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## EDITOR'S NOTE

*There have always been divergent views as to whether India is an ideal jurisdiction for international arbitration. Many judgments of the Supreme Court of India and various High Courts have been often viewed as anti-ADR. These judgments have been seen by the international arbitral community as undue protection for the local parties and against the essence of international arbitration. There are also views which states that through bilateral treaties international arbitration is encroaching into the judicial system of India. In this edition, we have two articles with such divergent views.*

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# Globalisation and the Judicial Sovereignty of India

: P.K. SURESH KUMAR

*There is a growing view that the power of the nation state is being eroded by globalisation. But can it go to the extent that an arbitral tribunal in London could criticize the Supreme Court of India for its delay in handling cases and directing the Government of India to compensate an investor for such delay? Can the Executive Government enter into any treaty, whether domestic or international, which would affect such independence of the judiciary? The author analyses the situation based on the award issued by ICC in White Industries v. Coal India Ltd.*

There is a growing view that the power of the nation state is being eroded by globalisation. But, I never knew that it would go to the extent of an award being passed by an arbitral tribunal in London criticizing the Supreme Court of India for its delay in handling cases and directing the Government of India to compensate an investor from Australia for such delay. The award which was brought to my notice recently by a friend who is an arbitration lawyer gave a rude shock to me in many respects. I am astonished at the way in which the bureaucrats sitting in Delhi signing international treaties and also the manner in which our Government conducts international arbitrations.

The case aforementioned arose in the following circumstances: In September, 1989 an Australian Company called White Industries entered into a contract with Coal India Ltd., for the 'supply of equipment to and development of a coal mine at Piparwar' in the State of Uttar Pradesh. Over a period, certain disputes arose between the parties and as provided by their contract, the disputes were referred to arbitration. In May, 2002 an arbitral tribunal in London, by its majority opinion passed an award in favour of White Industries for a sum of $ 4.08 Million. Coal India challenged the award in Calcutta High Court and White Industries made an application to the Delhi High Court for the enforcement of the award. The proceedings in both the courts went on for some time. In the meanwhile the Supreme Court rejected White's application for transferring the Calcutta case to Delhi. White Industries had also filed an application in the Calcutta High Court to reject the application filed by Coal India as not maintainable. That application was rejected and finally the matter was taken up to the Supreme Court. The Supreme Court after hearing the matter at length and as an important question as to whether a proceeding against an international award passed outside India could be entertained here arose, the matter was referred to a larger bench and the same is even now pending consideration along with other similar matters.

While so, White Industries invoked the provisions contained in a bilateral treaty between the Governments of India and Australia in the year 1999 and launched a claim for compensation from the Government of India. It was alleged that the claimant could not enforce the award it obtained against Coal India because of the delays on the part of the Indian Judiciary and therefore the Government of India is liable to compensate the Company. In an arbitral proceeding held at London, the arbitral tribunal passed an award accepting the claim of White Industries and directed the Government of India to pay around Fifty Crores of Rupees to it.

It is not the monetary part of the award that is important but the basis of the award. A reading of the award would send shock waves to anyone who believes that India is a Sovereign State. The award says:

> "*The most recent delay in this case stems from the apparent inability of the Supreme Court to impanel a three judge bench in a timely manner and from the stay ordered of the enforcement proceedings by the Delhi High Court.*"
>
> *"The Tribunal has no difficulty in concluding the Indian judicial system's inability to deal with White's jurisdictional claim in over nine years, and the Supreme Court's inability to hear White's jurisdictional appeal for over five years amounts to undue delay and constitutes a breach of India's voluntarily assumed obligation of providing White with 'effective means' of asserting claims and enforcing rights."*
>
> *"Having reached the conclusion that an Indian court, acting reasonably and complying with India's international obligations, would conclude that Coal India had not established that the Award ought to be set aside or not enforced, the Tribunal determines that White is entitled to full compensation for the loss it has suffered as a consequence of India's breach of the BIT. This compensation includes: a) the amount of A$ 4,085,180 payable under the award; b) interest on this amount at the rate of 8% from 24 March 1998 until the date of payment; c) the amount of US $ 84000 payable under the Award (for the fees and expenses of the Arbitrators); and d) the amount of A$ 500000 payable under the Award (for White's costs in the ICC arbitration)."*

Thus, an arbitral tribunal criticized the Indian Supreme Court and the Indian Judiciary in general and made the Government of India liable to compensate a company for the lapses on the part of the judiciary. This is nothing but an attack on the judicial sovereignty of the nation. The judicial function is one of the major sovereign functions of a State. No person or authority can be allowed to sit in appeal against the functions of the Judiciary except in accordance with the provisions of the Constitution of India. No outside agency can be allowed to evaluate the orders of the Indian Courts and to pronounce their judgment over the same. No international treaty could contain any provision or clause which enables any such agency to do so.

## *Interested to contribute Articles?*

*We would like to have your contributions. Articles should be in English. Please take care that quotations, references and footnotes are accurate and complete. Submissions may be made to the Journals Division, Indian Institute of Arbitration & Mediation, G-254, Panampilly Nagar, Cochin - 682 036 or editor@arbitrationindia.com.*

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There are 2 types of people:
The givers and the takers.
The takers may eat better,
But the givers sleep better.

The Indian Judiciary functions independently of the Executive Government of the State. Such independence is a basic feature of the Constitution of India. The concept of independence of judiciary, according to the Supreme Court of India, is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of Indian democratic polity. The Executive Government cannot, therefore, enter into any treaty, whether domestic or international, which would affect such independence of the judiciary. It is a shame on whoever has paved the way for a bilateral treaty being instrumental in awarding compensation on account of a sovereign function. The bureaucrats who sign the treaties shall go through the various clauses in the treaties and agreements before putting their signatures and before fastening the whole nation with various liabilities.

Now, another aspect to be examined is that whether the 1999 agreement between Australia and India would in anyway entitle an investor to make a claim of the present nature. On reading the whole agreement I feel that the counsel who appeared for India could have very well argued that what was protected by the agreement was only the investor's right to be treated fairly and justly as per the laws and the system prevailing in the country and therefore the delay on the part of the judiciary would not give rise to a cause of action in favour of the claimant. But, no such argument was seen addressed. Anyway, it is not the merit of the award that is the subject matter of this article.

The question is as to whether the Executive Government could have entered into an agreement which would empower an investor from a foreign nation to sue for compensation on account of the delay in our judicial system? If the agreement has such an effect, does it not amount to surrender of our sovereignty? According to me the entire matter deserves a nationwide debate and those who are responsible for irresponsibly signing such agreements have to be made answerable.

If those who entered into the treaty had applied their mind they could have very well avoided the arbitration clause which enables an 'Investor' also to raise a dispute. The dispute resolution clause in the agreement between two Governments should have conferred rights in that regard only on the contracting Governments and not anyone else. Similarly, the agreement should have specifically clarified that the protection given to an investor is in accordance with the system prevailing in the country. It is due to total lack of application of mind on the part of the bureaucracy to such aspects, situations like the ones mentioned here arise.

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Article

# Anti Arbitral Injunctions in International Commercial Arbitration: Legal position in India

: JYOTSNA NAGVANSHI & MUDIT KAUSHIKK

*Anti-arbitration injunctions, a dangerous innovation of the national Courts under the guise of protecting the parties and preventing suppression in an enjoining international arbitration, has been the cause for concern for the international arbitral community for some time. The authors attempt to show that injunctions issued by the Indian courts are unique, far removed from standard Anglo-Saxon practices and conclude that the injunctions are indeed a threat as they present an existential fear and deterrence to all international arbitrations in India, which makes India a rather less than ideal jurisdiction for international arbitrations.*

## INTRODUCTION

National courts involvement in international arbitration is a fact of life as prevalent as the weather.[1] National courts became involved in arbitration for a whole host of reasons, but do so primarily because national laws are permissive and parties invite or encourage them to do so. Despite the autonomous nature of arbitration, it must be recognized that no system of dispute resolution can exist in a vacuum. Without prejudice to autonomy, international arbitration regularly interacts with national jurisdictions for its existence to be legitimate and for support, help, and effectiveness.[2] Different standards[3] have been recognized by the international community and reflected in international instruments, international public policy and due process.

Anti-arbitration injunctions[4], a dangerous innovation of the national Courts under the guise of protecting the parties and preventing suppression in an enjoining international arbitration, has been the cause for concern for the international arbitral community for some time. Even though traditionally such injunctions are not unknown to the common law systems, it is the contention of the authors that the form of manner of

**(Footnotes)**

[1]Prof. Julian D M Lew QC, 'Does National Court Involvement Undermine The International Arbitration Process?' http://www.auilr.org/pdf/24/24-3-3.pdf>, accessed on 12/03/2012.

[2] William W. Park, *The* Lex Loci Arbitri *and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21, 30 (1983).

[3] (1) National laws are required to recognize and enforce the agreement to arbitrate and enforce any award; (2) national laws are required to support the arbitration process during the arbitration; and (3) international arbitration has established certain fundamental standards that require policing at the national level. These standards are recognized by the international community and reflected in international instruments, international public policy and due process.

[4] Anti-arbitration injunctions are used either before arbitration has commenced to prevent the tribunal from being established or after proceedings have begun to stop an arbitration in its tracks.

their usage by the Indian courts, especially post-1996, constitutes a threat to international arbitration in India. The threat in question being the prospect of derailing the arbitration process, creation of legal uncertainties, an undue tactical advantage to one party or the other and finally diminution in the probability of an enforceable award emerging out of the proceeding.

Earlier the questions, which used to arise, were about the nature of such involvement of the national Courts and doubts existed as to whether it complements or impedes the arbitration process. Is there a place for any court involvement at all in the system referred to as international arbitration? But, now the picture is clear and the authors contends that the arbitral injunction issued by the national Courts constitute a threat and this "threat" is not merely correlated with the frequency of the injunctions but more with the fact that the injunctions originate from certain structural deficiencies in the Arbitration and Conciliation Act 1996 (it has been variously referred to as the 1996 Act, new Act or simply the Act).

## ANTI-ARBITRATION INJUNCTIONS IN INDIA UNDER THE OLD ACT

In the Arbitration Act 1940 (Act 10 of 1940) (hereafter referred to as the old Act) there was no provision analogous to Art.5[5] of the Model Law, so there was no generic requirement for non-intervention. Under the old Act, ordinarily the courts need not revert to inherent powers,[6] because of the operation of section 34 and section 35 of the said Act.[7]

The old Act per se, did not make any differentiation between a domestic and international arbitration. It was to be read with Foreign Awards (Recognition and Enforcement) Act 1961(Act No.45 of 1961) (hereafter referred to as the Foreign Awards Act) and its precursor Arbitration (Protocol and Convention) Act 1937 (Act No.6 of 1937).[8] Section 3 of the Foreign Awards Act mandated that the court stay the proceedings before itself on an application of a party to an agreement wherein Art. II of the New York Convention[9] is applicable, provided the application for stay has been made before filing the written submission, or taking any other step in the proceeding and the court is satisfied that the said agreement is not null and void, inoperative or incapable of being performed. Section 3 of the Foreign Awards Act contained a non-obstante clause that the provisions of the Act be applicable, notwithstanding anything contained in the Arbitration Act 1940 and the Code of Civil Procedure 1908. Therefore, ex facie the Foreign Awards Act was a *lex specialis*[10] that excluded the operation of inherent powers of an Indian court. However, a larger bench (three judge panel) of the Indian Supreme Court holding a different view in *V.O. Tractor Moscow v Tarapore and Co.*[11] [12] said that it is empowered to issue injunction if circumstances of the case make such an interposition necessary or proper. This jurisdiction will be exercised whenever there is vexation or oppression.[13] It was further held that the principle underlying section 35 cannot be completely ignored while considering the question of injunction, the idea being that the arbitrators should not proceed with the arbitration side by side in rivalry or in competition as if it were a civil court.[14]

**(Footnotes)**

[5] Article 5 reads: "In matters governed by this Law, no court shall intervene except where so provided in this Law".

[6] The inherent powers of the courts are saved by the s.151 of Code of Civil Procedure that reads: "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

[7] Section 34 empowered a party to an arbitration agreement to apply the court for a stay of the proceedings commenced by another party to the said agreement. Section 35 mandated that unless a stay has been issued under s.34 all proceedings before the arbitration shall be invalid once a legal proceeding has commenced on the whole subject matter of the proceedings and notice has been issued.

[8] The said Acts applied to arbitrations wherein New York and Geneva Conventions respectively.

[9] Article II of the New York Convention reads: II (3). The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

[10] This view was supported by a catena of high court case laws like *Shiva Jute Baling Ltd v Hindley & Co Ltd* 1955 A.I.R. Cal 409; *Mury Exportation v D Khaitan & Sons Ltd* 1956 A.I.R. Cal 644, (under the s.3 Arbitration Protocol Act pari material with s.3 of the Foreign Arbitrations Act) also *Ludwig Wunsche & Co v Raunaq International Ltd* 1983 A.I.R. Del 247 etc.

[11] V.O. Tractor Moscow v Tarapore and Co [1970] 3 S.C.R. 53.

[12] In the instant case, the issue inter alia was whether the Madras High Court was justified in granting an interim injunction restraining the Russian firm from proceeding with arbitration at Moscow while a suit was pending in the same subject matter before the same High Court. An earlier application by the Russian party under s.3 of the Foreign Awards Act for a stay of the proceedings was dismissed.

[13] V.O. Tractor Moscow v Tarapore and Co [1970] 3 S.C.R. 53 at [24].

[14] *V.O. Tractor Moscow v Tarapore and Co* [1970] 3 S.C.R. 53 at [24].

## THE SCHEME OF THE ARBITRATION ACT 1996: CREEPING INTERFERENCE

### The New Act

The Arbitration Act 1940 proved to be unsatisfactory and went through several amendments.[15] The Law Commission was more benign but still conceded that the working of some provision has caused difficulties, but the 76th Law Commission report was silent about *VO Tractors* and *ONGC* and there was no express recognition of the interventionist approach manifest in the case laws. The vices of the old Act subsequently infected the new Act as well.

### Narrow Interpretation of Section 5

The new Act incorporates the principle of non-intervention in section 5.[16] The broad areas where the court can intervene are:

- Section 8 (judicial authority can refer the parties to arbitration);
- Section 9 (Interim measures etc by Court);
- Section 11 (Appointment of arbitrator);
- Section 34 (Setting aside the award) and
- Section 37 (Appealable orders).

### Extended application of Part-I of the Act

The most radical and some would say the most dangerous innovation of the courts under the 1996 Act has been to expand the supervisory jurisdiction of the courts over 'international commercial arbitrations' held outside India.[17]

**(Footnotes)**

[15] The Supreme Court considered it to be technical and prolix.

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

[17] Fali S. Nariman, "Emerging India remarks: India and International Arbitration" (2009) 41 Geo. Wash. Int'l L. Rev. 367.

**Think ... Three Things**

3 Things in life that once gone and never come back:
Time, words, opportunity.

3 Things in life that can destroy a person:
Anger. pride, un forgiven.

3 Things in life that you should never lose:
Hope, peace, honesty.

3 Things in life that are most valuable:
Love, Family & Friends, Kindness.

3 Things that are never certain:
Dreams, success, fortune.

3 Things that make a person:
Hard work, sincerity, commitment.

Section 2(2) of the Act lays down that Part I of the Act shall apply where the place of arbitration is in India.[18] There was no difficulty in applying Part I when the subject matter arbitration was (an international commercial arbitration "seated" in India but the legislation did not clarify whether Part I would apply to an international commercial arbitration whose seat is outside India. After a series of conflicting case laws by various High Courts the issue was finally settled by the Supreme Court of India in *Bhatia International v Bulk Trading S.A.*[19] In this case the issue before the Supreme Court was whether the Indian Court was empowered to issue interim protection under section 9[20] to ICC Arbitration on-going in Paris. The Supreme Court, in essence, ruled that Part I of the Act which gives effect to the UNCITRAL Model Law and inter-alia confers power on the court to grant interim measures in support of arbitration (S.9), applied even to arbitration held outside India. Its decision spelt out that arbitrations held in India would necessitate the application of the provisions of Part I with deviation permitted only to the extent of the derogable provisions of Part I.[21]

## A REVIEW OF THE INJUNCTION CASES UNDER THE NEW ACT

### The continued relevance of old Case Laws

Case laws under the old Act like *V/O Tractor, ONGC v Western* has not been expressly overruled by the Supreme Court, nor can it be said that the new Act by necessary implication legislatively overrules them. There have been odd cases[22] where the Supreme Court has held that *injunction ought not be have been granted* but there has been no definite pronouncement by the court that comprehensively lays down power of the court to grant injunctions and how the discretion ought to be exercised by a high powered bench under the 1996 Act. In absence of such definitive pronouncement by the Supreme Court it is instructive to look into the case law by the High Courts whereby injunctions have been granted.

### The Dabhol Story

The case that has brought most lasting disrepute to the Indian judiciary's approach to international arbitration is that of *Dabhol Power Company (DPC)* in the nineties.[23] In 1993 DPC entered into an agreement with the Maharashtra State Electricity Board (MSEB) for a two-phased project. Subsequently, the MSEB entered into a power purchase agreement with DPC. The project was backed by a letter of credit from major Indian Banks as well as payment guarantees by both the State of Maharashtra and the Union of India and political risk insurance by the US Overseas Private Investment Corporation (OPIC) (along with a loan of $160 million).

The subject matter injunctions arose in the second phase of the disputes, when MSEB defaulted in its payment obligations and invoked the payment guarantees in April 2001 and commenced ICC arbitration proceedings against the MSEB, the State of Maharashtra and the Union of India under the US Investment Guarantee Corporation. As a countermove to initiation of the international arbitration, the MSEB approached Maharashtra State Regulatory Commission (MSRC).[24] Before the MSRC it was argued that that by virtue of S.52[25] of the Electricity Regulatory Commission Act 1998 notwithstanding an arbitration agreement between the parties it is open to MSERC to exercise sole jurisdiction at its discretion. Thus, in effect the State sought to remove

**(Footnotes)**

[18] Ex-facie it would appear that this section incorporates the common law rule that the law of the seat of arbitration is the lex-arbitri sans an express choice of a different law.

[19] *Bhatia International v Bulk Trading S.A.* 2002 AIR 1432.

[20] Section 9 - Interim measures etc by Court.- A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court.

[21] *Bhatia International v Bulk Trading S.A.* 2002 AIR 1432 SC at [32].

[22] *Shree Subhlaxmi Fabrics Pvt. Ltd v Chand Mal Baradia* 2005 (20) S.C.R.1138 whereby the Supreme Court held: "14. The consistent view taken by this Court, therefore, is that contentious issues should not be gone into or decided at the stage of appointment of an arbitrator and no time should be wasted in such an exercise. The remedy of the aggrieved party is to raise an objection before the arbitral tribunal as under Section 16 of the Act it is empowered to rule about its own jurisdiction. …… In such circumstances we are of the opinion that the view taken by the City Civil Court was just and proper and the High Court erred in granting an injunction in favour of the plaintiff and staying the proceedings before defendant No. 2."

[23] The case primarily dealt with the use of discretion rather than the existence of the power to issue injunctions.

[24] *http://ita.law.uvic.ca/documents/Dabhol_award_050305.pdfaccessed on 18/03/2012.*

[25] Section 52 reads: "Save as otherwise provided in Section 49, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act". (Section 49 of that Act to provisions of the Consumer Protection Act 1986 and the Atomic Energy Act 1962).

the matter completely from the purview of the Arbitration Act and contractual obligations to the sphere of public law. The immediate relief claimed was an ad-interim injunction of the international arbitration till the time the question of jurisdiction can be settled.[26] The MSERC thereafter took the view that in "public interest", i.e. in interests of the electricity consumers of the State of Maharashtra overrides the Arbitration Act. It assumed jurisdiction provisionally, pending final determination of the issue and enjoined the international arbitration for the time being. This was appealed to the Bombay High Court, which ruled that the Commission had authority to determine its own jurisdiction.

## CONTEXTUALISING THE INDIAN INJUNCTIONS

It is necessary to visualise the Indian injunctions in an international context. Anti-arbitration injunctions are not unknown to the courts in common law. In a catena of case laws[27] under the UK Arbitration Act 1996 the courts have held that they are empowered to enjoin arbitration under their inherent powers in S.37 of the Supreme Courts Act 1981. In case of international arbitration another layer of protection was added in *Weissfisch v Julius*[28] whereby the Court of Appeal took the view that to enjoin a foreign seated arbitration would be against the principles of New York Convention and can be issued only in exceptional circumstances.

The Indian decisions are closer to the classic common law position that arbitration can be injuncted if it is "just and convenient". While the common law has travelled beyond the point, Indian law has not evolved in the same way.

## THE EFFECT ON THE INTERNATIONAL ARBITRATION

An injunction by the Indian court will give the applicant (usually the Indian party) a tactical advantage. But the ultimate impact of the injunction on the arbitration, pivot on a complex series of doctrinal and practical considerations enumerated below.

**(Footnotes)**

[26] The counsel for DPC appeared under protest and refused to give an undertaking to adjourn the arbitration till the jurisdictional issue can be decided, at the same time he sought time for filing a written submission on this point.

[27] *Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] APP.L.R. 05/14 per Jackson J. at [39] also see generally, *Intermet FCZO v Ansol Ltd* [2007] EWHC 226 (Comm) and *Elektrim SA v Vivendi Universal SA* [2007] EWHC 571 (Comm). In both of those cases the existence of the jurisdiction was acknowledged, but the court refused to grant an injunction.

[28] *Weissfisch v Julius* [2006] APP.L.R. 03/08.

The Lighter Side

A man sobering up from the night before is sitting through the Sunday sermon, finding it long and boring. Still feeling hung over and tired, he finally nods off.

The priest has been watching him all along, noticing his apparent hangover and is disgusted. At the end of the sermon, the preacher decides to make an example of him.

He says to his congregation, "All those wishing to have a place in heaven, please stand."

The whole room stands up except, of course, the sleeping man.

Then the preacher says even more loudly, "And he who would like to find a place in hell please STAND UP!"

The weary man catching only the last part groggily stands up, only to find that he's the only one standing.

Confused and embarrassed he says, "I don't know what we're voting on here, Father, but it sure seems like you and me are the only ones standing for it!"

**Recourse in India**

Foreign corporations may not be willing to pursue such a course due to several reasons. The foreign party may not have the monetary and organisational power to continue a long drawn legal battle in India. The foreign party may also have access to a more direct remedy under the Bilateral Investment treaties. India is not a forum structurally best suited for commercial litigation (delays, antiquated procedures, lack of provision for costs, etc.) and a foreign entity will do well to avoid Indian courts, if it can. Indeed it is submitted in many instances the foreign party will insist upon arbitration to avoid the Indian courts and a legal battle in India would be very counterproductive.

**Recourse before a Foreign Court[29]**

One of the principle criterions determining the party's reaction will be the foreign court's reaction to the anti-arbitration reaction by the Indian court. The Indian anti-arbitral injunctions do not enjoy a perfect reputation in the common law courts.[30]

It is submitted that in probability it shall be unwilling to accept the extraterritorial supervisory jurisdiction by the Indian courts. Reference may be made of the *Union of India v Mcdonell Douglas Corp*[31] whereby the Queen's Bench applied the English Arbitration Act in spite of the contractual stipulation of the parties that the arbitration be conducted in accordance with the Arbitration Act 1940. It was held that that the phrase "conducted in accordance with" denotes the way the parties carry out the arbitration rather than any power of supervision.

The aggrieved party will also have the option of seeking a catena of remedies. However, the most striking prospect is that of the other party retaliating with an anti-anti-suit injunction of its own or an order to compel arbitration as happened in the curious case of *Amaprop v Indiabulls*[32] [33].

**Injunctions and Arbitral Tribunals**

The most crucial question is how the international arbitral tribunal itself shall treat these injunctions. International arbitrators are typically given the authority by arbitral rules and laws to decide on their own jurisdiction. If the tribunal to believe that a valid arbitration agreement (and thus, arbitral jurisdiction) exists, they will generally try to proceed with a case even in the face of an anti-arbitration injunction. But, despite this, anti-arbitration injunctions can have a momentous effect, even stopping a case and perhaps even a major project. If the arbitration is held in the country of the party seeking the injunction, the arbitrators must at least pause to consider the effect of going forward. Since any appeal of the award will be to the courts of the country that is the place of the arbitration, going forward puts the award at risk because it is the same courts who issued the injunction that will decide whether to vacate the award. Forward hearings in violation of the injunction could lead to the annulment of the final award. While the hearings could be conducted in a country other than that chosen as the place of the arbitration, attacks on the award would necessarily still be filed in the courts of the formal situs of the arbitration. Even if the place of arbitration is in a neutral country, the non-moving party and the arbitrators must consider whether the award can only be enforced in the moving party's country, or whether it can be enforced elsewhere. If it can only be enforced in the enjoining party's nation, then going forward in the face of the injunction may be futile.

It is submitted that the ratio in *Bentler* will not assist an international tribunal when the dispute is between two private parties as judicial actions of a State Court cannot be imputed upon a private party. There are still options available to the tribunal.

**(Footnotes)**

[29] Foreign court for the purpose of the paper is a foreign court following the common law.

[30] David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration,* 23rd edn (London: Sweet & Maxwell, 2007) on *ONGC v Western* at fn.37.

[31] Union of India v Mcdonell Douglas Corp [1993] 2 Lloyd's Rep. 48.

[32] 2010 US Dist. Lexis 27117.

[33] Subsequent to the temporary injunction against the arbitration proceeding by the Bombay High Court, Amaprop approached the US District Court for the Southern District of New York seeking an order to compel arbitration under s.9 of the Federal Arbitration Act. The American court was pleased to issue an injunction after a strong indictment of the Indian judicial system.

To begin with it is possible for the tribunal to pre-empt an Indian injunction through an anti-suit injunction of its own.[34] Such injunctions are quite common in international arbitration be it investment arbitration, inter-state arbitration or international commercial arbitration.[35] Such injunctions are enforceable by the national courts. An injunction being an equitable relief operates *in personam* and therefore is directed usually to the parties and not to the tribunal.[36]

Even if arbitration, in defiance of an injunction culminates in an award, it will probably be set aside. In India the courts are empowered to set aside an award (under s.34 of the Act) or refuse the enforcement of a foreign award (i.e. an award where the New York Convention applies) under S.34 of the Act, if it is against the public policy of India. The order can still be enforced outside India provided the other party has enough assets to satisfy the award. That enforceability is independent of its enforceability in India and might operate even if the Indian courts set it aside.[37]

## A RAY OF HOPE: RECONSIDERATION OF THE *BHATIA* DECISION BY THE SUPREME COURT IN *BHARAT ALUMINIUM V. KAISER ALUMINIUM*.

The Supreme Court needs to adopt a 'pro-arbitration' stance to provide fast, efficient and predictable remedies to foreign investors. In cases involving foreign arbitral disputes, the Supreme Court has consistently revealed an alarming propensity to exercise authority in a manner contrary to the expectations of the business community. Observed in this light, the Chief Justice of India's recent decision to constitute a constitutional bench to hear challenges to the Court's earlier parochial rulings opens the most important chapter in the legal battle to convert the Indian judicial system into a pro-arbitration regime. The constitutional bench reference was made in the case of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc*. A two-judge bench of the Supreme Court had earlier in this case expressed reservation on the correctness of the operating precedent laid down in *Bhatia International v. Bulk Trading S.A. (Bhatia International)*, and subsequently followed in *Venture Global Engineering v. Satyam Computer Services (Venture Global)* and other cases. Thereafter, in accordance with judicial discipline and propriety, the two-judge bench referred the matter to a three-judge bench setting out the reasons why it could not agree with the three-judge bench operating judgment in *Bhatia International*. Later, the three-judge bench, which also included the Chief Justice, also came to the conclusion that the ruling in *Bhatia International* needs to be reconsidered by a five-judge bench.[38]

**(Footnotes)**

[34] Emmanuel Gaillard, *Anti-suit Injunctions Issued by Arbitrators, International Council for Commercial Arbitrations, International Arbitration: Back to the Basics 2006,* pp.235 and p.244 whereby it is argued that this power is inherent in the power of the tribunal to prevent violation of the agreement and protect the sanctity of the award.

[35] Professor Galliard gives the example of a host of cases including *SGS v Pakistan(ICSID supra), Plama Consortium Ltd v Republic of Bulgaria* (ICSID Case No.ARB/03/24), etc.

[36] However, sometimes the Municipal Court injunctions may also be directed against the tribunal as was the case in Himapurna. The implications of such injunctions have been addressed in the later sections.

[37] *Chromalloy Aeroservices v Arab Republic of Egypt* , 939 F. Supp. 907 (DDC 1996) (enforcing in the United States an award annulled in Egypt). The French courts took the same action in a related case: Paris Court of Appeals, January 14, 1997, *République arabe d'Egypte v Société Chromalloy Aero Services* , 1997 Rev. Arb. 385. In both cases, awards were enforced even when set aside by the situs courts.

[38] A second look at arbitration, *The Hindu*, http://www.thehindu.com/opinion/lead/article2735659.ece?homepage=true accessed on 20/03/2012.

## CONCLUSION AND SUGGESTIONS

> *'The entire legal profession has become so mesmerised with the stimulation of the courtroom that we tend to forget that we ought to be healers of conflicts. As healers of human conflicts, the obligation of the legal profession is to provide mechanisms that can produce an acceptable result in the shortest possible time, with the shortest possible expense and the minimum of stress on the participants. That is what justice is all about.' - Warren E. Burger.*

On this notion of justice, is based the genus of Alternative Dispute Resolution, of which, arbitration, conciliation and negotiation are the species. The exigency for expeditious settlement of disputes in the cross-currents of globalisation led to emergence of arbitration as a mechanism of Alternative Dispute Resolution. However, the proceedings under the Act had become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary.[39]

The article has attempted to show that injunctions issued by the Indian courts are unique, far removed from standard Anglo-Saxon practices but not quite in the league of the injunctions issued in Pakistan or Bangladesh, either. These injunctions are neither perverse nor unnecessarily biased but at the same time they are manifestation of a unique arbitration jurisprudence that has grown in India pursuant to the 1996 Act. Such a major legislative drive is unfortunately not on the immediate horizon.[40]

The authors conclude that the injunctions are indeed a threat as they present an existential fear and deterrence to all international arbitrations in India. Right now there does not seem to be a consensus towards a legislative change but such change is ultimately necessary. It is submitted that any kind of danger is determined by two parameters - proximity and probability. Corporate counsels therefore have to be aware of the realities and act accordingly. As a seasoned litigator the lawyer would also suggest multinational companies with deep Indian involvement to keep a legal exit strategy to deter any effort of a hostile court intervention at the outset. All this makes India a rather less than ideal jurisdiction for international arbitration.

**(Footnotes)**

[39] Former Chief Justice of the Supreme Court of the United States of America, in a 1984 address to the American Bar Association, http:/ /www.ebc-india.com/lawyer/articles/2006_3_1.htm( accessed on 13/03/2012).

[40] An effort in this direction was indeed made via the Arbitration Amendment Bill 2003 however, the Bill failed to generate requisite consensus and was abandoned.

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# IIAM Community Mediator Orientation Program

07/08 September 2012, Cochin, Kerala

Are you interested to become a Community Mediator or to start a Community Mediation Clinic? Apart from the acceptance and honour given by the community, it also gives absolute satisfaction of becoming peace builders in our community. IIAM is conducting a Community Mediator Orientation Program on the 7th and 8th of September 2012 (Friday & Saturday) at IIAM office at Panampilly Nagar, Cochin, Kerala. The program will be for 12 hours conducted in 2 days.

The Program is intended for mediators who would like to empanel with the IIAM CMS Clinics as Community mediators or would like to start IIAM Community Mediation Clinics themselves. The program offers you the opportunity to learn what is necessary to become a mediator yourself.

Fee: Rs. 5000/- (includes the Training material, IIAM Mediation Rules, IIAM Mediators' Professional Code of Conduct and the IIAM Mediators' Conduct Assessment Process, coffee/snacks and lunch for 2 days. Participants are responsible for their accommodation)

After successful completion of the training program, the participant will be empanelled as an IIAM Community Mediator in a CMS Clinic near to the place of the participant, if so available and a badge will be given. If such CMS Clinics are not available, the participant will be empanelled when such CMS Clinics are started in the area. On successful completion, if the participant is not empanelled with a CMS Clinic, the IIAM Community Mediator badge will not be given and he/she shall not act as an IIAM Community Mediator. The participant is free to practice as a freelance mediator.

For further details, log on to www.arbitrationindia.com/htm/events.html
or contact training@arbitrationindia.com

# Canada's International Commercial Arbitration Statutes under review

The Uniform Law Conference of Canada has established a working group to bring forward recommendations to update the Uniform International Commercial Arbitration Act, 1986 in 2013. The Uniform International Commercial Arbitration Act was made in 1986 as a template for the implementation of the United Nations Commission on International Trade Law (UNCITRAL) Model Law and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards by Canada's provincial, territorial and federal governments. The aim of this initiative is to help maintain Canada's reputation as a leader in the field of international commercial arbitration.

# ADR makes strides in solving cases in Ghana

Statistics available from the Court Connected Alternative Dispute Resolution indicates that between 2007 and 2011 out of 16,080, 8,802 of them were settled through mediation. These mediated cases represent about 55% of all cases received through the ADR system." Mrs. Justice Irene Danquish, an Appeal Court in-charge of the ADR Program disclosed this at an interview in the capital city Accra.

# 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

**Interested to start ADR Centre?**

Indian Institute of Arbitration & Mediation is looking for parties interested to start IIAM Chapters in various states and cities.

If you have a passion for dispute resolution and you are interested to start a Dispute Resolution Centre, please mail your details to: dir@arbitrationindia.com

**For details of IIAM activities visit www.arbitrationindia.org**