).

91 CME/Lauder v. the Czech Republic, (last accessed 15th Apr. 2014) italaw.com/documents/LauderAward.pdf.

92CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/08 Annulment Decision (2007).

93LG&E v. Argentina, ICSID Case No. ARB/02/1 24 (2006).

94 Frank Spoorenberg and Jorge E. Vinuales , Conflicting Decisions in International Arbitration The Law and Practice of International Courts and Tribunals 8 (2009) 92.

95 UNCTAD, Recent Developments in Investor- state Dispute Settlement (last accessed 17th Oct. 2015) http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf 2013

96 Frank Spoorenberg and Jorge E. Vinuales , Conflicting Decisions in International Arbitration The Law and Practice of International Courts and Tribunals 8 (2009) 91-113.

more deliberated jurisprudence.[97] Thus 'predictability, reliability, clarity, efficiency and consistency'[98] can reinvigorate the depleting interest in investment arbitration of developing economies. The arbitration mechanism does need to be extolled due to the efficiencies involved in reducing a wide range of transaction costs involved in the judicial process.

Conclusion:

The solution to the arbitration quagmire lies in the manner in which, the bilateral treaties, which are invoked, provide for such contingencies in anticipation of the exercise of regulatory powers by the host state as well as the legitimate expectations of the investor. The bilateral treaties must provide for the specific clauses which deal with the issue of the exhaustion of the jurisdiction provided under the international contract between the private investor, before the private investor resorts to the diplomatic protection provided under the Bilateral Investment treaty. The varied standards applied by arbitration tribunals put forth serious concerns with regard to the subjectivity instead of the need for the elixir of objectivity. The probing of the very definition of investment as a jurisdictional question stymies the resolution of disputes as provided under international contracts. The answer to the jurisdictional concoction is further deluded with the additive of the arguments concerning the acts of the host state and its justification, which form a part of the jurisdiction argumentation before the tribunal.

The remedy lies in the necessitating the requirement of jurisdictional clauses with fork in the road provisions, which address the issue of invocation of the protection under the bilateral investment treaty and the international contract between the respective parties. The arbitration mechanism must also provide for effectual principles, which reduce the ambiguity under the ambit of private international law in investor state disputes. The global phenomenon of trade and investment can only be sustained and nurtured under a mechanism which

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97 Susan D. Franck, The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have A Bright Future, 12 U.C. Davis J. Int'l Law and Policy 47 p. 57 (2005).

98 Susan D. Franck, The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have A Bright Future, 12 U.C. Davis J. Int'l Law and Policy 47 p. 99 (2005).

resolves the disputes and concerns of private investors as well as the host state, redefining their interaction and manner of judicial settlement in case of breach of international contracts. The consolidation of claims has been argued as an effective mechanism, which can result in the increase in the efficiency of arbitration and avoidance of conflicting or contradictory awards.[99] The prerequisite also exists for the government to disclose existing and proposed agreements to the public[100], when the citizenry is the one to pay for such arbitrations awards.[101] Thus public participation and consultation must be adhered to as a norm in the reformation of the India's model BIA's, which are plagued with impending liability. The Indian Government's decision to renegotiate 82 BIT's [102] bodes well for the very essence of exercising sovereignty, but remains a herculean task considering majority of the treaties having come into force. The long-term resolution can be found in the form of a Multilateral Investment treaty or an International Investment court,[103] which can reduce the snowballing equivocality of the deluding world of investment arbitration. The International Investment court can act as a final resort for adjudication of investor–state disputes, spearheading the much required certainty, neutrality and predictability in investment arbitration. The increasing litigation[104] under BIT's also needs to be tackled through an all-embracing re-evaluation of the vagueness and impact of India's bilateral agreements with various countries. Eventually foreign investment is not the elixir to the India's need for development, whilst

99 Catherine Yannaca-Small, Consolidation of Claims: A Promising Avenue for Investment Arbitration? International Investment Perspectives, p.233 (last accessed 17th Oct. 2015) http://www.oecd.org/investment/internationalinvestmentagreements/40079691.pdf

100 Kavaljit Singh, Fixing India's Bilateral Investment Treaty Framework, Mainstream, Vol VI, No. 51, (2013).

101 Jayati Ghosh, India's Bilateral Investment Treaties: Worst fears Realized, Frontline, Vol. 29 - Issue 5: 10-23 (2012).

102 Deepshikha Sikarwar and Joji T. Philip, India to Re-look at 82 BIPAs as Foreign Investors Invoke Global Arbitration, Economic Times, (last accessed 15th Oct. 2015) http://articles.economictimes.indiatimes.com/2013-04- 05/news/38306801_1_investment-protection-bipas-nation-treatment.

103 Aravamudhan Ulaganathan Ravindran, International Investment Law and Developing Economies: The Good, Bad and Comme CI, Comme CA, Indian Journal of Arbitration Law Vol.II 1 p 64-68 (2013).

104 Vivek Vashi and Kanika Sharma, Increasing litigation under Bilateral Investment Treaties – should the Government be worried?, Indian Law Journal (last accessed 16th Oct. 2015) ttp://www.indialawjournal.com/volume5/issue_2/article_1.html.

bolstering investor protection over and above national interests. The panacea lies in attracting investment through efficient governance and reforming the Indian version of Bilateral Investment Treaties. Investment arbitrations have also drawn the ire of developing countries as the arbitrators tend to side with the investor, to increase the perceived opportunity of reappointments.[105] The partial panacea to the emerging issues of investment arbitration lie in redefining the nature of India's BIT standards, purging the impeding ambiguity with regard to the standards of protection. A study by Gus van Harten shows that arbitral tribunals adhere to a wider interpretation of investment treaty clauses.[106] This evidently necessitates the requirement for redefining the role of investment arbitration whilst dealing with the question of arbitral bias for the cause of generating business. A small number of 15 arbitrators have sat in the panels of 55 per cent out of 450 investment-treaty disputes.[107] Thus the solution lies in not only remedying the BIT clauses and their ambiguity, but also securing the neutrality of the arbitrator. While some tribunals tend to view their task as a technicality whilst others see it as a duty to develop a system of international investment protection.[108]

The jurisprudential question in the dominion of arbitration has always been as to 'what the law should be and what the law is', which requires a considerate understanding of the conflicting interests of the stakeholders, whilst doing justice to the 'needs' of the developing world rather than the 'wants' of the developed world. As Gurcharan Das rightly notes, "Greed is the sin of capitalism, envy is the vice of socialism"[109], and in order to the balance this juxtaposition of international arbitration, one requires the reconciliation of divided interests within the legal framework.

105 GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW, Oxford University Press p. 3-4. (2007).

106 Gus Van Harten, Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration Osgoode Hall Law Journal 50.1 (2012) : 211-268.

107 Cecilia Olivet and Pia Eberhardt , Arbitrators' Role in the Recent Investment Arbitration Boom IISD Issue 3. Vol. 3. p. 17-18 (2013).

108 Rudiger Wolfrum, The Max Planck Encyclopedia of Public International Law Vol. VI Oxford University Press p. 323-324 (2012).

109Gurcharan Das, "The Difficulty of Being Good", Penguin Books India, 28 (2009).