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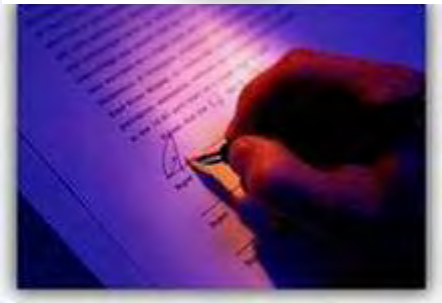

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EDITORIAL:

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EDITOR'S NOTE

IIAM has launched its Community Mediation Clinics in Kerala. The first batch of Mediation Clinics and Community Mediators were dedicated to the nation by the Chief Justice of Kerala. The motto of the IIAM Community Mediation Clinics is to serve the society to help resolve conflicts and disputes. The mission is to create a culture of empowering people to resolve their own disputes. IIAM is looking forward to your support in taking this concept ahead by creating more Mediation Clinics. If you are interested to take part in this project or support the cause, please contact us. Let us join together in creating a loving and caring world.

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'Mediating Mars and Venus'

Gender Matters in Mediation - Part II

: TONY WHATLING

There seems to be a noticeable difference in communication patterns between males and females. The author analyses the principles of linguistics, communication theory and social sciences in the backdrop of mediation, in an effort to develop greater awareness, understanding and questions about the possible implications for mediation practice. The article attempts to address what might in some way account for the language and communication problem of parties in mediation.

Born or made? The 'Nurture' - social conditioning story.

Writing about 'Sex-trait stereotypes' Borisoff and Victor cite the work of Psychologists Williams & Best who refer to `*…psychological characteristics or behavioral traits that are believed to characterise men with much greater (or lesser) frequency than they characterise women. As part of their extensive pan-cultural study of sex-stereotyping in 29 countries, these psychologists found that in all participating nations, the adjectives "adventurous," "dominant," "forceful," "independent," "masculine," "and "strong-willed," were applied to men, while the terms "emotional," "sentimental," "submissive," "and "superstitious" were used consistently to describe women.*` (Borisoff & Victor 1989 p86).

Borisoff and Victor also make the point that if we understand the nature and potential effects of such stereotypes we can consider (a) the extent to which they apply to us as individuals and (b) the effect they may have on interpersonal communication and sex-role expectations (S.R.E's). Whilst their focus of application is on conflict in the workplace, we can equally apply these ideas to communication and S.R.E's in our work as mediators. For example we could usefully reflect on how our own personal sex-role behaviour differs across our range of personal relationships - social relationships and relationships in the workplace - in terms of both the fundamental principles of mediation and the S.R.E's of our clients as a couple.

A frequently asked question is that of how do we acquire these gender differences in ways of thinking and behaving? How do cultures convey these differences? Is it 'nature' or 'nurture'? What is it that happens to children to perpetuate such differences even when some parents work really hard to prevent that happening? It seems likely that even where this is their intention, parents should not underestimate the many influences children are exposed to outside of the nuclear family home and immediate proximity of their parents.

Borisoff and Victor give a number of sources of research studies and highlight how – '*through play, dress, household tasks, socialisation and education, girls learn to be polite, expressive, nurturant, compliant, dependant and pretty. In contrast, boys are encouraged to display aggressiveness, emotional control, independence, competitiveness and physical strength. Children in play from as young as the age of two show distinct preferences for different toys and rather than being biologically determined the preferences were influenced by positive or negative reinforcement by parents and other significant adults, e.g. grandparents and teachers.* (Borisoff & Victor 1989 p93).

A problem with some of earlier writers on this subject was the tendency to pathologise such female male communication differences as right/wrong, good/bad. Writers referred to here however take the position that it is not about naming, blaming and shaming, but about facing the reality that difference just is, and moving on from that assumption to looking at ways to live and work with it, as suggested by Deborah Tannen.

> *'Recognising gender differences frees individuals from the burden of individual pathology. Many women and men feel dissatisfied with their close relationships and become even more frustrated when they try to talk things out. Taking a sociolinguistic approach to relationships makes it possible to explain these dissatisfactions without accusing anyone of being crazy or wrong, and without blaming-or-disgarding the relationship. If we can recognise and understand the differences between us, we can take them into account, adjust to and learn from each other's styles` …..If we can sort out differences of conversational style, we will be in a better position to confront real conflicts of interest-and to find a shared language in which to negotiate them,.* (Tannen 1991 pp17/18).

So what?

The late John Haynes would frequently, and always very wisely, ask in practice seminars and master-class workshops, 'So What'? He would say this, not in our traditional Western sub-cultural negative sense of 'So what yar-boo' or 'tough luck - deal with it', but in the sense of 'So what are the implications of what we have just heard or learned, for the way that we work as mediation practitioners?

Whatever our personal opinions and values about the thinking and communication differences debate, anecdotal evidence from direct mediation practice and frequent direct observation of mediation sessions through live supervision, there does seem to be a strong case for considering the implications for practice.

Just as we would respond sensitively to the needs of a client who did not have English as a first language, so too we should have regard for significant differences in conceptual thinking and communication preferences.

It is important to state at this stage that very few of us occupy the female male gender stereotypical positions described by the writers quoted above. Most of us are somewhere between the male female extremities of the scale and the centre point, or indeed may well cross over the central point in our hormonal influenced brain wiring configurations. In live-observed supervision I frequently see couples whose communication style preferences can be seen to be close to convergence nearer the centre of the scale - fairly well balanced in terms of left brain right brain preferences. At other times the stereotypical characteristics described at the start of this article can be observed. Less often I have witnessed a couple who both appear to have, as it were, crossed over the centre point. For example I observed a couple where the father, from a background in the arts and music, was the primary carer and full-time homemaker. The mother was the primary breadwinner and worked as an accountant. Both parents clearly demonstrated thinking and communication styles commonly associated with other gender stereotypical brain configurations - he thinking in very right-brained gestalts and big pictures - she in very logical, pragmatic and 'one thing at a time' left-brain style.

In terms of good quality inclusive mediation practice, what matters is that mediators have sufficient cultural sensitivity and cultural competence to be able to respond to these differences, just as they would to more obvious language or special needs communication provision.

To conclude, what follows is an attempt to highlight some of the mediation practitioner implications:

- Don't assume that because people look like you they are like you - treat every client as unique, and avoid stereotypical assumptions

- Be prepared to listen, think and communicate outside of your normal communication style box

- Client problems with communication are primarily a problem for the professional not that of the clients - it is our responsibility to understand them and respond sensitively as facilitators of effective communication

- One size does not fit all - clients often need bespoke packages and styles of communication tailored to their needs

- 'Audit the process' - when in doubt, be professionally curious. For example if the verbal and non-verbal communication indicates a potential problem - ask how the session is going for each party - is it helping or not? If not, what can be done to make it more effective? It may be possible to do this in the joint meeting, or it may merit the face-saving privacy of a one-to-one caucus.

- Consider the implications of gender balance when co-working, perhaps as a result of indicators picked up in the individual pre-mediation information/ intake meetings. Where mediator availability prevents a mixed gender partnership, then at least acknowledge it at the start of the joint meeting - for example by saying something along the lines of 'Obviously there are three women in the room and one man, so if that becomes a problem for either of you please say. Similar sensitivity and overt acknowledgement also applies to a female or male mediator working solo with a couple.

- Monitor the gender style preferences actively. Co-mediation may well help to balance such issues and should also bring the opportunity for the mediator who is not at any point directly engaged in managing the factual detail of the case, for example contact hours or financial number crunching, to observe the interpersonal communication interactions. Where there is any uncertainty as to effectiveness, a time-out/tea break may be indicated, giving the opportunity for co-workers to confer and perhaps challenge each other on the issues.

- Comment on what you are observing with the couple. Often in mediation the most helpful and effective thing to say is what is in your head as a question or hypothesis, so why not share it? If your hypothesis it is not affirmed by them, then whether you agree with them or not, nothing will have been lost. If on the other hand one or both affirm it, then the issue is on the table and out in the open, so can be explored in terms of how to manage it effectively.

- Question why someone walked out. When a client walks out from a session or withdraws from mediation altogether, ask to what extent it may have had to do with diversity of thinking and communication styles between mediator(s) and client(s). Mediation breakdown should always be an issue to take to supervision - obviously not in a blaming style but as a mature professional learning exploration. In the heat of the moment and perhaps high conflict/emotion in that session, did I/we miss something connected to gender communication difference?

In conclusion, I hope that this article helps to raise awareness and debate on the topic of gender difference and diversity.

In day to day practice it may not feature particularly highly on the scale of issues that challenge our competence as mediators nor indeed arise as a problem for the majority of most of our clients.

Nevertheless, in my view, it does connect with a range of potential difficulties which may be overlooked in the context of ever increasing pressure on service providers to process more and more referrals and achieve a faster settlement seeking and solution focussed turnover of cases, against a backcloth of ever diminishing resources. As an experienced professional practice consultant to a number of service providers I do have serious concerns about such pressures, when they threaten to impair and diminish a practitioners opportunity to step back, reflect on, and learn from, casework experience.

In terms of quality standards and codes of professional practice, the topic is arguably located in issues related to power-balancing, see for example how it connects with the following extracts from one such example:

2.2 Mediation also aims to assist participants to communicate with one another now and in the future and to reduce the scope or intensity of dispute and conflict.

Think ... Life's Echo

A son and his father were walking on the mountains. Suddenly, the son falls hurts himself and screams: "AAAhhhhhhhhhhh!!!" To his surprise, he hears the voice repeating, somewhere in the mountain: "AAAhhhhhhhhhhh!!!"

Curious, he yells: "Who are you?" He receives the answer: "Who are you?"
Angered at the response, he screams: "Coward!" He receives the answer: "Coward!"

He looks to his father and asks: "What's going on?" The father smiles and says: "My son, pay attention." And then he screams to the mountain: "I admire you!" The voice answers: "I admire you!"

Again the man screams: "You are a champion!" The voice answers: "You are a champion!"

The boy is surprised, but does not understand. Then the father explains: "People call this Echo, but really this is Life. It gives you back everything you say or do. Our life is simply a reflection of our actions.

If you want more love in the world, create more love in your heart.

If you want more competence in your team, improve your competence.

This relationship applies to everything, in all aspects of life. Life will give you back everything you have given to it.

4.3.2 Mediators must seek to prevent manipulative, threatening or intimidating behaviour by any participant. Mediators must conduct the process in such a way as to redress, as far as possible, any imbalance in power between the participants. If any behaviour seems likely to render mediation unfair or ineffective, the mediator must take appropriate steps to prevent this, terminating mediation if necessary. (College of Mediators Code of Practice (2008)

The topic also goes to the heart of ideas about how we learn as professionals, from reflecting on our practice. Donald Shon refers to this when he says: *'We are in need of inquiry into the epistemology of practice. What is the kind of knowing in which competent practitioners engage? How is professional knowing like and unlike the kinds of knowledge presented in academic textbooks, scientific papers and learned journals? In what sense, if any, is there intellectual rigor in professional practice?.....I begin with the assumption that competent practitioners usually know more than they can say. They exhibit a kind of knowing-in-practice, most of which is tacit. Nevertheless, starting with protocols of actual performance, it is possible to construct models of knowing, Indeed, practitioners themselves often reveal a capacity for reflection on their intuitive knowing in the midst of action and sometimes use this capacity to cope with the unique, uncertain, and conflicted situations of practice.' (Shon 1983)*

Despite the political pressures and resource limitations, I remain optimistic that, based on regular contact with many highly experienced and competent mediation practitioners, we can continue to develop, explore and debate such areas of our practice that Shon refers to as 'tacit'. If indeed we do tend to '*know more than we say*', then let us say what we know – and what better place for mediation professionals to do that than through the medium College of Mediators newsletters and conference events?

Given the title of this article I can think of no better quote to end on, than a postcard given to me recently, which states: 'Men are from earth – women are from earth – deal with it'

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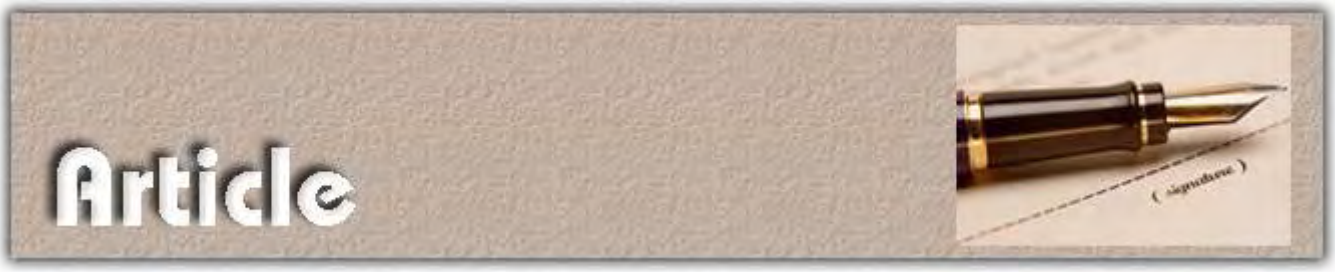
The Lighter Side

A group of managers are given an assignment to measure the height of a flagpole. So they go out to the flagpole with ladders and tape measures, and they're falling off the ladders and dropping the tape measures. The whole thing is just a mess.

An engineer comes along and sees what they're trying to do, walks over, pulls the flagpole out of the ground, lays it flat, measures it from end to end, gives the measurement to one of the managers and walks away.

After the engineer has gone, one manager turns to another and laughs: "Isn't that just like an engineer? We're looking for the height and he gives us the length!"



The death of "Double Exequatur" under the New York Convention

: ARNAV NARAIN AND ANUSHA PANDE

What are the requirements for enforcement of foreign Awards in countries other than the country that rendered such Award. The enforcement of a foreign Award in India is governed by Part II of the Act. Chapter 1 of Part II pertains to New York Convention (NYC) Awards. The Delhi High Court in the Universal Tractor case is the first Court in India to have expressly and effectively applied the NYC Convention insofar as it deals with the removal of the principle of double exequatur.

The Delhi High Court on 13th July 2012 in the matter of *Universal Tractor Holdings v. Escorts Limited*[1] has held that in order to seek enforcement of a foreign arbitral Award under Section 48 of the Arbitration and Conciliation Act, 1996 ('Act'), it is not necessary for the party seeking enforcement to show that leave for enforcing the Award has been obtained in the court of the country in which such Award is made.[2]

In order to understand what this ruling truly means, we need to first understand what were the requirements for enforcement of foreign Awards in countries other than the country that rendered such Award. The New York Convention, in Article V, provides for scenarios in which enforcement of a foreign Award can be refused. It reads as follows:

"*Article V:*
1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those

(Footnotes)
[1] *Universal Tractor Holdings v. Escorts Limited:* In Ex. P 372 of 2010 delivered on 13.07.2012
[2] Ibid. at para 31.

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
(e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

The enforcement of a foreign Award in India is governed by Part II of the Act. Chapter 1 of Part II pertains to New York Convention (NYC) Awards. The New York Convention itself has been set out in the First Schedule to the Act. Chapter 2 of Part II of the Act governs the enforcement of Awards under the Geneva Convention, which is set out in the Second Schedule to the Act. For the purpose of the present article, the author seeks to show as to how the rule for enforcement of foreign Award in a Convention country, other than the rendering State, has been liberalized post-the Geneva Convention.

One of the questions raised in the case of *Universal Tractor Holdings* was whether the impugned Award had become binding on the parties in terms of the abovementioned Article V(1)(e) of the New York Convention. Similar to the said provision of the New York Convention is Art. 48(1)(e) of the Act. The judgment debtor (JD) in the abovementioned case submitted that since the foreign Award, which was passed in the U.S.A., was yet to be recognized and held enforceable by the concerned US Court[3] under the Federal Arbitration Act[4](FAA), it cannot be sought to be enforced in a court in India.

The primary question that arose for determination was whether the foreign Award was, after being pronounced, required to be 'recognised' or made a decree of the Court in the USA under the FAA? This, in the view of the Hon'ble Delhi High Court, required the examination of the rule of double *exequatur*.

Understanding 'Double *Exequatur*'

Under the Geneva Convention, the burden was upon the party seeking enforcement of a foreign Award to prove the fulfillment of the conditions necessary for enforcement, one of which was that the Award had become "final" in the country in which it was made. In other words, the party seeking enforcement had to show that the question of *exequatur*, i.e. the question of whether or not the foreign Award can be recognized and/or enforced had been considered and answered in the affirmative by the competent authority in the country in which the Award was made. This created problems for the enforcement of foreign Awards as the judicial authorities in some countries were of the view that the person seeking enforcement of a foreign Award should first produce an order of the court of the country in which the Award was made granting leave to enforce (such as an *exequatur*) and then only seek a similar order in the country in which enforcement was sought. This was termed as "double *exequatur*".

New York Convention: Dispensing Double *Exequatur*

The New York Convention which replaced the Geneva Convention, was enacted with a view to reduce the multiplicity of proceedings involved in an arbitration, in particular, those that entailed a reasonable degree of judicial intervention. The idea was to strengthen this alternative means of dispute resolution by making suitable standards befitting all countries. Even though every country has its own laws, rules and regulations,

(Footnotes)
[3] Wake County Superior Court
[4] 9 U.S.C. § 1

the NYC was passed with a view to ease the working of the enforcement mechanism with regard to foreign arbitral Awards universally.

One of the major changes brought about by the NYC in the field of arbitration, as has also been noted by the DHC in the *Universal Tractor* case was the dispensation of the requirement of double *exequatur.* Another significant change that the NYC brought through was that the burden of proving the grounds for non-enforcement of the foreign Award was placed on the party resisting enforcement.

In Dicey and Morris, *The Conflict of Laws*[5], it is stated as follows:

"…The Private International Law Committee in their Fifth Report suggest that an Award is "binding" if no further recourse may be had to another arbitral tribunal (e.g. an appeals tribunal); and that the fact that recourse may be had to a Court of law does not prevent the Award from being 'binding'. One thing seems clear: the Conference which approved the New York Convention wished to avoid a double exequatur of arbitration Awards, one in the country where the Award was made and the other in the country where it is sought to be enforced."

Therefore, it becomes relatively clear that the intention of the NYC was the removal of the double *exequatur* requirement in order for a foreign Award to be easily enforceable in NYC country other than the rendering country.

This interpretation of the NYC was further strengthened in the seminal commentary on the New York Convention by Albert Jan van den Berg, which provides as follows:

"Another improvement of the New York Convention's scheme for enforcement of an Award is the elimination of the "double exequatur". Under the Geneva Convention the party seeking enforcement of an Award had to prove that the Award had become "final" in the country in which it was made. In practice this could be proven only by producing an exequatur (leave for enforcement or the like) issued in the country in which the Award was made. As the party had also to acquire a leave for enforcement, this amounted to a system of "double exequatur". The thought prevailed at the New York Conference that the acquisition of a leave for enforcement in the country where the Award was made was an unnecessary time-consuming hurdle, especially since no enforcement was sought in that country. Moreover it could lead to delaying tactics on the part of the respondent who could forestall the Award becoming final by instituting setting aside procedures in the country in which the Award was made.

(Footnotes)

[5] Dicey and Morris, *The Conflict of Laws,* 11th Edn. at p. 586

'The elimination of the "double exequatur" is achieved in two ways. In the first place, the word "final" is replaced by the word "binding" in order to indicate that it does not include the exequatur in the country of origin (Art. V(1)(e). In the second place, it is no longer the party seeking enforcement of the Award who has to prove that the Award has become binding in the country in which the Award is made; rather, the party against whom the enforcement is sought has to prove that the Award has not become binding."[6]

Foreign arbitral Awards under the New York Convention can, therefore be enforced immediately after the Award becomes binding upon the parties in the country rendering where the Award is rendered. The NYC has brought about the following three major changes which have been expressly recognized for the first time by the Delhi High Court in the *Universal Tractor* case:

- Removal of the requirement of double *exequatur*
- Replaced the term "final" with the term "binding" in respect of enforcement of foreign Awards
- Shifted the burden of proving whether or not an Award has become binding in the rendering State upon the party resisting enforcement.

In the commentary on '*International Commercial Arbitration*', Mr. Gary B. Born, an expert legal practitioner in the field of international commercial arbitrations, has made the following observation:

"International Arbitration Conventions: 'Final' or 'Binding' Awards.
Under international arbitration conventions that preceeded the New York Convention, enforcement of foreign arbitral Awards was generally required only if those Awards were "final". That was true, for example, under the Geneva Convention, which only mandated enforcement of "final" arbitral Awards. Moreover, the Geneva Convention provided that the burden of establishing "finality" was on the party seeking enforcement, which was required to demonstrate that the Award was "not open to opposition, appel or pourvoi en cassation (in the countries where such forms of procedure exist) [and that no] proceedings for the purpose of contesting the validity of the Award are pending.

As a consequence, parties seeking to enforce foreign arbitral Awards under the Geneva Convention were effectively required to follow a so-called "double exequatur" process. This entailed obtaining judicial confirmation of the Awards in the local courts of the places where they were rendered (in order to prove their "finality"), and thereafter seeking judicial enforcement abroad.

As reflected in the New York Convention's drafting history, one of the principal (and deliberate) innovations of the Convention was its abandonment of the "double exequatur" procedure which was widely perceived as cumbersome and ineffective. This purpose is uniformly confirmed by commentary and national court decisions. To accomplish this, the Convention shifted the burden of proof to the party resisting the Award (who is required to prove the existence of grounds for non-recognition of the Award, including that an Award is not binding)."[7]

A bare perusal of the abovementioned extracts makes it amply clear that the NYC specifically abandoned the "finality" requirement, which was embodied in Art. I of the Geneva Convention. Instead, Art. III of the NYC now requires that arbitral Awards shall be recognized, while At. V(1)(e) permits, but does not require, non-recognition of an Award if it has not become "binding" or has been set aside where it was made. Under these provisions of the NYC, once an Award becomes "binding" it is subject to recognition in any Contracting State- notwithstanding the fact that the Award has not been confirmed in the arbitral seat.

Mr. Born goes on to explain that "the possibility of ongoing judicial review of an Award in the arbitral seat should not prevent the Award from being binding (since this would effectively revive the double *exequatur* requirement by preventing an Award from being binding until avenues for local review had been exhausted."

(Footnotes)

[6] Albert Jan van den Berg, *The New York Arbitration Convention of 1958- Towards a Uniform Judicial Interpretation*(1981), at p. 266

[7] Gary B. Born, *International Commercial Arbitration*, Kluwer Law International, 2009, vol, II at p. 2720

Brief Case Analysis

India:

The Supreme Court of India in *Oil and Natural Gas commission v. Western Company of North America*[8] acknowledged the abovementioned modifications/ developments brought about by the NYC quoting extensively from Van den Berg's commentary. In that case, the question concerned the enforceability of a domestic Award under the Arbitration Ac, 1940 and not a foreign Award. Hence, no conclusive answer could be attributed to the ambiguity surrounding the double *exequatur* requirement.

As far as decisions in the Indian courts are concerned, the argument for dispensing the "double *exequatur*" requirement under the NYC has been raised by reputed Senior advocates like Mr. Ashok Desai and Mr. K. K. Venugopal in an array of cases, however, on the specific point of "double *exequatur*" the courts in the past have made no express ruling.[9] The courts have merely taken a note of such submissions since the primary question involved pertained to the interpretation of the term 'public policy'.

In the case of *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*[10], after discussing the 1940 Act, the 1996, and the Foreign Awards (Recognition and Enforcement) Act, 1961 it was clarified that "for enforcement of a foreign Award there is no need to take separate proceedings, one for deciding the enforceability of the Award to make it a rule of the court or decree and the other to take up execution thereafter. In one proceeding the court enforcing a foreign Award can deal with the entire mater." Thus it appears that the question whether an Indian court is precluded from enforcing a foreign Award which has not been recognized or declared enforceable in the Court of the country in which it was made has not directly arisen for consideration yet in the Supreme Court of India.

The Delhi High Court in the *Universal Tractor* case is the first court in India to have expressly and effectively applied the NYC Convention insofar as it deals with the removal of the principle of double *exequatur*.

(Footnotes)

[8] (1987) 1 SCC 496

[9] *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp(1) SCC 644; *Smita Conductors Ltd. v. Euro Alloys Ltd*, (2001) 7 SCC 728 and *ONGC v. SAW Pipes*, (2003) 5 SCC 705

[10] (2001) 6 SCC 356

Other Countries:

In *Rosseel NV v. Oriental Commercial & Supply Co. (UK) Ltd.*[11] it was held that "..the New York Convention eliminated the 'double *exequatur*' requirement under the earlier Geneva Convention. Under the Geneva Convention a party who sought to enforce an Award, had to prove an *exequatur* (leave to enforce) issued in the country in which the Award was made as well as leave to enforce in the country in which he sought enforcement. The New York Convention abolished the need to obtain leave to enforce in the country where the Award was made."

This view was reiterated and reinforced in the recent case of *Dallah Real estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*[12] wherein it was held as follows:

"The New York Convention does not require double exequatur and the burden of proving the grounds for non-enforcement is firmly on the party resisting enforcement."

Furthermore, in another recent case i.e. *Dowans Holding SA, Dowans Tanzania Ltd. v. Tanzania Electric Supply Co. Ltd.*[13], the High Court of Justice Queens Bench Division Commercial Court held that: "The New York Convention, upon which the UK Act is based, contained in almost identical wording the provisions of S.103(2)(f) in Article V(1)(e) and s103(5) is in almost identical terms to Article VI. It is common ground that the intention of the New York Convention was to make enforcement of a Convention Award more straightforward, an in particular to remove the previous necessity for double *exequatur*- i.e. the need, before a Convention Award could be enforced in any other jurisdiction, for it to be shown that it has first been rendered enforceable in the jurisdiction whose law governs the arbitration…"

Finally, the 5th Circuit Court in the case of *Karah Bodas Company LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*[14] observed that "when the Convention was drafted, one of the main purposes was to facilitate the enforcement of arbitration Awards by enabling parties to enforce them in third countries without first having to obtain either confirmation of such Awards or leave to enforce them from a court in the country of the arbitral *situs."*

Conclusion

It is therefore concluded that, at a time when courts (especially in India) are struggling to give finality to disputes that choose arbitration as a means of settlement, and delays are mounting on the shoulders of adjudicatory authorities, the need of the hour is to reduce the multiplicity of unnecessary and time-consuming proceedings.

The removal of the double *exequatur* requirement was aimed at reaching this very end i.e. timely implementation of a foreign Award. The legislative history of the NYC as well as the national and international case law, suggest that the interpretation of such Conventions must be in light of the ultimate welfare or the parties and should not serve as instruments of abuse of the procedures for settlement.

The Delhi High Court has taken a much needed and conclusive step towards a healthy implementation of foreign Awards under the NYC in countries other than the rendering State insofar as it has confirmed the removal of the double *exequatur* requirement under the New York Convention.

(Footnotes)

[11] (1991) 2 Lloyd's Law Rep 625
[12] (2011) 1 A.C. 763
[13] (2011)EWHC 1957 (Comm)
[14] 335 F. 3d 357, (5th Circuit 2003) at p. 366-67

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Argument is to determine who is right.
Discussion is to determine what is right.
~Bishop Dale Bronner~

News & Events

IIAM Community Mediation Clinics launched in Kerala

Chief Justice Manjula Chellur lighting the lamp, inaugurating the function. Present are (from left) Mr. Padmakumar, IG of Police, Mr. Anil Xavier, President of IIAM, Mr. Tony Chammani, Mayor of Cochin, Mr. Hormis Tharakan, former Director General of Police, Kerala, Mr. Jusrice K.T. Thomas, former Judge Supreme Court of India and Mr. Justice T.V. Ramakrishnan, former Judge, High Court of Kerala.

The Chief Justice of Kerala, Justice Manjula Chellur has dedicated to the nation IIAM Community Mediation Clinics on the 12th of October at a function held at Cochin. The function was presided over by Mr. Justice K.T. Thomas, former Judge of the Supreme Court of India. Five Community Mediation Clinics were launched in different districts of Kerala and a batch of 36 community mediators were accredited at the function.

The Chief Justice said that the concept of neighbours helping neighbours to resolve conflicts and disputes is a great concept which could go a long way in building a harmonious and peaceful society, which Mahatma Gandhi dreamt about. Mr. Tony Chammani, Mayor of Cochin, Mr. Hormis Tharakan, former Director General of Police, Mr. Padmakumar, Inspector General of Police and Mr. Anil Xavier, President of IIAM spoke on the occasion.

The IIAM Community Mediation Service is planning to put up Clinics in different parts of Kerala associating with organisations, associations, business groups and public spirited citizens. For details contact dpm@arbitrationindia.com

Bangladesh Proposing ADR for Criminal Cases

The government of Bangladesh is going to introduce Alternative Dispute Resolution (ADR) for criminal cases to ensure quick disposal. Amendment is proposed in the Criminal Procedure Code to incorporate ADR in it. This was mooted after the success of utilizing ADR in civil suits.

Bombay High Court on Anti-Arbitration Injunction

While the entire Indian legal fraternity was digesting the constitutional bench decision in *Bharat Aluminum* Case (setting aside the *Bhatia International* case), Bombay High Court on 14th September 2012, made an application for interim reliefs absolute in an anti-arbitration injunction suit against a foreign party restraining them from 'dragging' a non-contractual party to an arbitration agreement into an international arbitration. The decision was based on two Supreme Court decisions - *Indowind Energy* case and *SBP v. Patel Engineering* case. It was held that the court has the jurisdiction and is the appropriate forum for deciding on the existence of the arbitration agreement between the parties and that 'dragging' a party to international arbitration when there exists no arbitration clause at all between the parties, certainly affects the rights of the party and imposes serious monetary hardships to that party.

Asian-Pacific Mediation Conference 2012 - Hong Kong

Conference titled "Mediation and its Impact on National Legal Systems", scheduled on 16 and 17 November 2012 is being organized and hosted by the City University of Hong Kong with the support of UNCITRAL (United Nations Commission on International Trade Law). The conference will promote the modernization and harmonization of the law and practice of mediation in the region and the expansion of the role of mediation and mediators both within Asian-Pacific and internationally.

The objective of the conference is to provide a collegiate platform where different experiences and ideas can be shared and exchanged. The conference will bring together international legal scholars and experts from around the world to promote a better understanding of the current social, political and legal realities and how mediation law and practice has been developing over time to meet the changing needs and aspirations in the Asian-Pacific region and internationally. For details and registration, see http://www.cityu.edu.hk/slw/APMC2012

Certificate in Dispute Management (CDM)

CDM is a distance learning course of IIAM, valid for six months from the date of enrolment. You can enroll at any time of year and you study entirely at your own pace, submitting your assignments when you are ready. Your tutor will be available to mark your assignments and give feedback on your progress for a period of six months from the date of enrolment.

You will be sent four 'reading and study assignments' with your course materials, and these form an essential part of your distance learning course. They are designed to help you to work through the course manual and understand the concepts. The course will provide a good basic knowledge of ADR – Negotiation, Mediation & Arbitration – in theory and practice. On successfully completing the assignments included in the course a certificate will be awarded.

For more details on CDM, mail to training@arbitrationindia.com