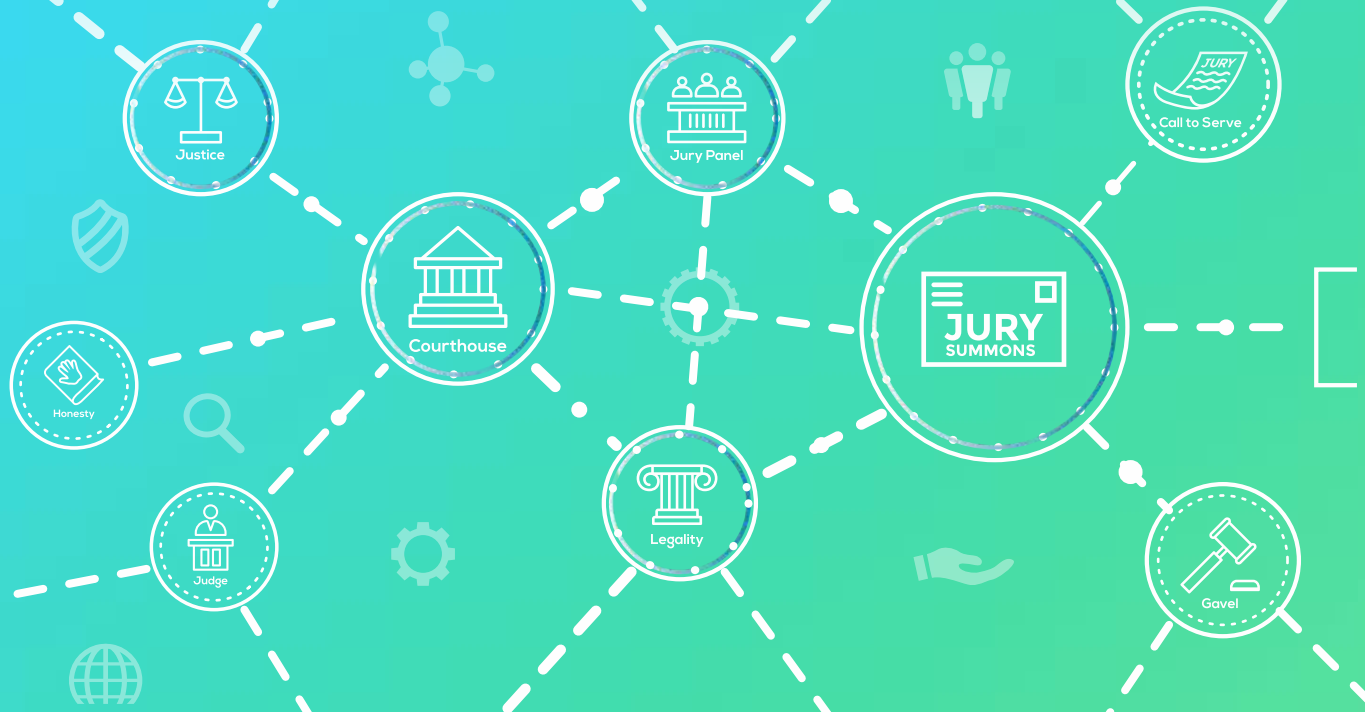
ICA
INDIAN COUNCIL OF ARBITRATION

ICA ARBITRATION QUARTERLY

Vol-202 | July - September, 2019



INDIAN COUNCIL OF ARBITRATION
Dedicated to Arbitration for Over Five Decades

STATEMENT OF PURPOSE

The ICA Arbitration Quarterly, published by the Indian Council of Arbitration, aims to be a scholarly journal to provide independent platform and ensure in-depth studies of the most important current issues in Domestic and International Arbitration, giving it even more urgency as a forum for original thinking, threadbare analysis and reporting on regional and global trends in order to contribute to the promotion and development of arbitration practices.

ICA, as such, welcomes the contribution from the intending writers on issues relating to domestic, maritime and international commercial arbitration. Intending writers are requested to read and understand "Guidelines for Authors" given on the inner side of the Back Cover of this Journal. The persons, intending to contribute in the Quarterly, may send article to:

The Editor

ICA Arbitration Quarterly
Indian Council of Arbitration
Federation House,
Tansen Marg, New Delhi- 110001
Email: editor.ica@ficci.com; ica@ficci.com

Note:

Publisher:

Indian Council of Arbitration
Federation House, Tansen Marg,
New Delhi- 110001

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FROM THE PRESIDENT'S DESK

Studies have shown that parties are now increasingly selecting arbitration as alternate dispute resolution mechanism to resolve their commercial disputes. However, there have been concerns raised by the users of arbitration regarding certain aspects of arbitration process in India including enforcement of award, fairness, speed and costs etc.

To address various issues, changes have been made by legislature through Arbitration and Conciliation (Amendment) Act of 2015 and 2019. Further, pro-arbitration judgments by the Courts are also a step in right direction to achieve the desire for fairness, speed and economy in resolution of disputes as suggested by Law Commission Report and High Level Committee Report. However, lot more needs to be done for India to become a global arbitration hub and I believe that with the passage of time, issues and concerns will be ironed out by further legislative amendments and interpretations by Courts.

The present arbitration scenario in India promises opportunities for professionals working in the field of arbitration as India plans to become a $ 5 trillion economy. At ICA, we will continue our efforts to promote arbitration as a preferred mode to resolve commercial disputes, use the services of ICA and make India an arbitration friendly jurisdiction. ICA also continues it's endeavours for the professional development of it's members by organising Conferences, Training Course, Workshops etc. Recently, on occasion of it's 54th Annual General Meeting, ICA organised a Conference on ***"Arbitration in India: The New Scenario"*** on 07th December 2019 at New Delhi. The Conference was graced by Hon'ble Mr. Justice Surya Kant, Judge, Supreme Court of India, as the Chief Guest.

At this juncture, I am happy to announce that the 3rd Edition of International Conference ***"Arbitration in the Era of Globalisation"*** is being organised by the ICA on 08th February 2020 at New Delhi, to further promote arbitration as a mode of dispute resolution in commercial matters and discuss international best practices in the field of arbitration. I hope more and more members will take benefit of the International Conference.

I wish all of you a very happy and prosperous 2020, a year of New Opportunities and Endless Possibilities !!

Happy Reading!!

N. G. KHAITAN

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS UNDER INDIAN ARBITRATION LAW – DEFENCES AVAILABLE TO THE PARTY AGGRIEVED FOR OPPOSING ENFORCEMENT

Justice D.R. Dhanuka (Retd.)
Former Judge, Bombay High Court
Senior Advocate, Supreme Court

The Arbitration and Conciliation Act 1996 makes provision for Domestic Award as set out in Section 2(7) of the Act of 1996 as well as recognition and enforcement of New York Convention Awards (Chapter I, Part II) and Geneva Convention Award (Chapter II, Part II). Preamble to the Act of 1996 unlike the Arbitration Act, 1940 makes it clear from the preamble that it has been enacted on the basis of recommendations whereby the General Assembly of United Nations, U.N. enacted Model Law and Rules etc., with the object of establishment of unified legal framework in International Commercial relations.

2. With the growth of Global Trade and International Commercial transactions, the scope and ambit of International Commercial Arbitration has increased much more than it was originally expected. If the Arbitration proceedings are held in India, Section 2(2) of the Act will apply subject to proviso appended thereto inserted by the Act 3 of 2016.

3. In case of Foreign Seated Arbitrations, substantive law (proper law) for the time being in force in India applies to this extent. The validity of Arbitration Agreement is governed by Arbitration Law applicable thereto. The arbitration proceedings are governed by curial law. Section 28 of the Act specifies category of applicable law for deciding the substances of dispute, in case of International Commercial Arbitration - category of law designated by the parties as applicable to the substances of dispute etc. as more particularly set out in the said section and the relevant sub-section.

4. An Arbitral Award is final and binding on the parties and persons claiming under or them subject to provisions contained in Section 35 of the Act in case of Domestic Award and Section 46 in case of Foreign Awards. A valid award is executable and enforceable in the countries which have adopted New York Convention or Geneva Convention to the extent provided in Part II of the Act. The valid Foreign Award may be relied upon by the party in whose favour the Award is made by way of defence, set off or otherwise in any legal proceedings in India.

5. The expression "Foreign Award" is defined for the purpose of interpreting and applying New York Convention Award by Section 44 of the Act. For the sake of brevity, the said section is not reproduced here. The text of New York Convention is appended to the Act in the first Schedule. Similarly, in case of Geneva Convention Award, the expression "Foreign Award" is required to be interpreted with reference to Section 53 of the Act read with the protocol set forth in the Second Schedule appended to the Act.

6. It happens sometimes that notwithstanding Arbitration Agreement which is valid and binding, parties resort to judicial proceedings before a Judicial Authority in order to circumvent the arbitration clause or on taking of certain technical and legal contentions. In case of Arbitration Agreement covered by Sections 44 and 53 of the Act, in all such cases the Judicial Authority is bound to refer parties to Arbitration as already agreed upon unless it finds that the arbitration Agreement is null and void, inoperative or incapable of being performed.

It has been held by the Hon'ble Supreme Court of India in case of Sasan Power Limited Vs. North American Coal Corporation India Pvt. Ltd., by a reported Judgement reported in 2017(2) Arbitration Law Reporter 86 that the scope of enquiry under Section 45 of the Act is confined only to the question whether the Arbitration Agreement is "null and void, inoperative of incapable of being performed but not the legality and validity of the substantive contract".

In this case it was argued that two Indian parties could not enter into an Agreement of Arbitration to be governed by the laws of other country. However, this question was not decided by the Apex Court having regard to the finding of fact reported therein and conclusion that the agreement therein was between three parties and not between five Indian parties. It was held that here the contract was between three companies and one of them was a Foreign Company. It was held that an order was already passed in this case under Section 45 of the Act providing for Reference of Arbitral Dispute in according with the laws of United Kingdom and thus it was not necessary to decide as to whether two Indian parties could refer disputes to arbitrate to be governed under Foreign law. Thus, it was obvious that the Order of Reference was valid and the scope of enquiry under Section 45 of the Act was appropriate and the question as to whether two Indian Companies could enter into Agreement to be governed by the Laws of another country would not arise in this case for decision of the Hon'ble Apex Court.

7. When an Foreign Award governed by New York Convention Award or Geneva Convention Award is sought to be enforced, an Application is required to be made before the Hon'ble Court concerned for enforcement of Foreign Award by producing before the Hon'ble Court original Award or copy thereof duly authenticated, original Agreement for Arbitration or duly certified copy thereof or such evidence as may be necessary to prove that the said Award was a Foreign Award and, no suit was required to be filed for enforcement of Foreign Award. All the procedural and other provisions pertaining to enforcement of New York Convention Award are set out in Chapter I of Part II of the Act (Sections 44 of 52). Similarly, all the provisions relating to enforcement of Geneva Convention Awards are set out in Sections 53 to 60 of the Act.

8. In one of the decided cases a question arose in the Judgement in the case of Integrated Sales Services Ltd., Vs. Arundev Upadhyaya as to whether the Foreign Award could be enforced against a party who was a non-signatory to the Agreement but who was party to the Award and was thus statutorily recognized. It was held by the Hon'ble High court of Bombay that on the basis of available precedents, the doctrine of alter ego was required to be applied. It was held that the expression "Public Policy of India" must be interpreted so as to consider as to whether there was a lack of judicial approach on the part of Arbitral Tribunal and thus there was contravention of 'Public Policy' of India. It was held that the Foreign Award was enforceable and the Chapter 1 of Part II of the Act in terms of provisions of Section 49 of the Act and the Foreign Award therein must be deemed to be a decree of the court.

9. Section 47 of the Act prescribes the list of documents required to be produced by the party applying for enforcement of Foreign Award. The words "having regard to the object of the Act and even though all the documents were not produced along with the application, the same could be produced later on".

10. Section 48 of the Act 1996 prescribes condition for enforcement of Foreign Award. For the time being I am restricting my study to section 48(2) and Section 34(2-a) of the Act. Section 34 (2-a) of the Act excludes the applicability of doctrine of patent illegality for challenging International Commercial Award. Section 48(1) of the Act provides that enforcement of the Foreign Award may be refused if the award totally furnished to the court proofs of any of the matters mentioned therein e.g. incapacity of the parties to enter into the Agreement, no proper notice, decision by the arbitral on the document not submitted etc., Section 48(2) of the Act reads as under:-

"48(2).Enforcement of an arbitral award may also be refused if the Court finds that -

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) Enforcement of the Awards would be contrary to the public policy of India.

Explanation 1:- For the avoidance of any doubt, it is clarified that an Award is conflict with the public policy of India only if :-

(I) Making of the Award was induced or affected by fraud or corruption was in violation of Section 75 or Section 81; or

(ii) It is in contravention of the fundamental policy of Indian law Or

(iii) It is in conflict with most basic motion of morality on justice.

Explanation 2 : For the avoidance of doubt, the test as to whether there is contravention with the fundamental policy of Indian Law shall not entail a review on merits of the dispute"

11. Explanation 1 and Explanation 2 were substituted in the said Sub-section of Section 22 of Act 3 of 2016. Thus, the scope and ambit of concept of Public Policy of India as a ground for setting aside the Foreign Award is very much restricted and narrowed down by Explanation I and is further restricted by clarificatory Explanation 2. In brief, if the Foreign Award is induced or affected by fraud or corruption or is in violation of Section 75 of Section 81 of the Act like purporting to admit evidence in conciliation proceedings which is inadmissible, the Award shall be considered as being in conflict with Public Policy of India.

12. By Explanation 2 it is clarified that whether there is a contravention with the fundamental policy of Indian Law shall not entail review on merits of the dispute. Identical restrictions on the applicability of the ground of award being conflict of public policy as a defence is provided by Explanations 1 and 2 substituted at the foot of section 57 (e) of the Act.

13. It must be clarified here and now that the expression "Fundamental Policy of Indian Law" does not mean mere error of law and even the ground of 'patent illegality' is segregated and further narrowed down from the ground of opposed to public policy. It means lack of judicial approach. As far as basic notion of morality or justice is concerned, in one of the cases which were observed that it would perhaps mean sexual immorality. I respectfully disagree. The language used is wide enough.

14. In this context a reference must be made to the earlier judgement of the Hon'ble Supreme Court of India in the case of Renusagar Power Co. Ltd., Vs. General Electric Company and General Electric Company Vs. Renusagar Power Co. Ltd., reported in AIR 1994 SCC 860. In this case it was held that expression "Public Policy of India" in the context or Foreign Award must be construed to mean only Public Policy of India and the enforcement of a Foreign Award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to -

    (I) Fundamental Policy of Indian Law; or

    (ii) Interest of India; or

    (iii) Justice or morality

    The grounds like fundamental policy of Indian Law contrary to justice or morality are incorporated in the amended legislate word by word in Explanations (ii) and (iii) Appended to Section 48(2) of the Act in case of New York Convention Award and sub-clauses (ii) and (iii) forming part of Explanation 1 appended to Section 57 in case of Geneva Convention Award. It was held in ONGC Ltd., Vs. Saw Pipes Limited that the external Public Policy of India must be widely construed for the purpose of interpreting and applying Section 34 of the Act. This view has been overruled legislatively as indicated in substituted provisions. It was also held in Renusagar's case that provision for allowing compound interest was not opposed to Public Policy of India. It was further held that breach of Foreign Exchange Regulation Act 1973 shall amount to contravention of Public Policy of India as the Foreign Exchange Regulation Act was enacted to safeguarding economic interest of India but in Renusagar's case, no breach of Foreign Exchange law was present.

15. The expression "Interest of India" as one of the grounds referred to in paragraph 66 of the Judgement in Renusagar's case makes no difference as if the Award is in contravention of interest of India it is bound to be treated as contrary to fundamental principles of justice or morality or fundamental policy of Indian Law and adding of this ground in so many words would make no difference.

16. It must however, be stated that one more ground has been added by Explanation 1 Appended to Section 34(2)(b), in addition to Explanation 1 appended to Section 48(2) of the Act and Explanation 1 appended to Section 57(e) of the Act directly or indirectly. It means that if the Award is procured or induced or affected by fraud or corruption, it would be treated as opposed to public policy. It further means that if Award is in violation of Section 75 or 81 of the Act provide for confidentiality of conciliation proceedings and inadmissibility of evidence or justice made during the course of conciliation in other proceedings is also ground of treating the award as opposed to public policy.

17. I shall now refer to the Judgment of the Hon'ble High Court of Madras in the case of Tehaicom Public Company Ltd. Vs. Raj Television Network Limited

reported in 2017(2) Arbitration Law Reporter 321 where the expression "Public Policy of India" was interpreted or applied in context of fundamental policy of Indian Law. It was the case of Arbitration held in Singapore the claim was within time according to the Arbitral Tribunal. When the Award was sought to be enforced in India it was sought to be argued that according to the Indian Law limitation of 3 years would apply for making an application for enforcement of Award and the Award could not have been validly made at Singapore ignoring three years of Law of Limitation prescribed by Indian Law of Limitation. This argument was rejected by the Hon'ble High court of Madras on the ground that fundamental policy of Indian Law was required to be interpreted in contexts of Judgment of Apex Court in the case of Shree Lalmahal Ltd., Vs. Progetto Grano Spa reported in 201492) SCC 433 that wider interpretation of the expression 'Public Policy' in case of Domestic Award was not applicable in case of enforcement or enforcement of Foreign Award. Earlier Judgement of the Hon'ble Supreme Court of India in the case of Phulchand Exports Ltd., Vs. OOO Patriot reported in 2011(10)SCC 300 was overruled. There cannot be second inning on a law point involved once again before the court before which Award was sought to be enforced under Section 48 of the Act. Section 45 of the Act clearly provides the Reference to Arbitration was mandatory unless the Agreement was null and void or inoperative or incapable of being performed. It was held that Indian Limitation Act cannot be invoked before the Learned Arbitrator and the Learned Arbitrator was justified in applying Singapore Law in view of the Order of Reference under Section 45 of the Act. Thus, it was held that the Agreement of Arbitration was lawful and was neither null and void nor inoperative or incapable of performed. The Award was upheld. It was held that Limitation was a part and procedural law and it would necessarily involve application of Law of Limitation which was closest to the Seat of arbitration i.e. in this case the law of Singapore.

Thus, in my humble opinion the amendment made by adding Explanations 1 and 2 to Section 48(2) of the Act rightly reduced the ground of challenge in respect of Foreign Award. By and large if international investors are to be persuaded to go ahead with the global trade, scope for challenging International Awards or Foreign Awards should be minimum and award should be treated as final both on facts as well as on law unless it was in breach of natural justice, without jurisdiction, oppose to public policy or patent illegality. As far as patent illegalities are concerned, the said ground is now separated from the ground of Public Policy as obvious from Section 34 (2-A) of the Act. In other words the award arising from International Commercial Arbitration cannot be set aside on the ground of patent illegality even if it so appears on the face of the Award unless the patent illegality is in respect of serious economic offence like contravention of FERA as held in Renusagar's case.

For the sake of brevity, I say, no more. The march of law is in right direction and must be appreciated by all of us by and large, the Awards must be honoured and the judicial intervention must be bared minimum.

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ANTI-ARBITRATION INJUNCTIONS AND INVESTMENT TREATY ARBITRATION – A TALE OF TWO (INDIAN) CITIES

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1. INTRODUCTION

"It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of light, it was the season of darkness, it was the spring of hope, it was the winter of despair."[1]

Thus wrote Charles Dickens in one of his classics, A Tale of Two Cities. Incidentally, these words also aptly describe Indian courts' approach towards anti-arbitration injunctions in relation to investment treaty arbitration proceedings. At times, their approach resembles a spring of hope, before quietly turning into the winter of despair. In a vague Dickensian tribute, this article endeavors to map this jurisprudential oscillation by exploring the judicial decisions emanating from two Indian cities - Calcutta and Delhi.

One of the defining traits of international commerce is its evolutionary nature. Any change in economic policies of nation states, regulatory regimes, and social structures often triggers a corresponding change in the manner in which commercial transactions are executed globally. Consequently, every few decades, a national legal system is confronted with novel issues of law relating to international commerce that are yet to receive a definitive judicial response. While such issues are ordinarily confined to the domestic law of a nation state, they may at times travel beyond its contours. The Indian law legal system is no exception to this norm; certainly not when it comes to questions relating to international investment law and investment treaty arbitration.

** *The contents of this article reflect the personal views of the authors alone, and not of any organization they may be affiliated with. The authors reserve their right to depart from these views in the future.*

[1] *Charles Dickens, A Tale of Two Cities (1859).*

Investment treaty arbitration is a hybrid form of international dispute settlement involving a foreign investor's investment in a host state, and cannot be rationalized as either a form of public international or private transnational dispute resolution.[2] An investment treaty tribunal derives its jurisdiction from a sui generis arbitration agreement that is formed when a foreign investor accepts a host state's offer to arbitrate contained in a bilateral or multi-lateral treaty, to which the investor's home state is also a contracting party.[3] The claims advanced by an investor in these arbitration proceedings are premised on alleged breaches of one or more of the obligations undertaken by the host state in the treaty invoked. This is also why the "law applicable to the issue of liability for a claim founded upon an investment treaty obligation is the investment treaty as supplemented by general international law",[4] and not its domestic law.

This article provides an overview of Indian courts' rendezvous with investment treaty arbitration, while dealing with requests for issuing an anti-arbitration injunction in relation to such treaty proceedings. This raises several fundamental questions. How have Indian courts responded to requests for anti-arbitration injunctions? Do they share the same sense of distrust towards investment treaty arbitration tribunals as has been shown by many Latin American countries? Or are they more respectful of arbitral tribunals' supposed competence to assess questions about their own jurisdiction?

Part II begins by explaining the circumstances under which investment treaty arbitration emerged as a controversial topic of conversation in India, and introduces the concept of anti-arbitration injunctions. Part III discusses the judgment rendered by the High Court of Calcutta in *Louis Dreyfus*[5] that issued a partial anti-arbitration injunction. Part IV thereafter discusses the High Court of Delhi's judgments to the contrary in *Vodafone*[6] and *Khaitan Holdings*[7] . Part V concludes.

2. INVESTMENT TREATY ARBITRATION AND THE INDIAN JUDICIARY

Over the past decade, the Indian legal system has grappled with this hybrid regime of international dispute settlement in some form or the other. And no conversation in this regard can be complete without a reference to the Final Award issued in the case of *White Industries Australia Limited v. The Republic of India*[8].

In *White Industries*, a tribunal constituted under The Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, made in New Delhi on 6 February 1999, was *inter alia* requested to decide if "the conduct of India's courts regarding the set aside and/or enforcement applications [relating to a commercial arbitration award] amounted to a denial of justice to White in breach of the fair and equitable standard?"[9]

While the Tribunal rejected White's claim based on an alleged denial of justice[10], it held that "the Indian judicial system's inability to deal with White's jurisdictional claim in over nine years, and the Supreme Court [of India's] inability to hear White's jurisdictional appeal for over five years amounts to

[2] *Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', 152.*
[3] *See Jan Paulsson, 'Arbitration without Privity', 10(2) ICSID Review – Foreign Investment Law Journal 232 (1995).*
[4] *Zachary Douglas, The International Law of Investment Claims (CUP 2009), 39, Rule 10.*
[5] *The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & others, 2014 SCC OnLine Cal 17695.*
[6] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (22 August 2017); Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (7 May 2018).*
[7] *Union of India v. Khaitan Holdings (Mauritius) Limited & others, I.As. 1235/2019 in CS (OS) 46/2019 (29 January 2019).*
[8] *White Industries Australia Limited v. The Republic of India, UNCITRAL (Rowley; Brower; Lau), Final Award (30 November 2011).*
[9] *White Industries Australia Limited v. The Republic of India, UNCITRAL (Rowley; Brower; Lau), Final Award (30 November 2011), 10.1.1(c).*
[10] *White Industries Australia Limited v. The Republic of India, UNCITRAL (Rowley; Brower; Lau), Final Award (30 November 2011), 10.4.24.*

undue delay and constitutes a breach of [the Republic of] India's voluntarily assumed obligation of providing White with "effective means" of asserting claims and enforcing rights."[11] As a result, the Tribunal directed the Republic of India to pay to White Industries an amount in excess of 4.6 Million in Australian Dollars, along with interest at the rate of 8% for a prescribed period of time.[12]

The award in *White Industries* was widely criticized in the Indian arbitral community,[13] and is viewed to have engendered a sense of distrust towards the investment treaty arbitration framework. The Tribunal's adverse remarks regarding the Indian judicial system, coupled with a gradual increase in investment treaty claims filed against the Republic of India, appears to have only bolstered this sentiment of hostility. This is probably why subsequent to the award in *White Industries*, the courts in India are now routinely requested to issue an anti-arbitration injunction against an ongoing investment treaty arbitration proceeding on the basis that the tribunal constituted lacks jurisdiction. Here, the expression "anti-arbitration injunction" refers to a judicial direction "to restrain a party from instituting or continuing arbitration proceedings when that party, going beyond the agreed terms of contract, wrongly attempts to invoke or invokes the jurisdiction of the arbitrator."[14]

For instance, recently in 2017, the Government of Tamil Nadu approached the High Court of Madras with a request to restrain Nissan Motor Company Ltd. from proceeding with an investment treaty arbitration against the Republic of India relating to a dispute over certain unpaid State incentives.[15] Interestingly, the Government of India opposed this request before the High Court on the grounds that the Government of Tamil Nadu did not have *locus standi* to seek an anti-arbitration injunction.[16] While the petition before the High Court of Madras is yet to be decided, some other High Courts in India have addressed similar requests on previous occasions.

Any request for the issuance of an anti-arbitration injunction that is premised on the existence of doubts about the jurisdiction of an arbitration tribunal is principally opposed to the negative effect of the principle of compétence-compétence[17] principle. In its positive incarnation[18], the compétence-compétence principle denotes that an arbitral tribunal "may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."[19] However, the negative effect of the principle goes a step further to suggest that an arbitral tribunal, and not a civil court, must decide questions surrounding its jurisdiction at the first instance, subject to a judicial review at the stage of annulment.[20]

A strict adherence to the negative effect of the *compétence-compétence* principle would imply that the courts in India ought not to issue any anti-arbitration injunctions against investment treaty

[11] *White Industries Australia Limited v. The Republic of India, UNCITRAL (Rowley; Brower; Lau), Final Award (30 November 2011), 11.4.19.*
[12] *White Industries Australia Limited v. The Republic of India, UNCITRAL (Rowley; Brower; Lau), Final Award (30 November 2011), 16.1.1.*
[13] *See Sumeet Kachwaha, 'The White Industries Australia Limited - India BIT Award: A Critical Assessment', 29(2) Arbitration International 275 (2013).*
[14] *S.R. Subramanian, 'Anti-arbitration injunctions and their compatibility with the New York convention and the Indian law of arbitration: future directions for Indian law and policy' 34 Arbitration International 185 (2018), 185.*
[15] *https://www.thehindubusinessline.com/companies/tn-moves-high-court-to-restrain-nissan-from-international-arbitration/article9981835.ece*
[16] *https://economictimes.indiatimes.com/industry/auto/india-to-oppose-international-jurisdiction-in-tamil-nadu-nissan-row/articleshow/62343591.cms?from=mdr*
[17] *Also referred to as the principle of kompetenz-kompetenz.*
[18] *Gary Born, International Commercial Arbitration (2010) 853.*
[19] *The Arbitration & Conciliation Act, 1996, s 16(1).*
[20] *Jean-Fracois Poudret and Sebastien Besson, Comparative Law of International Arbitration (2007) 387.*

tribunals merely because there may be some jurisdictional concerns. However, this is far from a foregone conclusion since in the recent past, Indian courts have explicitly refused to recognize the negative effect of the *compétence-compétence* principle.[21] The next sections delve into how Indian courts have addressed this dilemma in the context of investment treaty arbitration.

3. CALCUTTA - A HESITANT ODE TO THE PAST!

In 2014, the High Court of Calcutta became the first High Court in India to adjudicate a request for the issuance of an anti-arbitration injunction in relation to an investment treaty arbitration proceeding.

In *Louis Dreyfus*, the plaintiff approached the High Court of Calcutta by way of a civil suit seeking an anti-arbitration injunction in relation to an investment treaty arbitration proceeding initiated by a French national against India, under the Bilateral Investment Treaty ("BIT") between the Government of India and the Government of France. The plaintiff "essentially [sought a] restrain order upon the respondent no. 1 to proceed with the arbitration proceeding" under the India-France BIT.[22] It *inter alia* alleged that neither was Louis Dreyfus an "investor" under the treaty nor was KOPT, i.e. the entity arrayed as the first defendant in the treaty arbitration, a party to an arbitration agreement between Louis Dreyfus and the Republic of India.

To adjudicate this request, the High Court was required to assess whether the notion of anti-arbitration injunction was compatible with the Arbitration & Conciliation Act, 1996 ("A&C Act")?

> The High Court relied on the decision in Excalibur Ventures LLC v. Texas Keystone Inc. and others[23] to affirm the power of Indian civil courts to interfere with foreign arbitral proceedings in "exceptional circumstances"[24] . This included a situation where "the continuation of such foreign arbitration would cause a demonstrable injustice" [25] The Court further noted that "the jurisdiction of the Court to interfere in such a situation is not completely obliterated" by the provisions of the A&C Act.[26]
>
> On this basis, the High Court summarized the following circumstances under which an anti-arbitration injunction can be issued: "(I) If an issue is raised whether there is any valid arbitration agreement between the parties and the Court is of the view that no agreement exists between the parties; (ii) If the arbitration agreement is null and void, inoperative or incapable of being performed; (iii) [if the] continuation of foreign arbitration proceeding might be oppressive or vexatious or unconscionable."[27]

Curiously, in reaching this conclusion, the High Court cited the judgment rendered by a seven-judge bench of the Supreme Court of India in *SBP & Co. v. Patel Engineering Limited. & another*,[28] which had

[21] *See Pratyush Panjwani and Harshad Pathak, 'Assimilating the Negative Effect of Kompetenz-Kompetenz in India', 2(2) Indian Journal of Arbitration Law 24 (2013).*
[22] *The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & others, 2014 SCC OnLine Cal 17695, p. 1.*
[23] *Excalibur Ventures v. Texas Keystone, 2011 (2) Lloyd's L.R 289.*
[24] *The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & others, 2014 SCC OnLine Cal 17695, p. 23.*
[25] *The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & others, 2014 SCC OnLine Cal 17695, p. 23.*
[26] *The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & others, 2014 SCC OnLine Cal 17695, p. 21.*
[27] *The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & others, 2014 SCC OnLine Cal 17695, p. 24.*
[28] *S. B. P. & Co. v. Patel Engineering Limited. & another, (2005) 8 SCC 618.*

categorically refused to recognize the negative effect of the *compétence-compétence* principle. Specifically, by a majority of 6:1, the Supreme Court had held that the under the un-amended Section 11 regime, the Chief Justice or its delegate was required to decide certain jurisdictional questions, such as the existence of a valid arbitration agreement, before appointing an arbitrator.[29] On a first blush, this would suggest that the High Court gave a proverbial nod to the past, to assume primacy over questions of arbitral jurisdiction.

However, the High Court's adherence to the approach endorsed by the Supreme Court of India in *Patel Engineering* was not absolute. As far as the objection that the respondent no. 1 was not an "investor" under the India-France BIT was concerned, the Court held that whether Louis Dreyfus "could be treated as an investor is a matter to be decided by the arbitral tribunal duly constituted under the relevant rules. In the event, the preliminary objections are overruled and the arbitral tribunal is of the opinion that the matter can proceed and continuation of such proceeding would not be a recipe for confusion and injustice."[30] However, with respect to the second objection relating to KOPT, the High Court proceeded to grant an anti-arbitration as under:

> "The arbitration agreement is only enforceable against the Union of India and not against KOPT. The continuation of any proceeding against KOPT at the instance of the defendant no.1 would be oppressive for the reasons mentioned above. In view thereof, KOPT would not be bound to participate in the said proceeding. The respondent no.1 is restrained from proceeding with the arbitral proceeding only against the petitioner."[31]

4. DELHI - EMBRACING THE PRINCIPLE OF *COMPÉTENCE-COMPÉTENCE*

Around three years after the High Court of Calcutta's judgment in *Louis Dreyfus*, Indian courts' tryst with anti-arbitration injunctions relating to investment treaty arbitration moved to the High Court of Delhi.

4.1. Vodafone - Part I (2017)

In *Vodafone*, the Union of India approached the High Court of Delhi requesting for an anti-arbitration injunction in relation to an investment treaty arbitration claim advanced by the defendant nos. 1 and 2, who were shareholders of one Vodafone International Holdings B.V., under the India-UK Bilateral Investment Promotion and Protection Agreement ("BIPA"). It was India's objection that this arbitration was based on the same cause of action, and sought the same reliefs, as those sought by Vodafone International Holdings B.V in an ongoing investment treaty arbitration under the India-Netherlands BIPA.[32] Thus, the subsequent initiation of an identical investment treaty arbitration under the India-UK BIPA was stated to be "an abuse of law"[33]. Further, since the claims advanced in this arbitration encompassed tax demands raised by Indian taxation authorities, it was argued that such claims were "beyond the scope of arbitration provided under the bilateral investment treaty as taxation is a sovereign function and the same can only be agitated before a constitutional court of the host state."[34]

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[29] *S. B. P. & Co. v. Patel Engineering Limited. & another, (2005) 8 SCC 618, 46(iv). See also National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd, (2009) 1 SCC 267.*

[29] *The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & others, 2014 SCC OnLine Cal 17695, p. 25.*

[29] *The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & others, 2014 SCC OnLine Cal 17695, p. 25.*

[29] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (22 August 2017), p. 4.*

[29] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (22 August 2017), p. 4.*

[29] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (22 August 2017), p. 4.*

[30] *The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & others, 2014 SCC OnLine Cal 17695, p. 25.*

[31] *The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & others, 2014 SCC OnLine Cal 17695, p. 25.*

[32] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (22 August 2017), p. 4.*

[33] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (22 August 2017), p. 4.*

[34] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (22 August 2017), p. 4.*

With respect to the power to grant anti-arbitration injunctions, the High Court reasoned that "the Courts have to exercise great caution, while restraining foreign arbitration and apply the same principle as they apply to the grant of injunctions restraining foreign court proceedings."[35]

After affirming its power, the High Court explained that it was "of the *prima facie* opinion that as the claimants in the two arbitral proceedings form part of the same corporate group being run, governed and managed by the same set of shareholders, they cannot file two independent arbitral proceedings as that amounts to abuse of process of law."[36] Therefore, in the High Court's view, "it would be inequitable, unfair and unjust to permit the defendants to prosecute the foreign arbitration."[37]

On this basis, on 22 August 2017, the High Court of Delhi granted an *ex-parte* injunction as under:

> "... defendant No.1 and 2, their servants, agents, attorneys, assigns are restrained from taking any action in furtherance of the notice of dispute [...] and the notice of arbitration [...] and from initiating arbitration proceedings under India-UK [BIPA] or continuing with it as regards the dispute mentioned by the defendants [...]."[38]

4.2. Vodafone - Part II (2018)

Vodafone - Part I followed the High Court of Calcutta's approach, except that instead of adhering to the tripartite criterion laid down in *Louis Dreyfus*, the High Court of Delhi issued an *ex parte* anti-arbitration injunction on the grounds of abuse of process of law. However, this was merely the beginning of the saga as the High Court still had to decide whether to grant a permanent anti-arbitration injunction in relation to the investment treaty arbitration initiated under the India-UK BIPA. The High Court decided this question by its judgment dated 7 May 2018, which is now regarded as the landmark decision in India on the issue of grant of anti-arbitration injunctions in relation to investment treaty arbitration.

Vodafone - Part II dealt with wide array of issues that can be categorized in two parts.

The *first* category relates to determining whether the courts in India have the jurisdiction and power to grant anti-arbitration injunctions against an investment treaty arbitration. In this regard, the High Court held that the defendant nos. 1, 2, Vodafone International Holdings B.V. as also its Indian subsidiary were "one single economic entity"[39]. As such, the Court had inherent "jurisdiction over the Defendants *in personam* and over the subject matter of the dispute."[40]

It then went on to explain that the arbitration agreement between an investor and a host State does not constitute a treaty in itself, "is justiciable in accordance with the principles of international law, and there is no threshold bar or inherent lack of jurisdiction in the court to deal with BIPA Arbitrations."[41] To this extent, the High Court agreed with the judgment in *Louis Dreyfus* to hold that Indian courts "have and retain the jurisdiction to restrain international treaty arbitrations which are oppressive, vexatious, inequitable or constitute an abuse of the legal process."[42]

That being said, the High Court added the following caveat:

> "... as a matter of self-restraint, a National Court [in India] would generally not exercise jurisdiction where the subject matter of the dispute would be governed by an investment treaty having its own dispute resolution mechanism, except if there are compelling

[35] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (22 August 2017), p. 6.*
[36] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (22 August 2017), p. 9.*
[37] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (22 August 2017), p. 9.*
[38] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (22 August 2017), p. 9.*
[39] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (7 May 2018), 74.*
[40] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (7 May 2018), 75.*
[41] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (7 May 2018), 103.*
[42] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (7 May 2018), 104.*

> circumstances and the [Indian] Court has been approached in good faith and there is no alternative efficacious remedy available."[43]

Having affirmed its jurisdiction and power, the *second* category of issues addressed by the High Court in *Vodafone - Part II* related to whether it ought to exercise its power to grant an anti-arbitration injunction in the facts and circumstances placed before it.

Resisting the request for such an injunction, the counsel for Vodafone argued that the investment treaty arbitration sought to be restrained was governed by the UNCITRAL Arbitration Rules 1976; Article 21 of which incorporated the principle of *compétence-compétence.*[44] As such, any jurisdictional objection ought to be raised before the Tribunal itself. It was further clarified that should the Republic of India raise such a challenge before the India-UK BIPA Tribunal, the defendants herein as well as the claimants in the India-Netherlands BIPA arbitration would apply to the India-UK BIPA Tribunal to consolidate both the arbitral proceedings, which can be conducted before the same tribunal with the consent of all parties.[45]

To the contrary, the counsel for the Union of India submitted that Article 21 of the UNCITRAL Rules did not stipulate a negative formulation of the *compétence-compétence* principle so as to preclude this court from exercising its inherent jurisdiction to prevent abuse of process.[46] He also rejected the idea of a potential consolidation since that "would ensure that arbitration proceedings under the India-United Kingdom BIPA could be used to pursue the same claims relating to the same cause of action pertaining to the same economic harm."[47]

In addition to these rivalling submissions, the High Court was also informed that post the *ex parte* order dated 22 August 2017, the constitution of the tribunal under the India-UK BIPA had been completed. This was critical since the High Court ultimately relied on this fact to decline the request for an anti-arbitration injunction. It reasoned that since "[t]he cause of action for filing the present suit was that the arbitral tribunal under the India-United Kingdom BIPA may be constituted without India being represented"[48] , now that the tribunal has been constituted, "[a]ny challenge to its jurisdiction [including any challenge to the validity of the invocation of arbitration on allegations of abuse] must lie before the Tribunal."[49]

In arriving at this conclusion, the High Court relied on the principle of compétence-compétence, which it acknowledged was "recognised and accepted even under Indian domestic law."[50] Notably, in a complete reversal from the reasoning endorsed by the Supreme Court of India in Patel Engineering, the High Court recognized and applied the negative effect of compétence-compétence principle to accept the primacy of an arbitral tribunal in determining objections to its own jurisdiction. It reasoned that whether the arbitrators in the India-UK BIPA choose to stay the arbitral proceedings before them on account of pendency of related arbitral proceedings under the India-Netherlands BIPA is entirely a matter for them to decide pursuant to the principle of compétence-compétence and consequently, "the circumstance that arbitrators may do so cannot form an appropriate basis for the National Court to restrain the arbitration."[51] Finally, in ostensibly the most robust endorsement of the negative effect of compétence-compétence by an Indian court, the High Court of Delhi held as under:

[43] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (7 May 2018), 119.*
[44] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (7 May 2018), 15.*
[45] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (7 May 2018), 20.*
[46] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (7 May 2018), 33.*
[47] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (7 May 2018), 54.*
[48] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (7 May 2018), 133.*
[49] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (7 May 2018), 133.*
[50] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (7 May 2018), 133.*
[51] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (7 May 2018), 137.*

"This Court is of the opinion that it should apply the principle of *kompetenz-kompetenz* with full rigour as India-United Kingdom BIPA arbitral tribunal would be better placed to assess the scope of the two BIPA arbitration proceedings and the likelihood of parallel proceedings and abuse of process."[52] (emphasis added)

For these reasons, the High Court of Delhi dismissed the civil suit filed by the Union of India seeking the issuance of an anti-arbitration injunction in relation to the investment treaty arbitration under the India-UK BIPA, with the liberty that the abuse of process objection may be raised before the tribunal pursuant to the principle of *compétence-compétence*.[53]

4.3. Khaitan Holdings (2019)

In January 2019, the High Court of Delhi was again confronted with a request to grant an anti-arbitration injunction against *Khaitan Holdings,* which was a Mauritius-based company, in relation to an investment treaty arbitration initiated by it under a bilateral treaty entered into by the Republic of India and the Republic of Mauritius in 1998 for the Promotion and Protection of Investments.[54] Among other objections, it was the Union of India's submission that "the actual investor and beneficiary of Khaitan Holdings, being an Indian citizen [...] could not take advantage of the BIT agreement as the same is meant for adjudication of disputes between a genuine Mauritius investor and Republic of India, and not an Indian citizen and the Republic of India."[55]

The High Court's analysis commenced with a confirmation of its jurisdiction to grant an anti-arbitration injunction, and the caveats attached thereto. It explained that "[i]nterference by domestic courts in arbitral proceedings that may be commenced under BITs is permissible but only in *'compelling circumstances'*, in *'rare cases'*."[56] It added that courts in India "are hesitant to interfere in the arbitral process once the Tribunal is constituted and is seized of the dispute."[57]

Specific to the dispute at hand, the High Court noted that the investment treaty arbitration sought to be restrained was governed by the UNCITRAL Arbitration Rules, which empower the arbitral tribunal to rule on its own jurisdiction pursuant to the principle of compétence-compétence.[58] Moreover, since the BIT invoked contained a solemn commitment to arbitrate by the sovereign of India, the Court observed that "the continuation of arbitral proceedings is the rule and not the exception."[59]

In view of the above principles, the High Court relied on the judgment rendered in *Vodafone - Part II* to decline the request for the issuance of an anti-arbitration injunction. Without making any direct reference to the negative effect of the *compétence-compétence* principle, it reasoned that "the question as to whether Khaitan Holdings is a genuine 'investor' [...] which can invoke the jurisdiction of the Arbitral Tribunal is a question to be determined by the Arbitral Tribunal constituted under the BIT Agreement."[60] On this basis, the Court concluded as under:

"All the above grounds are those that can be [...] decided by the Arbitral Tribunal. The arbitration having been invoked in 2013 and the Tribunal having been constituted and being seized of the dispute, it is not for this Court to adjudicate on these issues. The above issues ought to be raised by the Republic of India before the Arbitral Tribunal, which under Article 21, would rule upon

[52] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (7 May 2018), 139.*
[53] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (7 May 2018), 149.*
[54] *Union of India v. Khaitan Holdings (Mauritius) Limited & others, I.As. 1235/2019 in CS (OS) 46/2019 (29 January 2019), 3.*
[55] *Union of India v. Khaitan Holdings (Mauritius) Limited & others, I.As. 1235/2019 in CS (OS) 46/2019 (29 January 2019), 15(c).*
[56] *Union of India v. Khaitan Holdings (Mauritius) Limited & others, I.As. 1235/2019 in CS (OS) 46/2019 (29 January 2019), 1.*
[57] *Union of India v. Khaitan Holdings (Mauritius) Limited & others, I.As. 1235/2019 in CS (OS) 46/2019 (29 January 2019), 1.*
[58] *Union of India v. Khaitan Holdings (Mauritius) Limited & others, I.As. 1235/2019 in CS (OS) 46/2019 (29 January 2019), 45-46.*
[59] *Union of India v. Khaitan Holdings (Mauritius) Limited & others, I.As. 1235/2019 in CS (OS) 46/2019 (29 January 2019), 47.*
[60] *Union of India v. Khaitan Holdings (Mauritius) Limited & others, I.As. 1235/2019 in CS (OS) 46/2019 (29 January 2019), 52.*

the same. The proceedings which are already underway cannot be termed as being oppressive, vexatious or an abuse of process at this stage..."[61] (emphasis added)

In a nutshell, following *Vodafone - Part II*, the High Court showed deference to the competence of the investment treaty tribunal to determine objections to its own jurisdiction; thereby, continuing Indian courts' freshly brewed romance with the negative effect of the *compétence-compétence* principle.

5. CONCLUSION

It was in 2013 that one of the authors of this article had first critiqued the decision in *Patel Engineering;* lamenting the Supreme Court's reluctance to embrace the negative effect of the principle of *compétence-compétence.*[62] About one year later, the High Court of Calcutta, in *Louis Dreyfus*, recognized the negative effect of the principle of *compétence-compétence*, albeit to a limited extent. Another four years later, the High Court of Delhi has taken monumental steps to embrace the *compétence-compétence* principle "with full rigour"[63]. To this extent, the jurisprudence emerging from Delhi appears to be far more arbitration-friendly than that from Calcutta.[64]

That being said, both High Courts maintain that in exceptional circumstances, Indian courts retain their power to issue an anti-arbitration injunction to restrain investment treaty arbitrations which are oppressive, vexatious, inequitable or constitute an abuse of the legal process. Thus, the negative effect of compétence-compétence applied by Indian courts is presently a debilitated application of the original principle, with ample room to adopt a contrary approach, if felt necessary.

This is particularly key since the understanding displayed by the High Court of Delhi is premised on certain assumptions that do not appear to be completely accurate. For instance, in *Khaitan Holdings,* the High Court appeared to be under an assumption that "[t]he Arbitral Tribunal is expected to, in general, rule on its jurisdiction as a preliminary issue."[65] However, unless mandated by a specific treaty provision[66], the bifurcation of arbitral proceedings to decide objections to the jurisdiction of an arbitral tribunal and the admissibility of claims as preliminary issues is rarely guaranteed.[67] Accordingly, despite signs of promise, it is prudent to temper any optimism with a sense of caution and to keep an eye on the future developments on these issues. What can, however, be said with certainty is that today, it may be more difficult to obtain an anti-arbitration injunction from Indian courts in relation to an investment treaty arbitration than it would have been a few years ago.

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[61] *Union of India v. Khaitan Holdings (Mauritius) Limited & others, I.As. 1235/2019 in CS (OS) 46/2019 (29 January 2019), 54.*

[62] *See Pratyush Panjwani and Harshad Pathak, 'Assimilating the Negative Effect of Kompetenz-Kompetenz in India', 2(2) Indian Journal of Arbitration Law 24 (2013).*

[63] *Union of India v. Vodafone Group PLC United Kingdom & another, I.A.9460/2017 in CS(OS) 383/2017 (7 May 2018), 139.*

[64] *See generally Ting-Wei Chiang, 'Anti-Arbitration Injunctions in Investment Arbitration: Lessons Learnt from the India v. Vodafone Case', 11(2) Contemp. Asia Arb. J. 251 (2018).*

[65] *Union of India v. Khaitan Holdings (Mauritius) Limited & others, I.As. 1235/2019 in CS (OS) 46/2019 (29 January 2019), 45.*

[66] *For instance, see Comprehensive Economic Partnership Agreement between Japan and the Republic of India, art. 96(21) ("An arbitral tribunal shall address and decide as a preliminary question any objection by the disputing Party that the investment dispute is not within the competence of the arbitral tribunal, provided that the disputing Party so requests immediately after the establishment of the arbitral tribunal.").*

[67] *See generally Massimo V. Benedettelli, 'To Bifurcate or Not to Bifurcate? That is the (Ambiguous) Question', 29(3) Arbitration International 493 (2014).*

ARBITRATION & ADR ROUNDUPS

1. LANDMARK ARRANGEMENT ON INTERIM RELIEF PROTECTION IN CHINA FOR HONG KONG ARBITRATIONS TO TAKE EFFECT ON 1 OCTOBER 2019

On 1 October 2019, the landmark arrangement between the Hong Kong Government and China's Supreme People's Court on interim measures in aid of arbitrations ("Arrangement") will enter into operation. The Arrangement allows parties to Hong Kong seated arbitrations administered by HKIAC, CIETAC (Hong Kong), ICC (Asia Office) or certain other eligible arbitral bodies to obtain an interim measure from the Chinese Courts that will be enforceable in Mainland China.

The Arrangement has significant implications for the local and international business communities. As of 1 October 2019, Hong Kong will be the first and only arbitral seat in the world that can provide this important benefit to international parties who wish to resolve China-related disputes in Hong Kong within a well-established legal framework and according to international best practices while preserving their ability to obtain interim relief in Mainland China. Conversely, Hong Kong law already allows parties to arbitrations seated in China and elsewhere abroad to seek from the Hong Kong courts interim relief in aid of their arbitration.

How it works

The Arrangement applies to arbitration proceedings provided that they are (i) seated in Hong Kong and (ii) administered by one of the following arbitral and dispute resolution institutions and permanent offices:

- Hong Kong International Arbitration Centre
- China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center
- International Court of Arbitration of the International Chamber of Commerce - Asia Office
- Hong Kong Maritime Arbitration Group
- South China International Arbitration Center (HK)
- eBRAM International Online Dispute Resolution Centre

The Arrangement also applies to arbitrations that were commenced before 23 September 2019.

The Arrangement mentions three types of interim measures available in Mainland China, namely preservation of (i) property (e.g., freezing orders), (ii) evidence (e.g., not to destroy a document) and (iii) conduct (e.g., not to use a trademark). However, it remains to be seen whether in practice Chinese courts will grant measures preserving evidence and conduct as the PRC Arbitration Law appears to provide only for property preservation.

A party to a pending Hong Kong arbitration may file an application for an interim measure from a Chinese court with the arbitral institution administering the case. The institution will then forward the application to the court which will decide it pursuant to PRC law. A prospective claimant seeking an interim measure before commencement of an arbitration may file the application directly with the court. However, the court must discharge the measure if, within 30 days after it has been taken, the court has not received confirmation from the administering institution that it has accepted the case.

What this means for you :

You are now able to choose Hong Kong-seated institutional arbitration without having to forego the ability to obtain interim relief protection from the Chinese courts.

To ensure that you are able to benefit from the Arrangement, please seek appropriate legal advice. Your arbitration clause should clearly and unequivocally:

Designate Hong Kong as the seat (legal place) of arbitration.

Specify that the arbitration shall be administered by one of the current five institutions or permanent offices that have been confirmed as qualified by the Hong Kong Government and the Supreme People's Court.

Your options for arbitrations seated in China remain unchanged as Hong Kong courts could already grant interim measures in aid of China (and other foreign) seated arbitrations before the Arrangement became effective.

Conclusion

The Arrangement reinforces and enhances Hong Kong's role and status as the preferred seat for China-related arbitrations. It is also an important contribution to the implementation of key policy initiatives such as the Greater Bay Area Initiative and the Belt and Road Initiative.

Source: As reported by Paul Teo, Gary Seib, Philipp Hanusch and Haifeng Li in Global Arbitration News dated September 30, 2019 from website https://globalarbitrationnews.com/landmark-arrangement-interim-relief-protection-china-hong-kong-arbitrations-take-effect-1-october-2019/

2. US JUDGE REJECTS EXXON, SHELL NIGERIA CASE

A U.S. judge rejected Exxon Mobil Corp's and Royal Dutch Shell Plc's effort to revive a $1.8 billion arbitration award against Nigeria's state-run oil company, which stemmed from a dispute over a 1993 contract to extract oil near the African country's coastline.

U.S. District Judge William Pauley in Manhattan cited public policy and due process considerations in deciding not to enforce the October 2011 award against Nigerian National Petroleum Corp (NNPC), which was subsequently set aside by courts in Nigeria.

"While this court may have inherent authority to fashion appropriate relief in certain circumstances, exercising that authority to create a $1.8 billion judgment is a bridge too far," Pauley wrote in a 50-page decision.

The companies said last November that the award had grown to $2.67 billion, including interest.

Exxon spokesman Todd Spitler said the Irving, Texas-based company disagreed with the decision and was evaluating its next steps. Shell and its lawyers did not immediately respond to requests for comment.

"NNPC is very pleased with the decision, and was always confident that there was no basis for a U.S. court to confirm the award," its lawyer Cecilia Moss said in an interview.

According to court papers, the 1993 contract anticipated that Exxon and Shell affiliates would invest billions of dollars to extract oil from the Erha field, about 60 miles (97 km) off Nigeria's coast, and share profits with NNPC.

But the affiliates, Esso Exploration and Production Nigeria Ltd and Shell Nigeria Exploration and Production Co Ltd, accused NNPC of unilaterally "lifting" more oil than was contractually allowed, at the behest of Nigeria's government, depriving them of billions of dollars of oil.

Pauley said Exxon and Shell still have "multiple appeals pending" in Nigeria, and rejected their argument that it might be difficult to collect there.

Exxon and Shell "executed a contract in Nigeria with another Nigerian corporation containing an arbitration clause requiring any arbitration to be held in Nigeria under Nigerian law, and it then sought to confirm the award in Nigeria," Pauley wrote. " cannot now

reasonably complain that efforts to collect will be frustrated in Nigeria."

In an August 7 regulatory filing, Exxon said it did not expect the case to materially affect its operations or financial condition.

The case is Esso Exploration and Production Nigeria Ltd et al v Nigerian National Petroleum Corp, U.S. District Court, Southern District of New York, No. 14-08445.

Source: As reported by Paul by Jonathan Stempel and Edited by Matthew Lewis and Richard Chang in Offshore Engineer dated September 4, 2019 from website https://www.oedigital.com/news/470314-us-judge-rejects-exxon-shell-nigeria-case

3. CHEVRON, THAILAND IN DISPUTE OVER DECOM TAB -BY PATPICHA TANAKASEMPIPAT

U.S. energy major Chevron Corp has opted to continue negotiations with Thailand rather than seek arbitration to resolve a dispute over who should pay for removing offshore oil and gas platforms, the company told Reuters on Wednesday.

Thailand wants Chevron to pay the full decommissioning costs for infrastructure at the Erawan gas field, which it is due to hand over to Thai state oil firm PTT Exploration and Production Pcl in April 2022 when its concessions expire.

Those costs have been estimated by one local newspaper at up to $2.5 billion.

The dispute has implications for other international energy companies such as France's Total SA and Japan's Mitsui & Co, which also have stakes in offshore energy concessions in the Gulf of Thailand.

"We have agreed to temporarily suspend the arbitration process to allow more time for resolution discussions," a Chevron spokesman told Reuters.

He said the company had been "encouraged" by the Thai energy minister's efforts to come to an agreement, but added that arbitration was still a possibility "within weeks" if talks do not succeed.

A spokesman for Thailand's energy ministry on Wednesday said he could not comment on the talks with Chevron.

Minister of Energy Sontirat Sontijirawong said in July he wanted to resolve the dispute as a matter of urgency to avoid an arbitration process, but that the issue was complicated.

The dispute arose in 2016 when Thailand retroactively enforced a new energy ministry regulation requiring gas field operators to pay the costs of decommissioning all assets they have installed even if they no longer operate those assets.

Chevron argues that under the terms of its initial contracts from 1971, it is only liable for infrastructure that is no longer deemed usable before it hands over the field to another operator.

The new law would require Chevron to pay the future costs of decommissioning all the infrastructure it has installed at the Erawan field, including still usable assets it will transfer to PTTEP free of charge.

Chevron told Reuters in July that moving to an arbitration process provided for by the 1971 contracts was a possibility.

The company had objected to a June request by Thailand's energy ministry to pay the full decommissioning cost of all its assets in the Erawan field upfront.

Neither Chevron nor the ministry would disclose the amount of the requested payment when asked by Reuters. However, local newspaper Thansettakij has reported it as around 75 billion baht ($2.5 billion), citing industry sources.

Retroactive law

Other operators in Thailand are watching the dispute closely in case it changes their future liabilities for assets in Thailand.

"Total will particularly be tracking the developments between Chevron and the government... since it will set a precedent that the government could apply to it," said Readul Islam, research analyst at Rystad Energy.

Chevron won the concessions to operate four blocks constituting the Erawan gas field, Thailand's second largest, from 1972 to 2012, after which the contracts were extended for 10 more years.

Chevron lost out to PTTEP, a unit of the state-owned PTT Pcl , in a bidding round for the new concession in December.

Foreign investors in Thailand in other industries were also concerned about what precedent the case might set for the sanctity of their contracts.

"It will snowball, as it's not just Chevron," said Kornkasiwat Kasemsri, director of the Energy and Resources Policy Research Center at Thailand's Rangsit University.

"What decision is made in this case could affect other cases to follow."

Source: As reported by Patpicha Tanakasempipat in Offshore Engineer dated September 26, 2019from website https://www.oedigital.com/news/471124-chevron-thailand-in-dispute-over-decom-tab

4. ASM INTERNATIONAL N.V. ANNOUNCES SETTLEMENT OF ARBITRATION PROCEEDING

ASM International N.V. (Euronext Amsterdam: ASM) announces that it has entered into a settlement agreement with Kokusai Electric Corporation (formerly known as Hitachi Kokusai Electric Inc. and hereinafter referred to as "KEC") to resolve the arbitration proceeding relating to the license agreement which expired in November 2017. As part of this settlement, KEC will pay ASM an amount of US$61 million. With this settlement all pending disputes between ASM and KEC with respect to patent licenses have been resolved.

As announced on February 23, 2018, ASM initiated an arbitration proceeding on August 30, 2017 with the American Arbitration Association against KEC for breach of the license agreement between the companies. This license agreement provided KEC and its affiliates a license under certain patents of ASM in the field of Batch ALD. The companies have now entered into a settlement agreement concerning all the matters of the arbitration.

This arbitration settlement is separate from the settlement of all patent lawsuits and invalidation proceedings between ASM and KEC that was announced on July 1, 2019.

The settlement of the arbitration will positively impact ASMI's sales and bookings in Q4 2019 with an amount of US$61 million, or approximately €56 million.

Source: As reported by ASM International NV in Globe News Wire dated October 29, 2019 from website https://www.globenewswire.com/news-release/2019/10/29/1936915/0/en/ASM-INTERNATIONAL-N-V-ANNOUNCES-SETTLEMENT-OF-ARBITRATION-PROCEEDING.html

5. RECENT DEVELOPMENTS IN INDIA-RELATED INVESTMENT TREATY ARBITRATION

In this issue we consider India-related investment treaty developments ("BITs"), starting with the signing of India's new BITs with Belarus and Taiwan.

We then consider new investment treaty claims commenced by Indian investors against Saudi Arabia and Macedonia, as well as new claims commenced against India, including the potential claim brought by a Portuguese investor and the new claim under the India-Korea BIT brought by KOWEPO.

We also cover the developments in existing BIT claims, such as India's first win in a BIT claim and the settlement negotiations in the Nissan BIT claim against India.

New Treaties

- India signs new BITs with Belarus and Taiwan and agrees joint interpretative statement with Colombia and Bangladesh.

As we previously reported in April 2015 and January 2016, the Government of India published a new model BIT (the "Model BIT") to serve as a template for future BIT negotiations. Later in 2017, India decided to terminate 58 of its existing BITs. The Model BIT limits the protections afforded to investors perhaps as a reaction to the number of investor claims against India in recent years.

India has since entered into a BIT with Belarus in September 2018 and with an investment promotion organisation in Taiwan in December 2018 Both BITs largely follow the text of the Model BIT including in the definitions of 'investor' and 'investment', exclusion of the fair and equitable treatment standard and detailed requirements on exhaustion of local remedies.

The "India-Taiwan" BIT is between the India Taipei Association and the Taipei Economic and Cultural Centre rather than between two nation states. India's Department of Economic Affairs currently notes that draft BITs based on the Model BIT are "under discussion" with a number of countries including Switzerland, UAE, Hong Kong, Israel, Mauritius and Iran.

Separately, in 2016, India circulated a proposed joint interpretative statement to be agreed with the counterparties to its existing BITs that were not then capable of being terminated (25 countries), seeking to align those BITs with the Model BIT. In October 2018, India and Columbia concluded a joint interpretative statement regarding the India-Columbia BIT of 2009. India had previously concluded a similar interpretative statement with Bangladesh in 2017.

New BIT Claims

- **Indian investor Khadamat Integrated Solutions Private Limited pursues BIT claim against Saudi Arabia**

As reported, Indian investor Khadamat Integrated Solutions Private Limited has brought a claim against Saudi Arabia under the India-Saudi Arabia BIT. It has been reported that the dispute concerns a large-scale development project in Saudi Arabia but no further details are available. The Permanent Court of Arbitration ("**PCA**") is administering the claim with a tribunal already formed under the UNCITRAL rules. Eric A. Schwartz has been appointed as chair by the co-arbitrators to sit alongside Franco Ferrari (nominated by Khadamat) and Rolf Knieper (nominated by Saudi Arabia).

- **Tribunal constituted in a BIT claim by Indian investors against Macedonia**

According to this report, the tribunal in a BIT claim by Indian investors against Macedonia has been constituted, with the President of the International Court of Justice appointing Nigerian arbitrator Funke Adekoya SAN as chair to sit alongside Robert Volterra (Indian investors' nominee) and Brigitte Stern (Macedonia's nominee). The claim was allegedly commenced in 2017 by Gokul Das Binani and Madhu Binani under the India-Macedonia BIT of 2008. The claim reportedly alleges that Macedonia illegally expropriated mining concessions awarded to a London-based company (in which the investors were the only shareholders) and subsequently auctioned it to a Bulgarian company. The arbitration is seated in Switzerland and governed by the UNCITRAL Rules.

- **India may face new claim from Portuguese investor**

As reported, the Indian government revealed that it may be facing a claim from a Portuguese investor currently identified only as Mascarenhas. While it is known that Mascarenhas is bringing the claim under the India-Portugal BIT, the details of the dispute remain undisclosed.

Although the India-Portugal BIT was terminated by India as of March 2017 alongside 58 other BITs the India-Portugal BIT contained a 15-year sunset clause which protects investments made in India prior to the BIT's termination date. Thus, while there are only very limited details of the claim, it is a useful reminder that claims may yet arise under the cancelled BITs provided they fall within the sunset provisions of the relevant treaty.

- **KOWEPO sends a notice of dispute under the India-Korea BIT and / or the Comprehensive Economic Partnership Agreement (CEPA) between India and Korea**

According to this report, Korea Western Power Company (KOWEPO) has sent a notice of dispute to the Government of India in relation to a gas-based power plant in the state of Maharashtra. KOWEPO, which owns 40% in Pioneer Gas Power Limited, the operator of the plant, has alleged that India has failed to honour its fuel supply commitments to the plant and has reportedly claimed US$ 400 million in damages.

Two treaties govern India's obligations towards Korean investors - the India-Korea BIT of 1996 (for investments made prior to the termination of the India-Korea BIT on 22 March 2017) and the 2009 Comprehensive Economic Partnership Agreement (CEPA) between India and Korea. It is unclear whether KOWEPO has initiated arbitration under one or both treaties. While the substantive investment protection standards in these treaties are different, both treaties provide for a cooling off period of at least six months from the date of the notice of dispute. If the dispute is not resolved in this period, KOWEPO is entitled to commence arbitration proceedings against India

Developments in Existing BIT Claims

- **Tribunal awards India its first public win in a BIT claim, dismissing claims of French investor**

An UNCITRAL arbitral tribunal reportedly dismissed a US$ 36 million claim by a French investor, Louis Dreyfus Armateurs SAS ("**LDA**"), against India under the 1997 France-India BIT. LDA claimed that India had breached its treaty commitment to provide full protection and security, in particular as regards LDA's Indian joint venture employees and their families, and was also in breach for its failure to follow Indian court orders. The tribunal reportedly found that it lacked jurisdiction over LDA's claims since the BIT requires that an investor in an indirect investment hold at least 51% ownership in order to fall within the BIT's protection. LDA's shareholding did not satisfy this threshold. The award is not public at this time, but press reports state that LDA has also been ordered to pay approximately US$ 7 million in respect of India's legal expenses.

- **Tribunal in Nissan BIT case dismisses India's objections and upholds jurisdiction**

According to this report, the claim brought by Nissan under the Japan-India Comprehensive Economic Partnership Agreement (CEPA) is now progressing to the merits phase, with the tribunal upholding jurisdiction in a now public decision.

As previously reported, the claim relates to withdrawal of incentive payments allegedly promised by the state government of Tamil Nadu pursuant to a 2008 agreement under which Nissan established a manufacturing facility in Chennai.

Despite settlement talks between the parties and the efforts by the state of Tamil Nadu to prevent the arbitration proceedings from happening the PCA tribunal applying the UNCITRAL rules has dismissed most of India's objections to the tribunal's jurisdiction.

India had objected to the tribunal's jurisdiction on five grounds. First, it objected to the default appointment by the PCA of India's nominee and the tribunal chair. Second, India claimed that Nissan had triggered a fork-in-the-road clause which barred it from bringing its claim to international arbitration. Third, India asserted that the claim was essentially contractual in nature, which meant the seat of the arbitration should have been Chennai, as stipulated in the 2008 agreement signed between the parties. Fourth, India alluded to CEPA's three-year time bar, and contended that Nissan had first acquired knowledge of the alleged breach and loss three years prior to filing its claim. Finally, India argued that Nissan's claim was barred entirely due CEPA's exception for taxation measures.

The tribunal dismissed India's first four objections and deferred its final objection to the merits phase, with the merits hearing set for February 2020. That jurisdictional award is now being challenged in the Singapore International Commercial Court.

- **Delhi High Court refuses to grant an anti-arbitration injunction restraining a BIT claim against India**

In 2013, Khaitan Holdings brought a claim against India under the India-Mauritius BIT. The claim arose from the Indian Supreme Court's 2012 decision (and subsequent decisions of regulatory bodies in India) to cancel 2G spectrum licenses granted by the Government of India (the "**GOI**"), including one granted to Loop Telecom of which Khaitan Holdings was a shareholder. The tribunal was not fully constituted until 2018 when Khaitan Holdings applied to the Permanent Court of Arbitration for the appointment of the presiding arbitrator to sit alongside Francis Xavier SC (Khaitan Holdings' nominee) and Brigitte Stern (the GOI's nominee).

The GOI then applied for an anti-arbitration injunction on the ground that (among other things) Khaitan Holdings is not a genuine and bona fide investor under the BIT as it is effectively controlled by Indian citizens. In a decision of 29 January 2019, the Delhi High Court dismissed the application on the basis that the GOI's arguments were jurisdictional in nature and ought to be raised before, and decided by, the tribunal. The court expressly upheld the principle of kompetenz-kompetenz. In doing so, it relied on the earlier Delhi High Court decision in Union of India v Vodafone

- **Indonesia defeats BIT claim by Indian Metals & Ferro Alloys Ltd**

As reported, Indian investor Indian Metals & Ferro Alloys Ltd (**"Indian Metals"**) has lost its claim against Indonesia brought under the India-Indonesia BIT. The dispute concerned alleged interferences with Indian Metals' coal mining rights in the Indonesian region of Kalimatan. In a currently unpublished award, the England-seated tribunal, applying UNCITRAL rules, dismissed the investor's claim and ordered it to bear certain costs. The tribunal was chaired by Neil Kaplan, sitting alongside Muthucumaraswamy Sornarajah (nominated by Indonesia) and James Spigelman (nominated by Indian Metals).

- **Hague court rejects set-aside of merits award in Devas case**

According to this report, the Hague District Court has refused to set aside the merits award in the CC/Devas case against India brought under the India-Mauritius BIT.

In the merits award, the tribunal had found that India's cancellation of a satellite lease contract was an unlawful expropriation and a breach of FET, but, in a split decision, also held that India was largely shielded from liability because of the BIT's "essential security" clause.

India attempted to annul the award, and challenged the tribunal's decision on jurisdiction and merits before the Hague District Court on three grounds. First, India alleged that the investor lacked a protected investment. Second, India argued that the tribunal had inappropriately dealt with its arguments on the "essential security" clause. Finally, India asserted that a domestic criminal complaint meant that the underlying satellite lease contract was void.

The Hague District Court rejected all of India's objections.

Two treaty claims against India withdrawn ahead of hearing

As reported, claims by Astro All Asia Networks and South Asia Entertainment Holdings, two affiliates of Malaysian satellite-TV group Astro, have been withdrawn.

As with the *Khaitan Holdings* case, these claims arose out of the Indian Supreme Court's decision in the 2G spectrum licenses case.

The UNCITRAL tribunal based in Hong Kong (comprised of Michael J Moser (chair), Peter Leaver QC, and Lucy Reed) issued consent awards recording the withdrawal of both claims.

Source: As reported by Nicholas Peacock, Kritika Venugopol, Nihal Joseph, Divyanshu Agrawal, Associate in Herbert Smith Freehills dated 8th November, 2019 from website https://hsfnotes.com/arbitration/2019/11/08/recent-developments-in-india-related-investment-treaty-arbitration/

6. GDPR DOES NOT APPLY TO ARBITRATION UNDER NAFTA

In *Tennant Energy LLC (USA) v. Government of Canada (PCA Case No. 2018-54)*, a NAFTA tribunal addressed the reach of the General Data Protection Regulation 2016/679 ("GDPR"). The EU-Regulation, which came into force in May 2016, introduced extensive obligations on data processors and data controllers. Since then, the Regulation has raised many questions. The tribunal now dealt with the question of whether the EU-Regulation affects arbitration under the North American Free Trade Agreement.

Background : On June 1, 2017, *Tennant Energy LLC initiated* arbitration proceedings against Canada which are being administered by the Permanent Court of Arbitration (PCA) in The Hague. The investor brought damages claims under Chapter Eleven NAFTA. The claims in the amount of $116 million relate to Claimant's investments in a wind project in Ontario, Canada.

From the outset of the proceedings, issues of data protection were at the core of the discussions. *Tennant Energy LLC* urged the tribunal to strictly comply with GDPR's data policies. Claimant argued that the Tribunal should address data protection in its Procedural Order and make sure that "a proper GDPR compliance mechanism [is] in place", since, according to Claimant's view, the EU-Regulation was applicable to the proceedings. It is not entirely clear from the reported case file why Claimant so heavily insisted on the compliance with GDPR.

Claimant's argument was that one of the arbitrators was resident in the UK and thereby was subject to the GDPR. Claimant basically argued that if one arbitrator is from the EU, the entire tribunal needs to comply with the GDPR and address data security in its Procedural Order. Also, Claimant pointed to the PCA being regarded a supranational institution under EU data protection law. Consequently, GDPR obligations would arise whenever there is a transfer of personal data between the PCA and the tribunal.

Canada, however, refused to accept GDPR related provisions in the Procedural Order and claimed that NAFTA in its entirety fell outside the material scope of the GDPR. Discussions followed on the applicability of the GDPR and whether compliance mechanisms had to be included in a Tribunal's Procedural Order.

Decision

The arbitral tribunal did not share Claimant's view. On 24 June 2019, the tribunal informed the parties in only two paragraphs why it would not apply GDPR and would not amend its Procedural Order accordingly. The tribunal kept it short and simple by stating:

"Arbitration under NAFTA Chapter 11, a treaty to which neither the European Union nor its Member States are party, does not, presumptively, come within the material scope of the GDPR."

No further explanation was given. In its prior communication, however, the tribunal already pointed to Art. 2(2)(a) GDPR which deals with the Regulation's material scope. The provision states that the GDPR "does not apply to the processing of personal data in the course of an activity which falls outside the scope of Union law". The tribunal explained that the Procedural Order would make no reference to the GDPR, however, "without prejudice to the importance of ensuring a high level of data protection."

Concluding remarks

As of today, in practice, most Procedural Orders do not contain specific reference to GDPR and provisions on data security. It remains to be seen whether this will change in the future and whether there will be published case law on that question. The effects of the GDPR on arbitration in general are still not quite clear and continue to be a big topic in the arbitration community. The ICCA and the IBA have, for instance, established a Task Force on Data Protection in International Arbitration which aims at providing guidance on the GDPR's impacts.

Source: As reported by Markus Altenkirch and David Weiss in Global Arbitration News dated September 18, 2019 from website https://globalarbitrationnews.com/gdpr-does-not-apply-to-arbitration-under-nafta/

7. NEW BRAZILIAN LAW AUTHORIZES MEDIATION AND ARBITRATION TO DISCUSS INDEMNIFICATION DUE TO EXPROPRIATION

On August 27, 2019, Law No. 13.86/19 was published, amending Decree-law No. 3.365/41 (the Brazilian statute on expropriation) to authorize the definition of amount due to owners in expropriation of assets for projects through mediation and/or arbitration.

This new law provides that, first, the government shall present to the owner an offer of amount to be paid as indemnification due to the expropriation. The owner has 15 days to answer; silence will be considered as denial of the offer.

In case of denial of the offer, besides the option of a judicial lawsuit, the owner has the alternative of choosing also mediation or arbitration to discuss the expropriation reimbursement amount. In both cases, the owner must choose one of the agencies or specialized institutions previously registered in the government database. Mediation will follow the rules provided by the Mediation Law, whilst arbitration will follow the Arbitration Law It will also be applicable the specific regulations provided by the agencies and specialized institutions.

This Law has immediate effect, however, it will be effective only for expropriations initiated as August 27, 2019.

This is an important step to enable the use of arbitration in expropriation. Nowadays judicial lawsuits to discuss the amount of indemnification in expropriation cases usually take years to be decided, while arbitration could be much faster.

Source: As reported by Joaquim de Paiva Muniz, Heloisa Uelze and Fabio Capobianco in Global Arbitration News dated August 29, 2019 from website https://globalarbitrationnews.com/new-brazilian-law-authorizes-mediation-arbitration-discuss-indemnification-due-expropriation/

8. SÃO PAULO REGULATES ARBITRATION WITH STATE ENTITIES

The State of São Paulo has issued on July 31, 2019 Decree 64,356, which regulates arbitration with such State and the entities it controls.

Institutional arbitrations should be preferred, being ad hoc arbitrations allowed only in exceptional cases, which shall be duly justified before this choice is made. The State of São Paulo will prepare a list of pre-approved arbitration centers, among the ones with secretarial capabilities and hearing centers in São Paulo and widely-known experience and track-record in arbitration involving state entities. The selection of institution shall be preferably made in the arbitration clause among the listed institutions. If it is not, the claimant can choose the applicable institution from the list.

The seat of arbitration shall be the city of São Paulo and Brazilian Law shall apply. The panel shall be composed of three arbitrators, unless the value at stake is low or the issue is not complex, in which case a single arbitrator is allowed. The language shall be Portuguese, but technical documents can be produced in English.

Claimant shall advance the fees of the institution and the arbitrators. The losing party cannot be sentenced to reimburse the winning party of attorneys' fees, but the panel can grant "sucumbência", that is to say, to sentence the losing party to pay an amount from 10% to 20% of the value at stake to the counsel of the wining party, over and above the amount of the award..

The arbitrators shall be independent and impartial. The parties can request information on whether the arbitrators have any case against the State of São Paulo and whether they represent clients in litigation whose subject matter is similar to the one discussed in the arbitration.

The arbitration will be public and the State of São Paulo will be allowed to publish the files in its web-site, provided that any legal obligation of confidentiality shall be respected. The attendance to hearing however can be restricted to the parties and their counsel, as well as to the witnesses and experts.

The rules enacted by the State of São Paulo are simple and reasonable. Now the three largest Brazilian States (São Paulo, Rio de Janeiro and Minas Gerais) have regulation on arbitration with state entities. It is expected in the Brazilian community that the Federal Union will soon enact its own regulation.

Source: As reported by Joaquim de Paiva Muniz in Global Arbitration News dated August 26, 2019 from website https://globalarbitrationnews.com/sao-paulo-regulates-arbitration-state-entities/

9. FEDERAL REPUBLIC OF GERMANY FACES THIRD EVER INVESTOR-STATE ARBITRATION: MIGHT CHANGES TO RENEWABLES REGIME LEAD TO ANOTHER PUBLIC "VATTENFALL-OUTCRY" ABOUT ARBITRATION?

On 20 September 2019, ICSID registered a request by the Austrian construction company STRABAG SE ("Strabag") for the initiation of an ICSID arbitration proceeding (**ICSID Case No. ARB/19/29**). Strabag and two of its affiliates ("Erste Nordsee-Offshore Holding GmbH" and "Zweite Nordsee-Offshore Holding GmbH") are suing the Federal Republic of Germany for damages in a still unknown amount.

So far, no documents are public except for the notification of a request for arbitration. The notification, however, clearly shows that the dispute relates to investments in the renewable energy sector. Strabag invokes the Energy Charter Treaty (ECT), which is an international agreement establishing a multilateral framework for cross-border cooperation in the energy industry. Both EU Member States involved, Germany and Austria, are signatories to the ECT. The ECT allows investors to sue a state before an international ICSID arbitral tribunal instead of submitting the dispute to the host country's state courts (Article 26 ECT).

Strabag is a listed company and one of the largest construction companies in Europe. According to the *Frankfurter Allgemeine Zeitung*, the ICSID claim relates to Strabag's offshore-activities in the German Northern Sea. Since 2009, Strabag was investing in offshore-projects there, where it had originally planned to build approximately 850 wind turbines by 2026. However, Strabag has increasingly withdrawn its plans and has instead begun to sell its shareholdings. In 2014, for example, Energy Baden-Württemberg AG (EnBW) acquired the Albatros offshore wind farm project from the consortium partners Strabag and the Norderland / ETANAX Group. In 2016, Strabag's subsidiary, Erste Nordsee-Offshore-Holding GmbH, sold its shares in an offshore wind project ("Northern Enegery Global Tech II GmbH") to another leading energy company, Vattenfall.

According to an interview with *JUVE*, Strabag now claims negative economic effects on its investments due to an increasing regulation of the German energy market. The main reason for Strabag's claim appear to be the amendments to the German Renewable Energy Sources Act (EEG). The EEG promotes the development of energy generated from renewable resources. The EEG is regarded as an innovative and successful *energy policy* measure. It first came into force on 1 April 2000 and has been modified several times since.

The EEG originally provided a *feed-in tariff* ("FIT") scheme to encourage the generation of renewable electricity. The state and investors concluded long-term contracts with state-fixed funding rates. This changed as of 2014, when the legislator introduced an auction system, according to which the funding rate for most renewable energy systems will be determined through tenders. This principally means that those who demand the least for the economic operation of a new renewable energy plant will receive financial support.

The ICSID tribunal will have to examine whether the changes made by the German legislator justify a claim for damages by Strabag, despite Achmea and other recent developments in investment arbitration. The proceedings initiated by Strabag are now the third ICSID proceedings brought against the Federal Republic of Germany. It is to be assumed that the Strabag case will continue to keep Germany busy for a long time to come as it is the case with the second (in) famous ICSID claim against Germany still pending, the Vattenfall case. In 2015, the Vattenfall case became the public scapegoat for critics of international investment arbitration proceedings. The public outcry over allegedly "back door justice" was massive. Yet, the German public has not widely taken note of the Strabag case. If recent history is any indication, both Parties and the involved law firms may prefer to keep it that way.

Source: As reported by Dr. Max Oehm and David Weiss in Global Arbitration News dated October 14, 2019 from website https://globalarbitrationnews.com/federal-republic-germany-faces-third-ever-investor-state-arbitration-might-changes-renewables-regime-lead-another-public-vattenfall-outcry-arbitration/

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54th Annual General Meeting

Photo Gallery

54th Annual General Meeting of the Indian Council of Arbitration (ICA) is chaired by Mr. N.G. Khaitan, President, ICA. The others present on the Dias are Ms. Geeta Luthra, Vice President, ICA; Mr. Rohit Relan, Sr. Vice President; Mr. Arun Chawla, Advisor, ICA; and Mr. Vinay Kumar Sanduja, Registrar, ICA.

A section of Members during 54th Annual General Meeting, ICA.

Group Photograph at the end of 54th Annual General Meeting of ICA (L-R) Mr. Vinay Kumar Sanduja, Registrar, ICA; Mr. Arun Chawla, Advisor, ICA; Mr. N.G. Khaitan, President, ICA; Mr. Rohit Relan, Sr. Vice President, ICA; Ms. Geeta Luthra, Vice President, ICA.

Presentation of memento by Mr. N.G. Khaitan, President, ICA to Dr. P.C Markanda, Senior Advocate as ICA Governing Body Member for his contribution to ICA for 33 years.

Conference on

"Arbitration in India: The New Scenario"

7th December 2019, New Delhi

BRIEF REPORT

On occasion of it's 54th Annual General Meeting, Indian Council of Arbitration (ICA), organised a Conference on ***"Arbitration in India: The New Scenario"*** on 07th December 2019 at New Delhi.

Hon'ble Mr. Justice Surya Kant, Judge, Supreme Court of India, was the Chief Guest at the Conference and delivered the Inaugural Address. In his Inaugural Address, Justice Kant highlighted the fact that Arbitration has now achieved judicial acceptance in India and noted that the arbitration is noble quest to existing justice dispensation.

Justice Kant emphasized about the dire need for institutional arbitration as the ad-hoc arbitration leads to unpredictability. In this regard, Justice Surya Kant noted that the cost factor plays important role for parties going into arbitration and accordingly arbitration should not be conducted according to strict procedures of court proceedings.

Justice Kant also emphasized that professionals should take arbitration as a regular profession on full time basis. Further, Justice Kant also stated that ethics is one area where arbitrators needs to take care, as they should be independent and impartial while conducting arbitration proceedings.

Hon'ble Mr. Justice J. R. Midha, Judge Delhi High Court in his Special Address spoke about process of execution of arbitral awards. Justice Midha shared that a new procedure has been formulated by him at Delhi High Court, which is expected to revolutionise the enforcement of arbitration awards. Justice Midha emphasized that 'morality' or 'justice' may be invoked to set aside arbitral awards.

Earlier, at the Inaugural Session of the Conference, Mr. Arun Chawla, Advisor, ICA being the session moderator delivered opening remarks. Mr. N.G. Khaitan, President, ICA and Senior Partner, Khaitan & Co. delivered welcome address at the Conference. Inaugural Session concluded with vote of thanks by Ms. Geeta Luthra, Senior Advocate and Vice President, ICA.

Inaugural Session was followed by a Panel Discussion which was chaired by Hon'ble Mr. Justice J. R. Midha, Judge Delhi High Court. Amongst other things Justice Midha, delved into the present state of arbitration landscape in India.

Eminent speakers in the field of arbitration were invited by the ICA at the said panel discussion, namely, ***Mr. Sanjeev Kapoor,*** Partner, Khaitan & Co; ***Mr. Ganesh Chandru,*** Executive Partner, Lakshmikumaran & Sridharan; ***Ms. Priya Hingorani,*** Senior Advocate; ***Dr. Arghya Sengupta,*** Founder and Research Director, VIDHI Centre for Legal Policy; ***Dr. Subir Bikas Mitra,*** Executive Director (Legal & HR), GAIL (India) Ltd.; and ***Ms. Geeta Luthra,*** Senior Advocate & Vice President, ICA. Eminent Panellists shared their views on the theme of the Conference and also shared their insights based on their practical experiences.

Mr. Sanjeev Kapoor, Partner, Khaitan & Co, discussed key factors for making India an arbitration hub including adoption of global best practices in Indian arbitration regime. Mr. Kapoor deliberated on the present arbitration landscape in India which has led to pro arbitration environment and also shared key areas of improvement in Indian arbitration regime.

Mr. Ganesh Chandru, Executive Partner, Lakshmikumaran & Sridharan shared the recent trends in International Institutional Arbitration and discussed new areas such as expedited /summary procedure, emergency arbitrator, joinder & consolidation, multiple contracts based on arbitration rules of Indian and Foreign Arbitral Institutions.

Dr. Subir Bikas Mitra, Executive Director (Legal & HR), GAIL (India) Ltd. shared industry perspective. Dr. Mitra discussed issues and challenges relating to arbitration being faced by the industry and initiatives taken in GAIL to strengthen Arbitration.

Ms. Priya Hingorani, Senior Advocate spoke about the benefits of mediation as a method of Dispute Resolution and the need for its wider acceptance and highlighted how several of the issues referred to for arbitration can, in fact, be resolved by mediation and conciliation.

Dr. Arghya Sengupta, Founder and Research Director, VIDHI Centre for Legal Policy shared his thoughts on recent judgement of Hon'ble Supreme Court of India in Hindustan Construction Company Limited and Ors. Vs Union of India (UOI) and Ors. striking down Section 87 of the Arbitration and Conciliation Act, 1996 as inserted by the Arbitration and Conciliation (Amendment) Act, 2019.

Ms. Geeta Luthra, Senior Advocate and Vice President, ICA shared recent 2019 Amendments to the Arbitration and Conciliation Act, 1996 including issues related to limitation period provided for completion of pleadings; issues relating to newly inserted provision relating to confidentiality of information by the arbitrator, arbitral institution, and the parties; and the role of Arbitral Council of India to be established as independent body mainly for the purposes of grading arbitral institutions and accreditation of arbitrators.

Panel discussion was followed by Q&A session wherein participants directed thought provoking questions to the panellists and also few questions were addressed to the Chair of the Panel Discussion, Hon'ble Mr. Justice J.R. Midha which were aptly replied.

Thereafter, the Conference concluded with Lunch.

Conference on

"Arbitration in India: The New Scenario"

7th December 2019, New Delhi

Photo Gallery

Participants at Registration Desk.

Hon'ble Mr. Justice Surya Kant, Judge, Supreme Court, Chief Guest for the Conference and Hon'ble Mr. Justice J.R. Midha, Judge, Delhi High Court are escorted to the Auditorium.

Group Photograph with Chief Guest (L to R): Mr. Arun Chawla, Advisor, ICA; Mr. N.G. Khaitan, President, ICA; Hon'ble Mr. Justice Surya Kant, Judge, Supreme Court of India; Hon'ble Mr. Justice J.R. Midha, Judge, Delhi High Court; Ms. Geeta Luthra, Vice President, ICA; Mr. Rohit Relan, Sr. Vice President, ICA and Mr. Vinay Kumar Sanduja, Joint Director & Registrar, ICA.

Hon'ble Mr. Justice Surya Kant, Judge, Supreme Court delivers Inaugural Address.

Hon'ble Mr. Justice Surya Kant, Judge, Supreme Court of India is presented with Green Certificate by Mr. N.G. Khaitan, President, ICA.

Hon'ble Mr. Justice Surya Kant, Judge, Supreme Court of India delivers Inaugural Address.

Mr. N.G. Khaitan, President, ICA delivers Welcome Address.

Mr. Arun Chawla, Advisor, ICA delivers Opening Remarks.

A section of participants during Inaugural Session.

Hon'ble Mr. Justice Surya Kant, Judge, Supreme Court delivers Inaugural Address.

Hon'ble Mr. Justice J.R. Midha, Judge, Delhi High Court is presented with Green Certificate by Ms. Geeta Luthra, Vice President, ICA.

Hon'ble Mr. Justice J.R. Midha, Judge, Delhi High Court delivers his Special Address.

Vote of Thanks by Ms. Geeta Luthra, Vice President, ICA.

End of Inaugural Session (L to R): Mr. Arun Chawla, Advisor, ICA; Mr. N.G. Khaitan, President, ICA; Hon'ble Mr. Justice Surya Kant, Judge, Supreme Court of India; Hon'ble Mr. Justice J.R. Midha, Judge, Delhi High Court; Ms. Geeta Luthra, Vice President, ICA; Mr. Rohit Relan, Sr. Vice President, ICA.

Hon'ble Mr. Justice J.R. Midha, Judge, Delhi High Court addressing the participants during the Panel Discussion.

Huge Gathering at the Conference.

A section of the participants.

Hon'ble Mr. Justice J.R. Midha, Judge, Delhi High Court replying to a query during Q & A Session.

Mr. Sanjeev Kapoor, Partner, Khaitan & Co. shares his views with the participants.

Dr. Arghya Sengupta, Founder and Research Director, VIDHI Centre for Legal Policy addresses the participants during the Panel Discussion.

Dr. Subir Bikas Mitra, Executive Director (Legal & HR), GAIL (India) Ltd. addresses the participants during the Panel Discussion.

Mr. Ganesh Chandru, Executive Partner, Lakshmikumaran & Sridharan shares his views with the participants.

Ms. Geeta Luthra, Senior Advocate & Vice President, ICA shares her views.

Ms. Priya Hingorani, Senior Advocate addresses the participants during the Panel Discussion.

Hon'ble Mr. Justice J.R. Midha, Judge, Delhi High Court addressing the audience during the Panel Discussion.

Distinguished Guests seated in the front row of the Auditorium.

Group Photograph at the end of Conference (L to R): Mr. Arun Chawla, Advisor, ICA; Ms. Priya Hingorani, Senior Advocate; Mr. Sanjeev Kapoor, Partner, Khaitan & Co.; Dr. Subir Bikas Mitra, Executive Director (Legal & HR), GAIL (India) Ltd.; Mr. N.G. Khaitan, President, ICA; Hon'ble Mr. Justice J.R. Midha, Judge, Delhi High Court; Ms. Geeta Luthra, Senior Advocate & Vice President, ICA; Mr. Ganesh Chandru, Executive Partner, Lakshmikumaran & Sridharan; Dr. Arghya Sengupta, Founder and Research Director, VIDHI Centre for Legal Policy and Mr. Vinay Kumar Sanduja, Joint Director & Registrar, ICA.

CASE HIGHLIGHTS

Mahanagar Telephone Nigam Ltd. Vs. Canara Bank and Ors.

In this case, Hon'ble Supreme Court of India invoked the Group of Companies doctrine and joined Can Bank Financial Services Ltd. (CANFINA) a wholly owned subsidiary of Respondent Company (Canara Bank) in the arbitration proceedings.

Briefly stated, Appellant (Mahanagar Telephone Nigam Ltd hereinafter MTNL) filed Special Leave Petitions challenging various orders passed by the Hon'ble Delhi High Court in relation to arbitration proceedings which commenced between MTNL, Canara Bank, CANFINA pursuant to their consent before Hon'ble Delhi High Court to resolve the issues through arbitration .

Issues before the Hon'ble Supreme Court were as follows: (i) first issue was raised by MTNL regarding the non existence of a valid arbitration agreement between the three parties viz. MTNL, Canara Bank, CANFINA; and (ii) the second issue was raised by Canara Bank that CANFINA, was not a party to the arbitration agreement, and hence cannot be impleaded in the arbitration proceedings.

Taking note of relevant section 7 (4) (b) of the Arbitration and Conciliation Act, 1996 as amended by 2015 Amendment Act (the Act), Hon'ble Supreme Court observed that *"The arbitration agreement need not be in any particular form. What is required to be ascertained is the intention of the parties to settle their disputes through arbitration. The essential elements or attributes of an arbitration agreement is the agreement to refer their disputes or differences to arbitration, which is expressly or impliedly spelt out from a Clause in an agreement, separate agreement, or documents/ correspondence exchanged between the parties.".*

Hon'ble Supreme Court also took note of it's earlier decision in *Khardah Company Ltd. v. Raymon and Co. (India) Pvt. Ltd. [1963] 3 SCR 183, wherein it laid down important principle for ascertaining the terms of an arbitration agreement between the parties in following words "If on a reading of the document as a whole, it can fairly be deduced from the words actually used herein, that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of a contract can be expressed or implied from what has been expressed. It is in the ultimate analysis, a question of construction of the contract."*

On facts, Hon'ble Supreme Court observed that the agreement between MTNL and Canara Bank to refer the disputes to arbitration was evidenced from various documents exchanged between the parties viz. a) minutes of the meeting with Cabinet Secretariat wherein all three parties (MTNL, Canara Bank, CANFINA) were present and participated and a view was expressed that all the three parties should take recourse to arbitration in view of the different inter-liked transactions between them and wherein Canara Bank suggested that to expedite the arbitration, it should be conducted under the Arbitration & Conciliation Act, 1996 which was accepted by MTNL, and no objection was raised. b) Circulation of letters by Canara Bank to MTNL along with draft Arbitration Agreement, wherein all three parties i.e. Canara Bank, CANFINA and MTNL were to be joined in the arbitration proceedings, pursuant to the proceedings conducted by the Cabinet Secretariat. c) Recorded consent of MTNL and Canara Bank before Hon'ble Delhi High Court to be referred to arbitration by a Sole Arbitrator under the Act. d) Participation by MTNL in the arbitral proceedings conducted by the Sole Arbitrator as appointed by Hon'ble Delhi High Court including filing of Claim, and Counter-Claim without any objection before the Sole Arbitrator that there was no arbitration agreement in writing between the parties. Only objection raised by MTNL during arbitral proceedings was that CANFINA should be joined as a necessary party in the proceedings.

Taking into account aforesaid facts, Hon'ble Supreme Court observed that *"The agreement between the parties as recorded in a judicial Order, is final and conclusive of the agreement entered into between the parties. The Appellant-MTNL after giving its consent to refer the disputes to arbitration before the Delhi High Court, is now estopped from contending that there was no written agreement to refer the parties to arbitration."*

Hon'ble Supreme Court rejecting the contention of MTNL about non existence of a valid arbitration agreement between the three parties viz. MTNL, Canara Bank, CANFINA observed that section 7(4)(c) of the Act provides that there can be an arbitration agreement in the form of exchange of statement of claims and defense, in which the existence of the agreement is asserted by one party, and not denied by the other. In the aforesaid context, Supreme Court noted that in the present case, Canara Bank had filed its Statement of Claim before the Arbitrator, and MTNL filed its Reply to the Statement of Claim, and also made a Counter Claim against Canara Bank. Accordingly, Hon'ble Supreme Court observed that the statement of Claim and Defence filed before the Arbitrator would constitute evidence of the existence of an arbitration agreement, which was not denied by the other party under Section 7(4)(c) of the Act.

As regards the second issue raised by Canara Bank that CANFINA, was not a party to the arbitration agreement, and hence cannot be impleaded in the arbitration proceedings, Hon'ble Supreme Court of India noted the following principles of contract law.

- *"An agreement entered into by one of the companies in a group, cannot be binding on the other members of the same group, as each company is a separate legal entity which has separate legal rights and liabilities.*
- *The parent, or the subsidiary company, entering into an agreement, unless acting in accord with the principles of agency or representation, will be the only entity in a group, to be bound by that agreement.*
- *Similarly, an arbitration agreement is also governed by the same principles, and normally, the company entering into the agreement, would alone be bound by it.*
- *A non-signatory can be bound by an arbitration agreement on the basis of the "Group of Companies" doctrine, where the conduct of the parties evidences a clear intention of the parties to bind both the signatory as well as the non-signatory parties.*
- *Courts and tribunals have invoked this doctrine to join a non-signatory member of the group, if they are satisfied that the non-signatory company was by reference to the common intention of the parties, a necessary party to the contract."*

Thereafter, Hon'ble Supreme Court looked into the well established position on the Group of Companies Doctrine. On facts, Hon'ble Supreme Court of India observed that:

- CANFINA was set up as a wholly owned subsidiary of Canara Bank.
- Disputes between MTNL, Canara Bank emanated out of the transaction whereby CANFINA has subscribed to the bonds floated by MTNL and CANFINA subsequently transferred the Bonds to its holding Company-Canara Bank.
- As per contentions of MTNL, since CANFINA did not pay the entire sale consideration for the Bonds, MTNL eventually was constrained to cancel the allotment of the Bonds.
- In the absence of CANFINA, it will be a futile effort to decide the disputes only between MTNL and Canara Bank, particularly in view of the fact that the original transaction emanated from a transaction between MTNL and CANFINA-the original purchaser of the Bonds.
- There was a clear and direct nexus between the issuance of the Bonds, its subsequent transfer by CANFINA to Canara Bank, and the cancellation by MTNL, which has led to disputes between the three parties.

Hon'ble Supreme Court of India, in light of aforesaid facts and Group of Companies Doctrine observed that CANFINA was a necessary and proper party to the arbitration proceedings and observed that *"The present*

case is one of implied or tacit consent by Respondent No. 2- CANFINA to being impleaded in the arbitral proceedings, which is evident from the conduct of the parties. We find that Respondent No. 2-CANFINA has throughout participated in the proceedings before the Committee on Disputes, before the Delhi High Court, before the Sole Arbitrator, and was represented by its separate Counsel before this Court in the present appeal. There was a clear intention of the parties to bind both Canara Bank, and its subsidiary-CANFINA to the proceedings. In this case there can be no final resolution of the disputes, unless all three parties are joined in the arbitration."

Accordingly, Hon'ble Supreme Court of India invoked the Group of Companies doctrine, to join Respondent No. 2-CANFINA i.e. the wholly owned subsidiary of Respondent No. 1-Canara Bank, in the arbitration proceedings pending before the Sole Arbitrator.

National Highways Authority of India Vs. Sayedabad Tea Company Ltd. and Ors.

In this case main issue before Hon'ble Supreme Court of India was whether the application under Section 11 of the Arbitration and Conciliation Act, 1996 (the Act) is maintainable in view of Section 3G (5) of the National Highways Act, 1956 (NHAI Act) which provides for appointment of an Arbitrator by the Central Government.

Briefly stated, in the instant case, Respondent (Sayedabad Tea Company Ltd.) had filed an application under section 3G (5) of NHAI Act for the appointment of the Arbitrator by the Central Government. However, as contended by Sayedabad Tea Company Ltd., the Central Government had not responded within 30 days and accordingly an application to Chief Justice/ his designate for the appointment of the arbitrator under section 11 of the Act was filed. Hon'ble High Court of Calcutta took note of the fact that Arbitrator was in fact appointed by the Central Government later on after filing of application under section of the Act and accordingly held that the right of appointment of the Arbitrator by the Central Government was forfeited as it failed to appoint the Arbitrator until filing of the application under Section 11(6) of the Act. Hon'ble Calcutta High Court observed that the appointment of Arbitrator during the pendency of proceedings, cannot be said to be a valid appointment and hence referred the matter to be placed before the Chief Justice for naming an Arbitrator.

Aggrieved by the order of Calcutta High Court, Appellant (National Highways Authority of India hereinafter NHAI), filed review application. However, the same was dismissed. Aggrieved by the order of Hon'ble Calcutta High Court, NHAI filed appeal before Hon'ble Supreme Court of India.

Hon'ble Supreme Court of India took note of it's earlier judgment in *General Manager (Project), National Highways and Infrastructure Development Corporation Ltd.* v Prakash Chand Pradhan in Civil Appeal No. 5250 of 2018 decided on 16th May, 2018 wherein while dealing with the scope of sub-sections (5) and (6) of Section 3G of the NHAI Act with reference to Section 11 of the Act it was held that the NHAI Act was a special enactment and Section 3G provided for an inbuilt mechanism for appointment of an Arbitrator by the Central Government. In the said judgment, Hon'ble Supreme Court of India also observed that Section 11 of the Act had no application and the power to appoint Arbitrator was exclusively vested with the Central Government under Section 3G(5) of the NHAI Act. In the said case, Supreme Court also observed that if the Central Government does not appoint an Arbitrator within a reasonable time, it is open for the party to avail the remedy either by filing a writ petition under Article 226 of the Constitution of India or a suit for the purpose but the remedy under Section 11 of Act was not available for appointment of an Arbitrator.

Accordingly, in the instant case, allowing the appeal, Hon'ble Supreme Court of India observed that it is settled principle of law that when the special law sets out a self-contained code, the application of general law would impliedly be excluded. Accordingly, it noted that NHAI Act was a special law enacted for the purpose of appointment of an arbitrator by the Central Government. Hon'ble Supreme Court also noted that for clarity, sub-section (6) of Section 3G of the NHAI Act provides that subject to the provisions of the NHAI Act, the provisions of Act shall apply to every arbitration obviously to the extent where the NHAI Act is silent.

Accordingly, the Arbitrator may take recourse in adjudicating the dispute invoking the provisions of Act for the limited purpose. Hon'ble Supreme Court reiterated that so far as the appointment of an Arbitrator was concerned, the power being exclusively vested with the Central Government as envisaged under sub-section (5) of Section 3G of NHAI Act, Section 11 of the Act will not be applicable.

Allowing the appeal, Hon'ble Supreme Court observed that in view of the power being vested exclusively with the Central Government to appoint an Arbitrator Under Section 3G(5) of the NHAI Act, being a special enactment, the application filed under Section 11(6) of the Act for appointment of an Arbitrator was not maintainable and provisions of the Act could not be invoked for the purpose.

Perkins Eastman Architects DPC and Ors. Vs. HSCC (India) Ltd.

Briefly stated, in the present case, Appellants (Perkins Eastman Architects DPC) approached Hon'ble Supreme Court of India under Section 11(6) read with Section 11(12)(a) of Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015 (the Act) for appointment of a Sole Arbitrator, in accordance with Clause 24 of the Contract executed between the parties for adjudicating the disputes and differences between the parties arising from the said Contract.

As per Clause 24 of the Contract entered into between parties, Chairman and Managing Director of the Respondent (HSCC (India) Ltd.) was empowered to make the appointment of a sole arbitrator and said Clause also stipulated that no person other than a person appointed by such Chairman and Managing Director of the Respondent would act as an arbitrator.

Appellants, Perkins Eastman Architects DPC in the application filed under Section 11(6) read with Section 11(12)(a) for appointment of an arbitrator contended that though the Chairman and Managing Director was the competent authority to appoint a sole arbitrator, but the Chief General Manager of the Respondent wrongfully appointed the sole arbitrator and in any case, an independent and impartial arbitrator was required to be appointed.

It was further contended by the Ld Counsel for Appellant, Perkins Eastman Architects DPC that *"the appointment process contemplated in Clause 24 gave complete discretion to the Chairman and Managing Director of the Respondent to make an appointment of an arbitrator of his choice, the Chairman and Managing Director of the Respondent would naturally be interested in the outcome or decision in respect of the dispute, the prerequisite of element of impartiality would, therefore, be conspicuously absent in such process; and as such it would be desirable that this Court makes an appropriate appointment of an arbitrator." During the arguments, Ld. Counsel for Appellants tried to establish the proposition that "if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. It was further contended that ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee."*

Relying on it's earlier judgment in *TRF Limited v. Energo Engineering Projects Limited* (2017) 8 SCC 377, Hon'ble Supreme Court allowed the application for appointment of fresh arbitrator. Hon'ble Supreme Court in particular took note of Paragraph 50 of the decision in TRF Limited i.e. *"whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator" and observed that "The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator."*

M/s. Uttarakhand Purv Sainik Kalyan Nigam Limited Vs. Northern Coal Field Limited

In this case, the issue before Hon'ble Supreme Court of India was which whether the Hon'ble High Court was justified in rejecting the application filed under Section

11 of the Arbitration and Conciliation Act (the Act) for reference to arbitration, on the ground that it was barred by limitation.

Deciding the issue, Hon'ble Supreme Court of India observed that as per the legislative mandate contained in Section 11(6A) of the Act ".. the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the Kompetenz Kompetenz principle.". Hon'ble Supreme Court also noted that as per Kompetenz Kompetenz principle, arbitral tribunal has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement except when the arbitration agreement is impeached by fraud or deception.

Taking note of the legislative intent of the Act, Hon'ble Supreme Court of India observed that once the arbitrator is appointed, or the tribunal is constituted, all issues and objections are to be decided by the arbitral tribunal.

Hon'ble Supreme Court of India observed that as per provisions of Section 16 contained in the Act , the issue of limitation would be decided by the arbitrator and also reiterated the position that limitation is a mixed question of fact and law.

Hon'ble Supreme Court also relied on it's earlier decision in NTPC v. Siemens Atkein Gesell Schaft, (2007) 4 SCC 451. wherein it was held that "the arbitral tribunal would deal with limitation under Section 16 of the 1996 Act. If the tribunal finds that the claim is a dead one, or that the claim was barred by limitation, the adjudication of these issues would be on the merits of the claim. Under subsection (5) of Section 16, the tribunal has the obligation to decide the plea; and if it rejects the plea, the arbitral proceedings would continue, and the tribunal would make the award. Under subsection (6) a party aggrieved by such an arbitral award may challenge the award under Section 34."

Setting aside the judgment of Hon'ble High Court, Supreme Court directed that the issue of limitation be decided by the arbitral tribunal.

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RE-ACT

Dear Editor,

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R.Paranjothi

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Thanks for sharing the ICA ARBITRATION QUARTERLY. Very interesting and informative to practitioners like me.

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INDIAN COUNCIL OF ARBITRATION
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ISSN: *2456-9801*

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