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Proposed Amendments to the Indian Arbitration Act: A Fraction of the Whole?

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The Indian law ministry released a consultation paper in April 2010 inviting comments on proposed amendments to the Indian Arbitration Act. While based on the Model Law, the interpretation of the Indian Act in 15 years since enactment has created serious divergence from transnational standards. A unique absurdity is the delimited application of the Act to even arbitrations seated outside India. Merits review has crept in through innovative means. Public policy defence is read as the repository of all residual powers. The proposals identify the problems, but do they walk the talk? This article analyses the contours of these problems in detail and puts the proposals to test. The conclusion in most cases is that the proposal covers a fraction of the whole issue it attempts to deal with. This article contains suggestions that could help complete the task and align Indian arbitral regime to transnational standards on these issues.

1. *Introduction*

Within a decade of the New Economic Policy in 1991,[1] India became a key player in international trade and commerce.[2] Since the early 90s, commercial laws in India have been adapting to the changing realities. One of the definitive steps towards such reform came in 1996, when by an Ordinance the Indian government brought into force the Arbitration and Conciliation Act, 1996.[3] The new legislation was based on the United Nations Commission on International Trade (UNCITRAL) Model Law on International Commercial Arbitration.[4]

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[1] The New Economic Policy of 1991 was the beginning of a series of reforms in India that led to deregulation, lowering of interest rates, reduction of public monopolies and automatic approval for foreign direct investment. See generally, Pulapre Balakrishnan, *Economic Growth in India: History and Prospect* (OUP 2010).

[2] See generally, Tapen Sinha and Dipendra Sinha, 'Doing Business in India' (1995) 23 Int'l Bus Law 213.

[3] See Tracy S Work, 'India Satisfies its Jones for Arbitration: New Arbitration Law in India' (1997) 10 Transnat'l Law 217, 228.

[4] UN Comm on Int'l Trade Law, UNCITRAL Model Law on International Commercial Arbitration, 1985 (hereinafter 'Model Law') <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 20 November 2011.

The new legislation was greeted with enthusiasm and expectation, not only in India but also around the world.[5] Since 1996, India has seen an exponential growth in arbitration—both domestic and international. However, most of that is attributable to the changing commercial dynamics than to the change in arbitration regime. Today, 15 years since the 'new legislation', the enthusiasm has disappeared giving way to cynicism and a demand for further refinement.[6] While the majority has been let down by the traditionalist approach to interpretation taken by Indian courts on many occasions, a small minority also complain of excessive deference been given to arbitration awards.

The Indian government has been conscious of the problems, but a solution has been investigated for a little too long with no result. It started with a draft amendment Bill proposed by the Law Commission of India in 2001. After many rounds of discussion and review of that Bill by multiple committees, it was withdrawn from the Parliament in 2006. The government was advised to prepare a new proposal for amendments, which restricted the role of courts in the arbitral process.[7] After over 4 years, the Ministry for Law and Justice released a set of proposals in the form of a Consultation Paper in order to receive comments and suggestions.[8]

The Consultation Paper adopts a non-intrusive approach to amendment. It suggests small number of amendments but succeeds in identifying some of the most urgent anomalies that have crept into the interpretation or functioning of the Arbitration and Conciliation Act, 1996.[9] This article is not intended to be a comprehensive review of all amendments proposed. This article shall instead put the Consultation Paper to test on an in-depth review of some of the most important problems addressed by the proposals. The intention is to identify intricacies that may not be apparent and examine whether the proposals have adequately addressed them.

Section 2 puts the Consultation Paper in context by providing a brief outline of the failed attempt to amend the Indian Act between 2001 and 2005. Section 3 investigates the problems in Indian arbitral regime created by the *Bhatia International*[10] decision of the apex court. Consultation Paper proposes an amendment to nullify the ratio of this decision.[11] It fails, however, to redress the collateral damage this decision has had in over 9 years of its existence as a

[5] See Tracy (n 3) 242.

[6] See generally Fali S Nariman, 'Ten Steps to Salvage Arbitration in India: The First LCIA-India Arbitration Lecture' (2011) 27 Arb Int 115 (presents the problems plaguing Indian arbitrations and suggests structured solutions).

[7] See Press Information Bureau, Government of India, Withdrawal of the Arbitration and Conciliation (Amendment) Bill, 2003, <http://pib.nic.in/newsite/erelease.aspx?relid=17020> accessed 20 November 2011.

[8] Ministry of Law and Justice Government of India, Proposed Amendments to the Arbitration and Conciliation Act, 1996: A Consultation Paper, April 2010 (hereinafter 'Consultation Paper') <http://lawmin.nic.in/la/consultationpaper.pdf> accessed 20 November 2011.

[9] Arbitration and Conciliation Act, 1996, hereinafter referred to as 'Indian Act', 'Indian Arbitration Act' or '1996 Act' as per context.

[10] *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105 (Indian Sp Ct).

[11] See Consultation Paper (n 8) 14.

binding precedent. Section 4 examines the judicial invention of merits review of arbitral awards in India by the *Saw Pipes*[12] decision. A comparative analysis of merits review in the UK and the US has been conducted to test linkages of this problem with the common law system. Consultation Paper's suggestion that such review may be retained for purely domestic arbitration[13] has been criticized as myopic. Section 5 also relates to the *Saw Pipes* decision, which gave an expansive definition to the concept of 'public policy' in the Indian Act. Public policy was interpreted as if it was the repository of all residual powers not specifically provided for in the Act. It signifies the failure to understand the context and use of this term in Model law and also the evolution of the concept under common law. The author concludes that the proposals are inadequate to address the definitional aspects of public policy. Section 6 argues against the growing consensus that Indian Act must be bifurcated so as to have different legislations governing domestic and international arbitration.

2. *Genesis of the Consultation Paper*

The Consultation Paper marks the beginning of the second round in the thought that has gone into proposing these amendments. The first round started with the recommendations of the Law Commission of India (LCI) in its 176th Report in 2001, which also included a draft amendment bill.[14] The recommendations were accepted by the government and led to the introduction of Arbitration and Conciliation (Amendment) Bill, 2003 in the Parliament.[15]

Following usual protocol, the Bill was referred to the Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice in December 2003.[16] In the meanwhile, the government appointed a committee under the chairmanship of Justice (Retd) B P Saraf in August 2004 to study the implications of the recommendations of 176th LCI Report and to make suggestions.[17] Report of this committee was submitted in January 2005.[18] The Rajya Sabha Committee waited for the Saraf Committee report before finalizing its own report, which was submitted to the Rajya Sabha in August 2005.[19]

[12] Oil and Natural Gas Corporation Ltd v SAW Pipes Ltd (2003) 5 SCC 705 (Indian Sp Ct).

[13] See Consultation Paper (n 8) 33.

[14] 16th Law Commission of India, 176th Report on The Arbitration and Conciliation (Amendment) Bill, 2001 (hereinafter '176th LCI Report'), <http://lawcommissionofindia.nic.in/arb.pdf> accessed 20 November 2011.

[15] See The Arbitration and Conciliation (Amendment) Bill, 2003 (India) <http://lawmin.nic.in/legislative/arbc1.pdf> accessed 20 November 2011 (as introduced in the Parliament on 22 December 2003).

[16] Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, hereinafter referred to as the 'Rajya Sabha Committee'.

[17] Committee under Justice (Retd) B P Saraf, hereinafter referred to as the 'Saraf Committee'.

[18] See Consultation Paper (n 8) 114–31.

[19] See Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, 9th Report on the Arbitration and Conciliation (Amendment) Bill, 2003 (04.08.2005), <http://164.100.47.5/webcom/typewise.aspx?type=DRSCRS> accessed 20 November 2011.

The Rajya Sabha Committee *inter alia* recommended that the 2003 Amendment Bill be withdrawn, as it would lead to a more intrusive role of Courts in the arbitral process. It instead suggested bringing a fresh comprehensive legislation on the subject of amendment of the Indian Act, as expeditiously as possible.[20] The government accepted the suggestion that a more refined proposal be brought after further investigation of all aspects.[21] Accordingly, the Bill was withdrawn from the Parliament and after about 4 years, the release of the Consultation Paper has flagged off another attempt in the direction of reforms.

India has an active business community and is an important commercial destination in the 21st century. Yet, parties from abroad resist India as a seat of arbitration.[22] This is despite a robust common law jurisprudence and judicial culture, which is one of the most neutral in its treatment of foreigners.[23] There are no language barriers either, English being the language of business and of the High Courts and the Supreme Court in India. The resistance to India as a seat is based on—(i) the problem of judicial delays and the backlog in most courts[24] and (ii) problems in the arbitration regime.[25]

The real test of the Consultation Paper lies in its ability to redress some of the most immediate problems in the current arbitration regime in India. The next three sections investigate one selected problem each that has been tackled by the Consultation Paper. Each section analyses in detail the various manifestations of the problem and whether they are successfully addressed by the proposals. Some suggestions to improve the efficacy of the proposals are also addressed at the conclusion of each section.

3. *Solving the Bhatia International Conundrum*

Any discussion about the Indian arbitral regime since 2002 has had to focus on the Indian Supreme Court's decision in *Bhatia International v Bulk Trading SA*.[26] From a strictly academic point of view, *Bhatia International* is a pointless enquiry into a branch of law that should never have existed and would contribute nothing to the future development of arbitral law. Even so, from a practical perspective, it remains the one aspect of Indian law the ignorance of which could lead parties into situations they never imagined possible.[27]

[20] ibid 7.
[21] See Press Information Bureau (n 7).
[22] See eg Philipp Ritz, 'Pitfalls to Avoid when Drafting Arbitration in India-Related Contracts' (2009) 27 ASA Bull 717, 730.
[23] See Nariman (n 6) 116–7.
[24] See generally H Chodosh and others, 'Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process' (1997–98) 30 NYU J Int'l L & Pol 1 (a comprehensive study dealing with judicial reforms necessary to fast-track Indian courts).
[25] Nariman (n 6).
[26] *Bhatia International* (n 10).
[27] Most law firms now have a special advice for drafting arbitration clause in contracts related to India; See eg Aloke Ray and Dipen Sabharwal, 'India and Arbitration – Arbitration Clauses for Contracts with Indian

Bhatia International essentially deals with the territorial scope of the Indian Act. The Indian Act is divided into four parts.[28] Part I of the Act deals with general matters, arbitration agreement, composition of the tribunal, jurisdiction of the tribunal, conduct of arbitral proceedings, arbitral award, challenge, enforcement and appeals—the entire realm of issues dealt with under the Model Law. Ideally, as provided in the Model Law, these provisions are applicable only when the seat of arbitration is within the State and not otherwise. *Bhatia International* delimited the territorial scope of Indian Act by stating that it shall apply to all arbitrations unless expressly or by implication excluded by parties.

A. *Bhatia Ratio: Transcending All Boundaries*

Section 2(2) of the Indian Act contained in part I reads, '[T]his part shall apply where the place of arbitration is in India'.[29] Section 2(2) of the Indian Act is a modified adaptation of Article 1(2) of the Model Law, which provides that '[t]he provisions of this law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State'.[30] A *prima facie* comparison highlights two important distinctions in the Indian adaptation—(i) there are no exceptions for specific provisions; and (ii) the word 'only' is deleted.

The three judges of the Supreme Court in *Bhatia International* were faced with the question of jurisdiction of Indian courts to grant interim measures in an arbitration seated outside India. The decision essentially turned on the interpretation of section 2(2) extracted above. The court rejected the argument that it was a limiting provision. It held that the section was an inclusive provision providing that part I of the Act will essentially apply to all arbitrations held in India.[31] After a detailed analysis, the court summarized:

> To conclude we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsory apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the

Parties' <http://www.whitecase.com/publications/List.aspx?archive=true&year=2008> accessed 20 November 2011; see also Herbert Smith, 'Dispute Resolution and Governing Law Clauses in India-related Commercial Contracts' <http://www.herbertsmith.com/Publications/> accessed 20 November 2011; Norton Rose Group, India <http://www.nortonrose.com/files/india-26265.pdf> accessed 20 November 2011.

[28] See generally Arbitration and Conciliation Act 1996, Act No 26 of 1996 (India) <http://www.indiankanoon.org/doc/1306164/> accessed 20 November 2011.

[29] ibid s 2(2).

[30] Model Law (n 4) s 1(2).

[31] See generally Raghav Sharma, 'Bhatia International v. Bulk Trading S.A.: Ambushing International Commercial Arbitration Outside India?' (2009) 26 J Int Arb 357 (discusses the parties' arguments and the court's reasoning leading to the decision).

> parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.[32]

The prevailing transnational standard is to limit applicability of national arbitration legislations on territoriality, determined in most cases exclusively by the seat or place of arbitration.[33] This was considered in detail in the discussions leading to the adoption of the Model Law.[34] The *Bhatia* ratio, however, interprets the Indian Act in total disregard to this transnational standard. It relies heavily on the deletion of the word 'only' in section 2(2) of the Indian Act. It rejects the narrow interpretation on grounds that it would result in leaving parties remediless in arbitrations seated outside India—as they could not seek interim measures with respect to matters that might lie in exclusive jurisdiction of Indian courts.[35]

The net effect of *Bhatia International* on Indian arbitral regime is that the issue of jurisdiction of Indian courts in arbitral matters is no more limited by a choice of seat. This led Indian courts to the inescapable and slippery slope of conflict of law analysis for each case to decide this issue. No wonder an analysis of the post-*Bhatia* decisions lead us to no concrete conclusions and have left a muddled jurisprudence on the subject.

B. *Life after Bhatia: A Kafkaesque World of the Unknowable*

Many commentators have found some merit in *Bhatia International* in as much as it opened the doors for Indian courts to grant interim measures in arbitrations held outside India—the lack of which resulted in many stalemate situations for parties.[36] Such magnanimity towards the decision subsided eventually when the true scope of the *Bhatia* ratio was highlighted in subsequent decisions.[37]

(i) *Annulment of foreign awards*

Many commentators argue that it was not *Bhatia International* but *Venture Global v Satyam Computers*[38] that led Indian law on a fatally erroneous path.[39] In *Satyam Computers*, a division bench of the Indian Supreme Court relied on the *Bhatia* ratio to hold that Indian courts would have jurisdiction to set aside a foreign award. Rejecting the argument that foreign awards had to be enforced

[32] *Bhatia International* (n 10) 32 (hereinafter referred to as the '*Bhatia* ratio').
[33] See Gary B Born, *International Commercial Arbitration* (Kluwer L Int 2009) 306.
[34] See generally, Travaux Preparatoires for the 1985-UNCITRAL Model Law on International Commercial Arbitration, 330th meeting, 19 June 1985 (territorial limitation discussed), <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_travaux.html> accessed 20 November 2011.
[35] *Bhatia International* (n 10) 31.
[36] See eg Sharma (n 31) 357.
[37] See eg Fali S Nariman, 'India and International Arbitration' (2009–10) 41 Geo Wash Intn'l L Rev 367, 374.
[38] *Venture Global Engineering v Satyam Computer Services Ltd* (2008) 4 SCC 190 (Indian Sp Ct).
[39] See Sharma (n 31) 364.

under part II of the Indian Act, the Court held that a larger bench in *Bhatia International* had settled the issue.[40] The Court also held that the provision for annulment under part I of the Indian Act (section 34) made available wider public policy challenge, which as a matter of right could not be denied to the parties merely because the award was a foreign award.[41]

Satyam Computers stretched the already overreaching ratio of *Bhatia International* so as to be in violation of India's obligations under the New York Convention.[42] Some commentators rightly argue that *Satyam Computers* failed to read the *Bhatia* decision in its entirety and relied on a single part of it.[43] While the *Bhatia* ratio is wide enough to grant Indian courts jurisdiction on almost all aspects of foreign seated arbitration, annulment of foreign awards is the one area for which it specifically indicated an exception.[44] However, the over-arching summarization (extracted as the *Bhatia* ratio above) probably made the *Satyam* accident inevitable.

The New York Convention provides for a single remedy against foreign awards[45]—to oppose its enforcement on grounds exhaustively listed in Article V.[46] The Convention does not grant any power to the courts to set aside a foreign award, which is universally acknowledged to be an exclusive power of the courts at the seat.[47] The Indian Act adopts Article V in section 48. In any case, being a signatory to the New York Convention, the courts are bound to uphold India's international obligations. It is a matter of directive principles of State policy contained in Article 51(c) of the Indian Constitution, which requires that '[t]he State shall endeavour to.... foster respect for international law and treaty obligations in the dealings of organized peoples with one another...'.[48] It is a well settled principle of Indian law that in case of ambiguity, a law must be interpreted such as not to be in violation of India's international obligation.[49] From this standpoint, without any discussion of its flaws under arbitration theory, *Satyam Computers* laid down bad law.

Interestingly, in *Centrotrade Minerals v Hindustan Copper*, a divided Supreme Court division bench cast doubts on the correctness of the *Bhatia* ratio.[50]

[40] *Venture Global* (n 38) 17.
[41] ibid s 19.
[42] See eg Alok Jain, 'Yet another Misad-Venture by Indian Courts in the Satyam Judgment?' (2010) 26 Arb Int 251, 278.
[43] Sharma (n 31) 362.
[44] *Bhatia International* (n 10) 26.
[45] Convention on the Recognition and Enforcement of the Foreign Arbitral Awards, 1958 (New York Convention), <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html> accessed 20 November 2011, at s V:1.
[46] See eg Alan Redfern and others, *Redfern and Hunter on International Arbitration* (OUP 2009) 638.
[47] Born (n 33) 2720.
[48] The Constitution of India, 1949 art. 51.
[49] See generally *M/s Entertainment Network (India) Ltd v M/s Super Cassette Industries Ltd* (2008) 13 SCC 30 (Indian Sp Ct) (where the Berne Convention was taken into account in interpreting Indian copyright legislation, even though amendment in terms of the convention had not been carried out by the legislature).
[50] See *Centrotrade Minerals and Metals Inc v Hindustan Copper Limited* (2006) 11 SCC 245 (Indian Sp Ct) at [17].

Unfortunately, it received no consideration by the *Satyam Computers* bench. Till date, regrettably, no other bench has picked up on that whisper of dissent.

(ii) *Appointing arbitrators in foreign seated arbitrations*

Section 11 of the Indian Act (analogous to Article 11 of the Model Law) empowers the Chief Justice of India or his designate to appoint an arbitrator in case of default or disagreement between the parties in an international commercial arbitration. Under the Model Law regime, such powers are of course limited to arbitrations seated within the State by virtue of territorial scope defined in Article 1(2). That limitation having been removed by the interpretation of section 2(2) of the Indian Act by *Bhatia International*, the appointment powers under the Indian Act became extendable to arbitrations held outside India.

This conclusion was first affirmed in the decision of the Indian Supreme Court in *Aurohill Global Commodities v M.S.T.C. Ltd*. While the court refused to make the appointment on grounds that parties had agreed to a particular procedure, it held that Indian courts would have jurisdiction despite the seat being London and parties having specifically agreed to the exclusive jurisdiction of courts in UK. Reliance was, of course, placed on the *Bhatia* ratio.[51]

All doubts, if any remaining, were laid to rest in *Indtel Technical Services v W.S. Atkins*.[52] The Supreme Court held that *Bhatia International* has clearly provided for application of part I, including section 11, to international arbitrations held outside India. The court noted that arbitration agreement would normally be governed by the same law as applicable to the substance of dispute (being English law in the present case), but held that such authorities would have to be distinguished in light of the *Bhatia* ratio. Thus, the court appointed an arbitrator exercising its powers under the Indian Act.[53]

A lone decision of the Supreme Court, only a few months following *Bhatia International*, refused jurisdiction to appoint an arbitrator in an international arbitration seated in New York. It even disregarded *Bhatia International*'s interpretation of section 2(2) holding that the provision unambiguously prevented application of part I to arbitrations held outside India.[54] While this decision escaped attention and survived for almost a decade, it has finally been declared as not binding in a recent decision of the Supreme Court.[55]

[51] See generally *Aurohill Global Commodities Ltd v MSTC Ltd* (2007) 7 SCC 120 (Indian Sp Ct) (the case is unclear in its reasoning but affirms applicability of pt I of Indian Act despite a foreign seat, foreign rules and an exclusive jurisdiction clause in favour of UK courts).

[52] *Indtel Technical Services Pvt Ltd v WS Atkins PLC* (2008) 10 SCC 308 (Indian Sp Ct) (there was no specific choice of seat in the dispute resolution clause).

[53] See also *Citation Infowares Ltd v Equinox Corporation* 2009 (5) UJ SC 2066 (Indian Sp Ct) (followed *Indtel*).

[54] See *ShreejeeTraco (India) Pvt Ltd v Paperline International Inc* (2003) 9 SCC 79 (Indian Sp Ct).

[55] See *Cauvery Coffee Traders, Mangalore v Hornor Resources (International) Co Ltd* 2011 (10) SCALE 419 (Indian Sp Ct) [11] (the court declared the decision to be not binding as it disregarded a higher bench decision in *Bhatia International*).

(iii) *The implied exclusion escape route: no roadmap to follow*

The *Bhatia* ratio mercifully left an escape route from its otherwise expansive interpretation—in international arbitrations seated outside India, parties could expressly or by implication exclude the application of some or all provisions of part I of the Indian Act.[56] Legal advisors around the world have since made sure to adapt arbitration clauses dealing with India to benefit from this exception.[57] Express exclusion has been respected by Indian courts and has not raised significant concern. It is the implied exclusion route that has baffled courts and commentators—for despite a quantitatively loaded case law on the subject, it is not possible to draw a roadmap as to what would conclusively amount to implied exclusion.

The first conclusion that seems obvious from the *Bhatia* ratio is that a mere selection of foreign seat by the parties would not amount to an implied exclusion. The very foundation of the *Bhatia* ratio is that the territorial limitation contained in section 2(2) of the Indian Act is not a limiting provision. In addition, in *Bhatia International* the parties had agreed to an 'ICC in Paris' clause and yet the application of Part I was not excluded.[58] Further, in *Satyam Computers* implied exclusion was denied despite the seat being London.[59] However, in a recent decision the Supreme Court held that a specific choice of seat amounted to the choice of curial law, which in effect excluded the application of Part I of the Indian Act.[60] In *Dozco India v Doosan Infracore*, the court relied on a passage from Lord Mustil's book stating that the choice of seat amounted to a selection of the law of arbitration by the parties and held such selection to be an express exclusion of Indian law.[61] While *Dozco India* indeed follows the transnational standard on the issue and gives appropriate effect to a choice of seat, the author believes this decision will not survive future scrutiny in so much as it ignores the *Bhatia* ratio, which is a decision of a larger bench.

Another argument that has consistently met court's disapproval is that a choice of foreign proper law of contract should amount to implied exclusion of the Indian Act. Whether the clause designates a specific seat or not, courts have refused to read an implied exclusion based on the proper law of contract.[62]

[56] *Bhatia International* (n 32) and accompanying text.

[57] See Ray and Sabharwal (n 27).

[58] See generally *Bhatia International* (n 10) (where the court acknowledged that the seat was Paris, yet applied pt I of the Act).

[59] See generally *Satyam Computers* (n 38) (where an LCIA arbitration clause was provided for and the decision proceeded on the presumption that the seat was outside India and yet found pt I applicable).

[60] *Dozco India Pvt Ltd v Doosan Infracore Co Ltd*, 2010 (9) UJ 4521 (Indian Sp Ct).

[61] ibid 13.

[62] See *Indtel Technical Services* (n 52) 24; see also *Citation Infowares* (n 53) 17; see generally, *Satyam Computers* (n 38) (where despite the seat being London and proper law of contract being that of Michigan, no implied exclusion was read into the arbitration agreement).

Specific choice of curial law by the parties has been interpreted as implied exclusion of part I of the Act.[63] By somewhat flawed analogy, the Supreme Court has also interpreted choice of a foreign law governing arbitration agreement to amount to exclusion of part I.[64] It must be noted that only an express choice of such law and not one derived by application of conflict of law principles is considered sufficient for reading an exclusion.[65] Another dimension added by the Supreme Court recently is that if the institutional rules chosen by the parties lead to a default *lex arbitri*, Indian Act will be impliedly excluded.[66]

In *Aurohill Global Commodities v M.S.T.C. Ltd*, the Supreme Court chose to exercise limited powers under Part I despite the existence of an exclusive jurisdiction clause which read, '[t]he competent court under the laws applicable in Great Britain alone shall have exclusive jurisdiction to decide all matters, disputes and controversies relating to this contract, including arbitration proceedings instituted or to be instituted. The jurisdiction of court will be London'.[67]However, a subsequent decision of the Delhi High Court interpreted an exclusive jurisdiction clause to be clear indication of the parties' intention to exclude applicability of part I of the Indian Act.[68] The Delhi High Court seems to have taken the correct position. In any case, given the vague nature of opinion expressed by the Supreme Court in *Aurohill*, it is expected that the Delhi High Court decision will be followed in the subsequent cases.

These cases clearly show that there is no certainty as to what would amount to an implied exclusion in terms of the *Bhatia* ratio. The author considers this to be natural consequence of a binding precedent that is in strong disagreement with the plain language of statutory provisions.

C. *Collateral Damage by Bhatia International*

At the present state of evolution of arbitration laws, legal fiction of the seat of arbitration is the foundation on which the edifice of international arbitration stands.[69] Since pure application of conflict of law principles was found

[63] See *Hardy Oil and Gas Limited v Hindustan Oil Exploration* (2006) 1 GLR 658 (Guj H Ct) (the arbitration clause provided that the law governing arbitration shall be English law, which was held to be an exclusion in terms of the *Bhatia* ratio).

[64] See *Videocon Industries v Union of India* MANU/SC/0598/2011 (Indian Sp Ct).

[65] See generally *Indtel Technical Services* (n 52) (where an argument for exclusion based on derivative curial law was rejected). But see *Dozco India* (n 61) (where such an exclusion was held by reliance on derivate curial law).

[66] See *Yograj Infrastructure Ltd v Ssang Yong Eng And Const Co Ltd* 2011 (9) SCALE 567 (Indian Sp Ct).

[67] *Aurohill Global* (n 51) 4.

[68] *Max India Limited v General Binding Corporation*, 2009 (3) ARBLR 162 (Del H Ct).

[69] Debate on delocalized arbitration is, however, gaining momentum and an evolution in the future where features of both might reflect in arbitration laws around the world cannot be ruled out. cf Emannuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010) with Michael Reisman and Brian Richardson, *Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration*, Presented at 50th Anniversary ICCA Conference (Geneva, 20 May 2011), available with ICCA and attendees of the conference; See also Julian Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22 Arb Int 179; Michael Reisman

ineffective to assure certainty, eventually the choice of seat came to determine the curial law and trigger the exclusive jurisdiction of the court of seat. In further refinement, venue of arbitration was distinguished from the seat. Choice of seat thus became a legal fiction with the effect of indicating curial law and thereby the choice of curial court.[70]

Bhatia International failed to appreciate the juridical nature of the seat of arbitration. Under its binding effect, Indian courts necessarily have to rely on conflict of law principles to determine whether parties intended to exclude jurisdiction of the Indian courts.[71] Under the 1940 Act, *NTPC v Singer*[72] had been the leading authority in India on these questions. It did not, therefore, account for the principles and policy considerations on which the new law was enacted. In any case, recent decisions of the Supreme Court have held that principles in *NTPC v Singer* cannot override the sweeping pro-jurisdiction stance of *Bhatia International*.[73] Therefore, on the interactions between private international law and arbitration, Indian law has had to begin afresh. This, combined with the negation of the value of seat, has drastically compromised predictability on whether Indian courts would have jurisdiction on an international arbitration.

In light of the evident conflict between *Bhatia International* and the plain meaning of the provisions of the Act, Indian courts have struggled to keep purist interpretation of certain concepts in arbitration. A glaring example is the decision of the Supreme Court in *Videocon Industries v Union of India*. The court held that the specific choice of a foreign law governing arbitration agreement amounts to exclusion of part I of the Indian Act.[74] To arrive at this conclusion, the court relied on a decision the ratio of which was based on the fact that parties had specifically chosen English law to govern their arbitration.[75] The analogy completely disregards the distinction between *lex arbitri* and the law of the arbitration agreement[76]—an

and HeideIravani, 'The Changing Relation of National Courts and International Commercial Arbitration' (2010) 21 Am Rev Int'l Arb 5.

[70] See generally, Born (n 33) 1675–78.

[71] See eg, *Satyam Computers* (n 38) 23 (ideally the court should have considered whether providing for LCIA Rules amounted to choice of London as seat, instead the focus was to see whether due to a non-obstinate clause, Indian law would govern enforcement of award); See also *Max India Limited* (n 68) 30 (where the court relied on principles of conflict of laws applicable in arbitration cases from an old apex court decision despite such principles not being of any relevance in the particular dispute before it).

[72] *National Thermal Power Corporation v Singer Company* (1992) 3 SCC 551 (Indian Sup Ct). For a brief synopsis of this case and its ratio relevant to international arbitration and New York Convention, see Philipp Ritz, 'Pitfalls to Avoid when Drafting Arbitration Clauses in India-Related Contracts' (2009) 27 ASA Bull 717, 724.

[73] See eg, *Indtel Technical Services* (n 52) 24 (followed in *Citation Infowares*).

[74] See *Videocon Industries* (n 64).

[75] See *Hardy Oil* (n 63).

[76] See also, *Indtel Technical Services* (n 52) (where the court has used the two terms interchangeably with no clear distinction).

important distinction, the blurring of which could lead to absurd situations in the future.[77]

In *NACMFIL v Gains Trading Ltd,* the Supreme Court interpreted a clause that provided for arbitration '...in Hong Kong in accordance with the provisions of the Arbitration and Conciliation Act, 1996...'[78] to be referring to the venue and not the seat. The apex court in *Shivnath Rai v Abdul Ghaffar* refused jurisdiction in an international arbitration on a strange interpretation of section 42 of the Act. The provision provides that if a court has already assumed jurisdiction over an arbitration under part I, that court alone shall have jurisdiction over all matters under the Act with respect to such arbitration. Naturally, the provision was meant to resolve parallel jurisdictions of various courts within India. However, given the *Bhatia* ratio, which opens part I to all arbitrations held anywhere in the world, section 42 was interpreted to include foreign courts. Therefore, since parties had moved the Singapore courts in the past, Indian courts' jurisdiction was held to be ousted.[79]

The analysis above evidences that the scope of damage done by the *Bhatia* ratio goes much beyond delimiting territorial applicability of part I of the Indian Act. The confusion since *Bhatia International* has had a domino effect. First, it has resulted in the devaluation of the concept of seat of arbitration. As a natural consequence, independent conflict of law rules are coined to decide questions of jurisdiction of courts and law applicable to various aspects of arbitration—which rules have found no coherent consensus. Recent decisions of the apex court in India are indicative of the proverbial drowning man clutching at the last straw—recognizing the error in *Bhatia International* and its consequence on the Indian arbitral regime, the court reads an implied exclusion even where they are not compatible with the *Bhatia* ratio.[80] Consequently, Indian law on the subject is not only contrary to transnational standards but also inconsistent and unpredictable.

D. *Proposed Amendment: Too Little Too Late*

Whether one agreed with the court's decision or not, it was obvious to all that *Bhatia International* had brought to light an important lacuna in the drafting of the Indian Act. This infamous and often criticized decision itself remarked that '[l]astly it must be stated that the said Act does not appear to be a well drafted legislation'.[81] All it needed was a quick response by the concerned authorities and an immediate amendment to correct the situation. What we have, however,

[77] See generally, Sumit Rai, 'Positive or Double Negative? - A Critique of Videocon Industries v. Union of India' (2011) 14 Int Arb L Rev 138 (examines the *Videocon* decision and its fallout on certain important aspects of arbitration law).

[78] *National Agricultural Co-op Marketing Federation India Ltd v Gains Trading Ltd*, 2007 (2) UJ SC 0768 (Indian Sp Ct) [2].

[79] See generally, *Shivnath Rai Harnarain v Abdul Ghaffar Abdul Rehman* (2008) 5 SCC 135 (Indian Sp Ct).

[80] ibid; see also, *Dozco India* (n 55); *Videocon Industries* (n 58).

[81] *Bhatia International* (n 10) 35.

is a Consultation Paper proposing a correction—8 years and a number of blunders later. This delay has allowed mushrooming of conflicting and inconclusive precedents that might outlive simplistic solutions suggested by the Consultation Paper.

The Consultation Paper proposes section 2(2) to be amended to read:

> This part shall apply *only* where the place of arbitration is in India. *Provided that provisions of Section 9 and 27 shall also apply to international commercial arbitration where the place of arbitration is not in India if an award made in such place is enforceable under Part II of this Act* (text italicized are proposed addition).[82]

This effectively will bring the section in sync with Article 1(2) in the Model Law, from which it was carelessly adapted earlier.

The proposed amendment shall take care of the territoriality problems that the *Bhatia* ratio had created. Indian courts will have no jurisdiction on arbitrations seated outside India—except to provide interim measures of protection and to assist arbitration in collection of evidence. However, in the author's opinion, the proposed amendment is inadequate. While it shall resolve problems in cases where an international arbitration agreement contains a specific choice of seat outside India, it hardly addresses the resolution of such issues when a seat is indeterminate.

Model Law does not provide a specific solution for cases where the seat of arbitration is unknown.[83] The basic premise for deciding questions of jurisdiction etc is left to the primary principle of contractual interpretation—the court must decipher the intention of parties. This approach, though must remain the final repository when all else fails, is undesirable especially when the attempt is to harmonize laws in different nations to rule out possibility of concurrent jurisdiction of different national courts over the same arbitration.

Deciphering the intention of parties can lead to different results depending on the approach taken. Should the focus be on determining the intention of parties as to their choice of seat, which would in turn indicate the curial law? Or should the inquiry determine curial law by application of conflict of law rules, which will indicate the seat? It is clear that the different approaches can lead to different results.[84] This is of special concern in India post-*Bhatia International*. As explained above, in the attempt to tackle the *Bhatia* ratio, courts have created an incoherent and conflicting set of precedents in determining intention of parties by applying conflict of law principles.

[82] Consultation Paper (n 8) 14–15.

[83] Article 20 provides that the arbitrator shall decide the seat of arbitration in case parties fail to agree. However, there are no guidelines for courts when they are faced with the issue before determination by the tribunal or when on some extraneous ground under domestic law, a party asserts his right of access to court and the seat of the alleged arbitration agreement is indeterminate.

[84] With focus on seat, geographical determinants could be of primary importance whereas if the focus is on determining curial law, proper law of contract or arbitration agreement might carry more weight.

Therefore, any correction of *Bhatia International* needs to address this collateral area of concern. The Consultation Paper makes no such attempt.

Since the Model Law offers no solution in this respect, one must look elsewhere for inspiration. A well-structured model can be found in the English Arbitration Act, 1996.[85] The Act clearly provides that it shall apply when the seat of arbitration is England and Wales or Northern Ireland.[86] It then charts out the various provisions and the limits within which those provisions may apply when the seat is indeterminate or outside the UK.[87] It also clarifies that in case the seat is indeterminate, it shall be deciphered in accordance with parties' agreement and all relevant circumstances by the court.[88] It further elucidates that in case of choice of a different law with respect to matters covered under the Act, such law shall be treated as an agreement between the parties and shall be applicable only to non-mandatory provisions.[89]

Thus, English law clearly establishes the primacy of the juridical concept of seat as the governing factor in matters of jurisdiction and applicable *lex arbitri*—foreclosing any possibilities of second guesses through judicial interpretation. It further takes care to resolve a possible conflict when parties choose the seat as well as a different curial law. Similar provisions are essential in the Indian Act, especially given the conflicting interpretations on applicable law issues since *Bhatia International*. Without such provisions, despite the suggested amendment, Indian law will continue to bear the burden of post-*Bhatia International* precedents, every time the choice of seat is unclear or conflicted with choice of a different curial law.

Another aspect that needs to be addressed is a clear disposition of the distinction between curial law, law governing the arbitration agreement and the proper law of contract. Indeed these are doctrinal concepts not necessarily requiring statutory explication. However, given the tendency of the courts to use them interchangeably without proper appreciation of the distinctions and their importance, the statute must clarify the position.[90] It is also necessary to provide what factor should control the determination of the law governing arbitration agreement in the absence of specific choice—a question that has divided opinions internationally.[91]

An important consequence of the *Bhatia International* conundrum has been that many complicated questions of interaction between private international law and arbitration have been brought to focus. It would be a grave fallacy to leave these questions open without providing any guidelines. This is an

[85] Arbitration Act, 1996 (23 of 1996, UK) <http://www.legislation.gov.uk/ukpga/1996/23/contents> accessed 20 November 2011.
[86] ibid s 2.1.
[87] See ibid s 2 and s 4.5.
[88] ibid s 3 (this clearly establishes that the courts, in order to decipher party intention, must determine the seat and not the curial law).
[89] ibid s 4.5.
[90] See (n 76) and accompanying text.
[91] See eg Gary B Born, *International Arbitration: Cases and Materials* (Kluwer L Int'l 2011) 234.

opportunity for Indian legislature to align the Indian act to transnational standards on these issues, even though the Model Law offers no solutions.

4. *Resolving Judicial Invention of Merits Review of Arbitral Awards in India*

A. *No Merits Review: An Existential Necessity for Arbitration?*

Despite being in the realm of 'alternate dispute resolution' with strong emphasis on party autonomy, arbitration is essentially an adversarial process of private adjudication. A fundamental feature of arbitration that gives it an adjudicatory colour is that it results in a final and binding decision, which is enforceable. This leads to two conflicting policy considerations.[92]

First, it entails a policy of non-intervention on questions of merits. It is a cardinal principle of modern arbitral regimes that arbitration awards are not to be reviewed by courts as to their correctness in determination of substantive issues.[93] Secondly, given that these awards are binding and States offer their judicial machinery for its execution, it is imperative that the courts are allowed to review the validity of the process and ensure adherence to principles of natural justice.[94] This is both reasonable and essential, as the sanctity of a process must be ensured if it results in executable orders.

The problem lies in demarcating the boundaries between the two. Justice is indeed the primary goal of any legal system and arbitration as a process cannot be an escape route from that noble objective. Yet, allowing any level of merits review poses existential questions for the entire arbitral regime. If arbitral awards were reviewed as to their correctness in terms of applicable law or factual conclusions, arbitration would merely be, in William Park's words, 'foreplay to litigation'.[95]

In any case, the primary benefit that arbitration offers is a fast and definite result—which parties chose over 'correct' or 'perfect' decision 'through multiple layers of appellate review in national courts'.[96]

Advocates of merit review argue that applying a wrong principle of law is by itself a violation of the contract between the parties; as parties must be presumed to have agreed only to abide by an award based on the correct principles of law. The realm of legal interpretation, however, is not mathematical in precision. Therefore, correctness is often a matter of subjective opinion and not that of due diligence. Arbitration is a conscious choice to

[92] See eg William W Park, Arbitration of International Business Disputes: Studies in Law and Practice (Oxford 2006) 148.
[93] See eg Redfern and others (n 46) 587.
[94] See eg Park (n 92) 147.
[95] ibid 157.
[96] Gary B Born, 'The Principle of Judicial Non-Interference in International Arbitration Proceedings' (2008–09) 30 U Pa J Int'l L 999, 1002.

delegate the powers of interpretation and adjudication to a tribunal, thereby contractually ousting the traditional jurisdiction of courts in the matter.[97]

However, the issue becomes even more complex in the realm of international commerce, where 'international arbitration is the only game'.[98] Given the fact that there is no real alternate choice, there is more force in the argument that an absolute bar on merits review is too presumptuous. The counterargument, however, is that allowing merits review is even more disastrous for international arbitration as it negates the principal reason for it being the 'only game'—allowing parties to avoid the uncertainty of a foreign judicial system.[99]

The conflicting principles of justice and finality have led most common law countries to find at least a small opening to merits review. The judicial tradition of common law empowers the judges with sufficient discretion to apply the law in a way that meets the end of justice.[100] Respecting the letter of the law at the cost of meting out injustice has never been a feature of common law tradition.[101]

B. *US and the Manifest Disregard Doctrine*

In order to appreciate the common law reservations about an absolute bar on merits review of arbitral awards, a study of the history of this issue in the United States is enriching.[102] Before the Federal Arbitration Act of 1925 (FAA), the traditional approach on vacatur law was to allow merits review in 'limited submissions' to arbitration. Courts held that if the reference meant deciding 'in accordance with law', mistake would become a ground for vacatur.[103] It was further qualified in the mid-19th century that not every error of judgment but only gross or proven mistakes could invalidate an award.[104] In the decade preceding the enactment of FAA, however, courts leaned towards a more limited application of this principle by insisting on a bad-faith element.[105]

[97] See Born (n 33) 1020.
[98] See Nariman (n 37) 368.
[99] See Park (n 92) 148.
[100] See generally Sarosh Zaiwalla, 'Challenging Arbitral Awards: Finality is Good but Justice is Better' (2003) 20 J Int Arb 199 (discusses some cases where the English courts took an approach that was consistent with justice even though not strictly consistent with the principle of deference to arbitral decisions).
[101] See generally Melvin Eisenberg, *The Nature of the Common Law* (Harvard University Press 1991) (the chapter on 'Social Propositions' examines how moral norms and policies figure in legal reasoning and judicial decision-making in the Common Law system).
[102] See generally James M Gaitis, 'Unravelling the Mystery of Wilko v. Swan: American Arbitration Vacatur Law and the Accidental Demise of Party Autonomy' (2007) 7 Pepp Disp Resol LJ 1 (discusses in detail the historical context and interplay of the manifest disregard doctrine with the FAA).
[103] See *Kleine v Catara*, 14 FCas 732 (CCD Mass 1814) (No 7869) 735 (the traditional concept at this point was that unreasoned awards which resulted from an unlimited submission could not be reviewed, while if the award was to be made 'in accordance with law'—such awards must conform to the established legal principles and mistakes must be corrected).
[104] See *Burchell v Marsh*, 58 US (17 How) 344 (1854) 350; see also Gaitis (n 102) 25.
[105] See Gaitis (n 102) 37.

Though not widely acknowledged today, there is sufficient evidence to presume that section 10 of the FAA (containing grounds for vacatur) was not intended to replace the traditional common law on the subject.[106] It was rather meant to codify it through statute, which is evident from use of phrases from pre-FAA decisions in the drafting of section 10.[107] In any case, contrary to the contemporary reading of FAA, this legislation did not put an end to merits review. In many decisions subsequent to the enactment of FAA, it was understood that 'imperfect execution of powers' ground under section 10(a)(4) allowed setting aside for 'perverse misconstruction'.[108]

This was followed by the sly *obiter* of the US Supreme Court in *Wilko v Swan*.[109] In a discussion not related directly to the issue at hand, the court observed '[i]n unrestricted submission . . . the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation'.[110] The phraseology was vague and the decision did not discuss what exactly 'manifest disregard' meant. Through a tragi-comedy of interpretational errors, this *obiter* led to the framing of an extremely dubious doctrine of 'manifest disregard of law'.[111]

Based on a *prima facie* understanding that *Wilko* suggested a departure from the traditional rule of allowing merits review,[112] 'manifest disregard' came to be interpreted as allowing vacatur on something more than a mere misconstruction. The 9th circuit first formulated the doctrine thus: '. . . manifest disregard of the law . . . might be present when arbitrators understand and correctly state the law, but proceed to disregard the same'.[113] This unique definition came to be adopted, in one form or the other, by every federal circuit.[114] Many circuits acknowledged it as an extra-statutory ground for vacatur, despite section 9 mandating confirmation of award except in terms of section 10 and 11.[115]

In a recent decision of the US Supreme Court, where the issue related to contractual extension of the grounds for review of arbitral awards under the FAA, an argument was made that the grounds were not exhaustive since the court itself had added a new ground of 'manifest disregard'.[116] The court

[106] ibid 41.

[107] For example, the phrase 'exceeded their powers, or so imperfectly executed them' in s 10(a)(4) of the FAA is borrowed from the phrase 'unless the arbitrators have exceeded their power, or executed them imperfectly' used by NYSCt in *Jackson v Ambler* (1817).

[108] See Gaitis (n 102) 45.

[109] *Wilko v Swan*, 346 US 427 (1953) (overruled on merits in 1989; the manifest disregard comment survived).

[110] ibid 437.

[111] See ibid 8–9.

[112] See contra id.

[113] San Martine Compania de Navegacion, *SA v Saguenay Terminals Ltd* 293 F2d 796 (9th Circuit 1961).

[114] See *Birmingham News Co v Horn* 901 So 2d 27 (Ala 2004) (discusses that all federal circuits have recognized manifest disregard doctrine in some form or the other).

[115] See generally Eric Chafetz, 'Looking into a Crystal Ball: Courts' Inevitable Refusal to Enforce Parties' Contracts to Expand Judicial Review of Non-Domestic Arbitral Awards' (2008–09) 9 Pepp Disp Resol LJ 63 (surveys the case laws dealing with whether manifest disregard is an extra-statutory ground).

[116] See *Hall Street LLC v Mattel Inc* 552 US 576 (2008, USS Ct).

emphatically rejected the argument and remarked that *Wilko* (a) does not permit a general review of arbitrator's legal errors as contended, and (b) does not necessarily provide a new ground, as 'manifest disregard' could arguably be read into section 10(a)(3) or (4).[117] Many hoped that *Hall Street* was the final blow to the manifest disregard doctrine.

However, that was not to be. First, the short discussion on 'manifest disregard' in *Hall Street* only concerns itself with dismissing the argument that it supports a case for contractual extension of judicial review of awards. It raises doubt but falls short of answering whether manifest disregard is an extra-statutory ground. In fact, there is no discussion concerning validity of the manifest disregard doctrine *per se*. In any case, in a certiorari from the 2nd Circuit, the US Supreme Court refused to comment as to whether 'manifest disregard' survived *Hall Street*.[118] This was in a case where the lower courts had denied the demise of the doctrine. Hence, it is reasonable to presume that the doctrine lives on for now.

To summarize, the United States has always had some form of merits review of arbitral awards, which over time has narrowed into the 'manifest disregard' doctrine—not statutorily but by gradual restrictive interpretation of the FAA over a period of time. The manifest disregard doctrine does not allow vacatur on error or mistake but only on the grave and wilful neglect of the law applicable.

C. *Arbitration with a Stiff Upper Lip—Appeal a la English Style*

UK has had a very long tradition of arbitration—according to one commentator 'as long as the common law'.[119] Way back in 1698, a statute enabled parties to enforce a written arbitration agreement by an action of contempt of court. Courts supervision reigned supreme for a long time and awards could be set aside for minor procedural error or mistakes of either law or fact. The Common Law Procedure Act, 1854 sought to introduce a framework within which such review would be conducted.[120] The powers remained wide. Under a special appeal procedure, parties could ask the arbitrators to submit questions of law for determination by the court. Under the procedure for vacatur, courts could set aside awards if errors were apparent on the face of record.[121]

[117] ibid 6-7.

[118] See *Stolt Nielsen SA v Animalfeeds International Corp* 2010 US LEXIS 3762 (n 8).

[119] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford: OUP 2005) 477.

[120] See generally, Francis Russell, 'A Letter of 1853 from Francis Russell Esq. MA of the Inner Temple, Barrister-at-Law, to the Rt. Hon. Lord Brougham & Vaux on the Improvement and Consolidation of the Law of Arbitration' (1997) 13 Arb Int 253 (where Russell explains the problems facing the branch of law and argues for a consolidated General Arbitration Act with specific suggestions as to various clauses).

[121] See D St J Sutton and J Gill, Russel on Arbitration 19 (Swt and Max 2003) (provides a brief historical context of English law on arbitration).

Many legislative interventions were made since 1854, including the statutes of 1950 and 1975. Yet, the arbitration regime in the UK remained primarily under the final supervision of courts. By the 1970s, due to an explosion in international trade and consequently the arbitration market, the frequent appeals to commercial courts became unmanageable. Due to the competition from the France and Switzerland, UK started losing out on arbitrations. These and other factors led to the 1979 Arbitration Act, which for the first time provided for arbitral awards to be the final determination on facts. Appeal on questions on law to the High Court was provided for, with the requirement to show that the question affected the party's rights substantially.[122]

A major event in English law was the decision of the House of Lords in *Pioneer Shipping Ltd v B.T.P Tioxide Ltd*.[123] In this very first case under the 1979 Act to reach the House of Lords, strict guidelines were laid as to when a leave to appeal to the High Court against an award could be given. The court held that in cases of one-off clauses,[124] '[l]eave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument' that the arbitrator is obviously wrong.[125] A less strict criterion was suggested for standard clauses—the court must be satisfied of a strong *prima facie* case that the arbitrator is wrong. Even in case of standard clauses, if the event to which it was to be applied was a one-off event—the strict criteria of one-off clauses was to be applied.[126] This case is of special importance as it forms the foundation of the philosophy under which a form of appeal was retained in the new English law of 1996.[127]

With widespread interest in Model Law around the world, English law was looking at another revision. Around this time, a few interventionist decisions of the court in early 1990s led international commentators to publish scathing criticism of the English regime. In one such piece, Jan Paulsson remarked that English judges laid claim on their inherent right '[l]ike over-grown boy scouts brimming with eagerness to frog march perfectly ambulatory arbitrators across the street'.[128] Finally, the much-awaited new legislation came into force in

[122] See generally Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1998) 129–37 (the historical context around the revision in 1979 discussed in detail).

[123] *Pioneer Shipping Limited and Others v BTP Tioxide Ltd* 1982 AC 724.

[124] A distinction between 'standard' and 'one-off' clauses was recognized in English law for the purposes of review of arbitral awards on grounds of legal error. It was considered important that standard clauses should have a uniform interpretation in order to allow such clauses to be used confidently without significant negotiation. Therefore, mistakes involving such clauses were important to be corrected. One-off clauses, on the other hand, were left alone. This was a feature developed owing to the special sensitivity in UK towards maritime laws—a branch where standard form contracts are the norm. UK had been for centuries the 'headquarters' for maritime business and special care was taken of their concerns.

[125] See *Pioneer Shipping Ltd* (n 123) 742.

[126] See ibid 743.

[127] See Tweeddale (n 119) 797.

[128] Jan Paulsson, 'The Unwelcome Atavism of Ken-Ren: the House of Lords Shows its Meddle' (1994) 12 ASA Bull 439 439.

1996. However, to the dismay of international commentators, section 69 of the English Arbitration Act retained an appeal on questions of law to the High Court, albeit on fulfilment of multiple strict requirements.[129]

During the drafting of the new English law, after an extensive discussion on the issue, the final answer tilted on the consideration that when parties agree for arbitrators to decide a dispute in accordance with a system of law, there is an implicit agreement that the arbitrators should apply the law properly. If it failed to do so, the result reached by the arbitrator was not in terms of the agreement between parties.[130] The Department Advisory Committee (DAC) also explained the limitations placed over the right to appeal: (i) the question of law must substantially affect the rights of parties; (ii) such question of law must have been raised before the tribunal; (iii) factual basis of such appeal will remain as decided by the arbitrators; (iv) tests laid down in *Pioneer Shipping Ltd*[131]would apply; and (v) court must consider whether it would be just and proper for the court to decide the question despite an arbitration agreement. It was also explained that parties could waive the right by agreement, without any restrictions as to form and extent of such waiver.[132] It is now settled that reference to institutional arbitration rules that contain such waiver are sufficient for the purpose.[133]

Despite scepticism in the beginning, section 69 of the Act has not resulted in any significant intervention by the courts. Former critiques of English arbitral regime have had to admit that section 69 largely remains a tool to delay the final result and not to overturn awards.[134] In a Report on the working of the Act published in November 2006, only 15% users surveyed opined that section 69 be abolished. However, London remains the preferred seat of arbitration today.[135]

Therefore, it would be safe to deduce that despite acknowledgment of the primary principle that arbitral awards should not be interfered with on merits, two of the oldest common law jurisdictions (US and UK) have successfully retained a restrained window of opportunity to do just that. In the United States, the story is complex as they deal with new interpretation of an old law every passing decade. In the UK, the legislators took a bold risk by retaining such review in the statute and the courts have kept that faith.

[129] See Toby T Landau, 'Introductory Note to United Kingdom: Arbitration Act of 1996' (1996) 35 ILM 155 (describes in nutshell the features of the Act including the strict restrictions on appeal u/s 69).

[130] See Department Advisory Committee (DAC) Report on the Arbitration Bill, 1996 (UK) [285].

[131] See *Pioneer Shipping Ltd* (n 123).

[132] See DAC Report (n 130) 286–92.

[133] See eg *Sanghi Polyesters Ltd (India) v The International Investor KCFC (Kuwait)* [2001] CLC 748 (QB, Comm Ct, UK) 751.

[134] See Jan Paulsson, 'Arbitration-Friendliness: Promises of Principle and Realities of Practice' (2007) 23 Arb Int 477 495.

[135] See 2010 International Arbitration Survey: Choices in International Arbitration 19 (School of International Arbitration, Queen Mary, University of London, 2010).

In India, the jurisprudential leanings towards a stricter check of arbitral awards can be traced back to common law tendencies evidenced above. Yet, the Indian legislature adopted the grounds of challenge under Model Law without any modification—thereby signifying shift in policy towards non-intervention. However, yielding to the temptations of stricter review, the apex court ignored that policy to provide a doorway to merits review. In doing so, it extended the concept a little too far—much beyond the doctrinal safeguards of 'manifest disregard' or strict pre-requisites under section 69 of English Act.

D. *Supreme Court Reinvents 'Patent Illegality' in India*

In the old Indian legislation on arbitration, courts had permitted vacatur of awards on grounds of 'error on the face of record'. This was based on section 30(c) of the 1940 Act, which provided that an award could be set aside if it was 'improperly procured or is *otherwise invalid*' (emphasis added).[136] The 1996 Act did away with such grounds and stuck to the transnational standards as provided in the Model Law. It was widely anticipated that India had made the leap of faith into a pro-arbitration regime by blocking possibilities of judicial review of arbitral awards on merits. However, a division bench of the Supreme Court found a way in for merits review within the Model Law text.

The division bench of the Supreme Court in *ONGC v SAW Pipes* found not one but two distinct routes to a merit review of arbitral awards. While the term used for such review was vacatur on grounds of 'patent illegality', in fact any error of substantive law falls squarely within the ratio of *Saw Pipes* allowing nullification of an award.[137]

The case concerned the challenge of a domestic award on grounds that the arbitrator erred in interpreting the terms of the contract and the law on damages as contained in the Indian contract law. The court first considered the scope of its powers under section 34 of the Indian Arbitration Act to set aside an award. It found, through unsustainable creative interpretation, that the court could set aside an award 'if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the Contract'.[138] It held that in any of these circumstances, the award would be patently illegal.

(i) *Error in substantive law is against mandatory procedure under the Act*

The first route to patent illegality ground was discovered by a combined reading of sections 34 and 28 of the Indian Act. The *Saw Pipes* court relied on

[136] The Arbitration Act, 1940 (Act 10 of 1940, India) <http://www.indiankanoon.org/doc/1052228/ accessed 20 November 2011, at s0030(c).
[137] See eg Pramod Nair, 'Surveying a Decade of the 'New' Law of Arbitration in India' 23 Arb Int 699 730.
[138] *Saw Pipes* (n 12) 14.

section 34(2)(a)(v) of the Indian Act, which allows setting aside of an award if '[t]he arbitral procedure was not in accordance with the agreement of the parties . . . or, failing such agreement, was not in accordance with this Part'.[139] It then noted that section 28 of the Act providing for the rules applicable to substance of the dispute is a part of the 'procedure' prescribed under the Act and defines the powers of the tribunal.[140] Section 28(1)(a) mandatorily requires that in arbitrations held in India involving exclusively Indian parties, the tribunal '[s]hall decide the dispute . . . in accordance with the substantive law' of India.[141] Section 28(3) provides that in all cases, the tribunal shall decide in accordance with the terms of the contract.[142] Therefore, reading these provisions together, the court held that any award that is *dehors* the said provisions—ie sections 28(1)(a) and 28(3)—would be on the face of it illegal.[143]

Saw Pipes thus concluded that where the award is contrary to the substantive provisions of law or against the terms of the contract, it could be interfered with under section 34.[144] Court justified the conclusion on arguments that to allow such award to stand would be against the interests of justice.[145] It invoked the maxim that law must be interpreted in sync with the principle that every wrong has a remedy.[146]

The rationale for this interpretation is similar to that on which other common law jurisdictions had traditionally allowed review of merits of awards—the presumption that parties have agreed to a legally correct decision when they chose to make submissions for decision 'in accordance with law'. The same argument was also used by the DAC to justify section 69 of the English Arbitration Act.[147] Yet, *Saw Pipes* has received severe criticism.[148] Some reasons for such response are discussed below—after summarizing the second proposition by which *Saw Pipes* allowed merits review.

(ii) *Public policy includes patent illegality*

While the court could have stopped at this point and still achieved its aim of vacating the award, it went on to establish that public policy under section 34(2)(b)(ii) of the Act must be interpreted widely. This provision allowed courts to set aside an award if it found that it was in conflict with the public

[139] Indian Act, 1996, (n 28) s 34(2)(a)(v) (analogous to art 34(2)(a)(iv)).
[140] See *Saw Pipes* (n 12) 10.
[141] Indian Act, 1996 (n 28) s 28.
[142] ibid.
[143] *Saw pipes* (n 12) 11.
[144] ibid 14.
[145] ibid 12.
[146] ibid 13.
[147] See DAC Report (n 130) and accompanying text.
[148] See eg Redfern and others (n 46) 614; see also Michael Mcllwrath and John Savage, *International Arbitration and Mediation: A Practical Guide* (Kluwer L Int 2010) 337.

policy of India. The significant difference is that the public policy ground need not be pleaded or proved by the aggrieved party.[149]

In *Renusagar v General Electric*, a decision under the Foreign Awards (Recognition and Enforcement) Act, 1961[150] the Supreme Court had held that 'public policy' was used in a narrow sense and something more than the violation of the law of India was required to invoke it. It had then outlined three elements, the violation of which would amount to a violation of public policy—fundamental policy of India; interests of India and justice and morality.[151] This case had restricted the scope of public policy and was followed ever since, until *Saw Pipes* distinguished it in 2003.

Saw Pipes distinguished *Renusagar* by drawing an analogy between its powers under section 34 with that of an appellate court. It held that enforcement was akin to an execution proceeding and required the interference to be minimal. But when 'validity of award is challenged there is no necessity of giving a narrower meaning to the term "public policy of India"'.[152] The court concluded that—(i) public policy is a living concept and changes with time; (ii) it is incapable of precise definition; and (iii) public policy can be given a wide meaning.[153] It added a fourth element to the Renusagar list—if an award is patently illegal, it would be in violation of the public policy of India.[154]

Saw Pipes provides that 'patent illegality' would only cover errors that go to the root of the matter.[155] However, application of the principle laid down to the facts of the case in *Saw Pipes* suggests that any error of law is sufficient.[156]*Saw Pipes*, though, restricted the application of patent illegality ground to domestic awards involving only Indian parties. However, when read with the *Bhatia International* decision, it has been held to apply to any arbitration where matters of Indian law might be involved.[157]

(1) *Manifest Disregard of Legislation by Saw Pipes*

Saw Pipes suffers from the same fallacy as *Bhatia International*– the fallacy of reversed reasoning. The judges in *Saw Pipes* sat down to find a way to set-aside

[149] See Indian Act, 1996 (n 28) s 34(2)(b)(ii).

[150] The Foreign Awards (Recognition and Enforcement) Act, 1961, Act No 45 of 1961 (India), available at <http://www.indiankanoon.org/doc/1695780/> accessed 20 November 2011 (the New York Convention was given effect by this legislation in India; it now stands repealed by the 1996 Act which contains these provisions in pt II).

[151] See Renusagar Power Co Ltd v General Electric Co AIR 1994 SC 860 (Indian Sp Ct).

[152] *Saw Pipes* (n 12) [21].

[153] ibid 15–21.

[154] ibid 30.

[155] ibid.

[156] The court reassessed evidence and reversed arbitrator's finding that ONGC had suffered no damage and therefore was not entitled to receive liquidated damages under law. Court held that though it was not possible to calculate the damage, it was obvious that some damage was definitely suffered and reasonable compensation must have been awarded. On application to facts of the case, *Saw Pipes* read like any appeal to a first instance court order.

[157] See *Satyam Computers* (n 38) (held that wider public policy review under section 34, as provided by *Saw Pipes*, would be available even in international arbitration seated outside India if questions of Indian law were involved).

an award for error in legal reasoning, as it violated 'basic principles of justice' in their subjective opinion. The decision lacks any serious analysis of the reasons for the new legislation, the shift in policy, or the difference in text between the 1940 and 1996 Act – all of which would have prevented arriving at the interpretation that it finally did.

A simple reference to the Model Law's legislative history would have shown that the court's interpretation of Article 28 was grossly mistaken. During the discussions on the text of this article, it was agreed that there was no remedy for its violation and that it was merely a guideline to arbitrators to help them determine the law applicable to merits. The provision requiring arbitrators to take the terms of the contract into account was essentially to establish that even when arbitrators were authorized to decide *ex aequo et bono*, contract clauses must not be disregarded.[158]

It has correctly been noted that *Saw Pipes* effectively brought to naught the entire scheme of the Arbitration and Conciliation Act, 1996.[159] It was an arrogant refusal to accept an evident change in policy reflected in a new legislation and to revert to the old position by judicial disregard of existing law. While the court was correct in stating that public policy is an indefinable living concept capable of wider or narrower adaptation with time, it failed to appreciate that the realm of public policy starts where that of illegality under positive law ends.[160]

As discussed before, there has been a tendency amongst common law jurisdictions to reserve some powers of judicial review over arbitral awards to ensure that illegal awards causing substantial injustice can be set aside. The progression of these tendencies in the United States and the UK has been examined above. Similar tendencies have been present in Australia—another significant common law jurisdiction.[161] However, there is a unique problem with the *Saw Pipes* approach, which makes it the target of such severe criticism.[162]

In the case of the 'manifest disregard' doctrine in the United States, the expanse of coverage and possibilities of its application have progressively decreased over the years. In addition, as was shown in the analysis above, its genesis can be found in the Statute.[163] The problem in the US primarily is that of reconciling a 1925 statute with modern concepts. In the UK, the policy

[158] See Model Law Travaux Preparatoires (n 34) 327th meeting (USSR delegate suggested deletion of the provision as in any case there was no remedy against it and it was a mere guideline; a detailed discussion ensued where no delegate ever suggested that it was meant to be a mandatory provision violation of which could lead to annulment; the group agreed to it being a mere guideline but essential for a comprehensive arbitration legislation).

[159] Fali Nariman, Senior Advocate, Supreme Court of India, Speech at New Delhi, CII-Bar Council of India Conference on Legal Reforms in Infrastructure—The Road Map (2 May 2003); see also Ritz (n 22) 273.

[160] See eg, Nelson Enonchong, *Illegal Transactions* (LLP 1998) 8.

[161] See eg, Richard Garnett and Luke Nottage, 'The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?' (2011) 7 AIAJ 29, 32.

[162] See (n 159)

[163] See (n 117) and accompanying text.

finds clear exposition in the statute with adequate explanation by the draftsmen of its scope and limitations.[164] Section 68 and 69 of the English Act were intended by legislature to be extraordinary remedies and the English courts have ensured that it remains so.

Saw Pipes on the other hand approaches the new Indian Act with total disdain. It fails to look at the Act as a whole and refuses to investigate its policy or drafting history. It even fails to compare the provisions with Model Law on which the Act declares itself to be based on.[165] No reference to *travaux preparatoires* of the Model Law or to the transnational standard on the question can be found. *Saw Pipes* disagreed with the policy of the new Indian Act and decided to change it.[166] It took India back in time in the name of judicial wisdom.[167] It deserved criticism.

E. *Consultation Paper's Half Measures*

(i) *Preventing vacatur on incorrect interpretation of contractual terms*

As discussed in the preceding paragraphs, *Saw Pipes* had concluded that an award violates mandatory procedure under the Act if it is based on an incorrect interpretation of contractual terms—since section 28(3) of the Act requires decision to be 'in accordance with the terms of the contract'. Consultation Paper recognizes the problem and proposes to replace the words 'shall decide in accordance with the terms of the contract' by the words 'shall take into account the terms of the contract'.[168] The author feels this should suffice to nullify that part of the ratio of *Saw Pipes*, which provides for error in application or interpretation of contract as justification for vacatur.

(ii) *New ground of serious irregularity for purely domestic awards*

The Consultation Paper suggests no solution to limiting *Saw Pipes* ratio with respect to error of law read as violation of mandatory procedure. This is because it specifically seeks to provide for such ground in case of arbitration involving only Indian parties. While we deal with that ground below, it must be pointed that not interfering with the link between section 34(2)(a)(v) and section 28(1)(a) established by *Saw Pipes* is a blunder.[169] It is essential that an incorrect application of law be clarified not to be a violation of mandatory procedure under the Indian Act.

[164] See (n 130–133) and accompanying text.

[165] See Indian Act, 1996 (n 28) (the preamble concludes: '[a]nd whereas it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules').

[166] See *Saw Pipes* (n 12) 25–26 (court acknowledged on a comparison with ss 68 and 69 of the English Act that Indian legislature has not provided grounds for such challenge or appeal and then cited judicial lawmaking powers to prevent 'perversion of the goals and values of society').

[167] See eg, Ritz (n 22) 723.

[168] See Consultation Paper (n 8) 26 (it cites the European Convention on Commercial Arbitration, 1961 as inspiration for the proposed language).

[169] See ibid.

Taking into account the concerns raised by Supreme Court[170] and the proposal in the 176th Report of the Law Commission of India,[171] the Consultation Paper proposes adding a new ground for vacatur of awards in arbitrations other than international arbitrations. The proposal is to allow challenge on ground that there is a patent and serious irregularity, which has caused or is likely to cause substantial injustice to the applicant, and of which the court is satisfied.[172]

This proposal is extremely dangerous and lacks progressive thought. Citing the debate between finality and justice to slip-in the age-old solution of 'patent illegality' evidences the lack of creativity in the drafting of these proposals. With the advent of commerce and refinement of legal procedures, certain issues in this regard stand settled—(i) that it is in the larger interests of justice that courts should not be clogged with private commercial dispute;[173] (ii) choice of arbitration must entail no second guessing of merits issues by courts;[174] and (iii) courts must ensure the sanctity of the process of arbitration not the veracity of its result.[175] Patent illegality is a concept of the age when common law courts distrusted arbitrations and considered legal interpretation in its exclusive domain.[176] To introduce this ground for domestic arbitrations would be the final nail in its coffin.[177]

To add to the blunder, the only requirement to be satisfied under the proposal is that the 'court must be satisfied' of the serious irregularity and that it causes injustice. The author submits that this requirement is *non-est* by the fallacy of being circular in proposition. It is strange that the Consultation Paper retained this ground while ignoring all the conditions it was proposed with by the Law Commission in 2001.[178]

[170] See *Sikkim Subba Associates v State of Sikkim* (2002) 5 SCC 629 (Indian Sp Ct) (extracted at p 32 of the Consultation Paper).

[171] See 176th LCI Report (n 14) 143–4.

[172] See Consultation Paper (n 8) 33 (provides that for purely domestic arbitration, an award could also be set aside if 'there is a patent and serious illegality, which has caused or is likely to cause substantial injustice to the applicant'; it further provides that 'the court must be satisfied that the illegality identified by the applicant is patent and serious and has caused or is likely to cause substantial injustice to the applicant').

[173] This is of special concern in India where 55,000 cases in Supreme Court, 4,200,000 cases in high courts, and 28,000,000 cases in lower courts are pending as of 30.09.2010. See generally PRS Legislative Research, 'Vital Stats: Pendency of Cases in Indian Courts' <http://www.prsindia.org/parliamenttrack/vital-stats/pendency-of-cases-in-indian-courts-1837/> accessed 20 November 2011.

[174] See eg, William W Park, 'The Nature of Arbitral Authority: Comments on Lesotho Highlands' (2005) 21 Arb Int 483, 484.

[175] See eg Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (Kluwer L Int 2003) 673.

[176] See Tweeddale (n 119) and the accompanying text.

[177] But cf Amelia C Rendeiro, 'Indian Arbitration and Public Policy' (2011) 89 Tex L Rev 699, 719–20 (considers that the *Saw Pipes* ratio is essential for a robust domestic arbitration regime and helps to keep a check on *ad hoc* arbitration in India); Sidharth Sharma, 'Public Policy Under the Indian Arbitration Act' (2009) 26 J Int Arb 133 (defends the *Saw Pipes* decision and supports inclusion of residual power of courts to set-aside an unjust award).

[178] cf Consultation Paper (n 8) 33 with 176th LCI Report (n 14) 10–2 (where LCI had proposed similar ground but with all safeguards as contained in the English Act).

If India wants domestic arbitrations to flourish, this provision must be withdrawn. In case the drafters are ill advised to keep it, it must be an opt-in provision. The provision should trigger only if parties have agreed to it mutually and not otherwise. In the alternative, there must be an opt-out route, including by reference. Parties may agree to exclude this provision specifically in their agreements or impliedly by adoption of institutional rules that prohibit review of awards.

The author proposes that the draftsmen should consider a more evolved and less intrusive approach to safeguarding against 'patently and seriously illegal' awards. Arbitration is a contractual process. Disputes submitted to it relate to relationships well within the contractual prerogative of parties. A reasonable and adequate test, which keeps the choice of arbitration meaningful and yet allows necessary safeguard is possible. The author suggests that the test should be—would a settlement entered in the terms of the operational part of the award by way of a contract between the parties be valid? If yes, the award should not be interfered with. The existing Model Law regime ensures sanctity of the process through procedural supervision under article 34. An additional ground putting to test awards that go beyond the realms of settlement permissible under contractual prerogative is sufficient. There seems to be little judicial interest in interfering with awards that lie within these limits.

5. *Bottling the Genie of Public Policy*

The most damaging aspect of *Saw Pipes* decision is the manner in which it defines the term 'public policy' in Indian Arbitration Act. *Saw Pipes* not only declared 'patent illegality' to fall within the public policy umbrella but also opened doors to an extremely liberal use of the term. The problems with respect to the merits review have been dealt with in the preceding section. This section focuses on the definitional problems of the term 'public policy'. It then assesses if the proposed amendments address them successfully.

A. *Public Policy and the Common Law*

The error of equating 'public policy' in the new Arbitration Act to the common law principle of 'public policy' should not have come as a surprise. It was well anticipated by Lord Mustill and supported by the Indian delegate during the discussions on the draft text by the commission. Lord Mustill objected to the use of the term, as it would not cover what it was meant to—procedural injustice.[179] Indian delegate supported this and even proposed

[179] See Model Law TravauxPreparatoires (n 34) 317th meeting.

deletion of the term.[180] It was finally decided to retain it on the understanding that its meaning in context would become clear from the report that would be released with the final draft.[181] It was also explained in the discussions that 'public policy' in the Model Law was not the same concept as existed in common law. It was merely an English translation of the well-understood French concept 'ordre public' that referred to the most fundamental principles of law in a polity.[182]

Despite anticipating the problem of using a term that carried heavy baggage in the common law tradition, the Indian legislature retained it without any guidelines to limit its scope—probably relying on the fact that its interpretation would be rightly directed by reference to the report published with the Model Law. That was not to be. A common law judge knows the term 'public policy' when he sees it. It carries with it centuries of precedents and refinement that are difficult to be sidestepped by a single stroke of an explanation in a working group report. However, does the *Saw Pipes* definition of public policy confirm to that in common law? With some historical enquiry, the answer is an emphatic 'no'.

Public policy has existed in the realm of common law for centuries.[183] It has steadily narrowed down[184] from a repository of legislative powers of the court to a rare exception—sometimes contained in statute specifically and at other times relied on to fill a gap. Courts have refused to define it, for its purposes in the common law relate mostly to indeterminate instances. Winfield aptly sums up: '[I]nstead of sprawling in vaporous fashion across the legal atmosphere like a genie of *Arbaian Nights*, it is shrinking to certain departments of the law; but no one had yet thought of imprisoning it in a jar, and indeed no one has ever been able to do that.'[185]

One of the tenets of common law is the belief that pre-defined rules cannot provide for all situations.[186] Concepts like public policy developed traditionally to guide judicial legislation. Over time, common law found significant space for statutory enactments.[187] For some time, judicial law-making conflicted with legislative privileges and their interactions became complex.[188] Eventually,

[180] See ibid 318th meeting (the Indian delegate said that his delegation 'would prefer to see [public policy ground] deleted. The expression "public policy" was much too vague and had very little to do with the law of arbitration').

[181] See generally Report of the United Nations Commission on International Trade Law on the work of its eighteenth session, 1985 <http://www.uncitral.org/uncitral/en/commission/sessions/18th.html> accessed 20 November 2011.

[182] See (n 180) ('[T]he Chairman said that "public policy" was a translation of the French term "ordre public" and meant the fundamental principles of law').

[183] See generally Percy H Winfield, 'Public Policy in the English Common Law' (1928–29) 42 Harv L Rev 76 (It has taken various names over times: from 'divine law' to 'inconvenient and against reason'; 'repugnant to the State' to 'case of State'; and 'public benefit and convenience' to 'reasonableness').

[184] See ibid 84.

[185] ibid.

[186] See eg, JF Burrows, 'The Interrelation between Common Law and Statute' (1973–76) 3 Otago L Rev 583, 585.

[187] See ibid 583–4.

[188] See eg, Harlan Stone, 'The Common Law in the United States' (1936) 50 Harv L Rev 4, 15 (remarks that legislation for a long time was considered 'as an alien intruder in the house of common law').

principles of separation of powers became inviolable in constitutional theory. Old tools of common law including public policy, naturally, had to adapt to new realities. In this reinvented role, it has been established for over a century now in common law that 'public policy' cannot conflict with legislation.[189]

Thus, public policy has been stripped of legislative connotations from common law for considerable time now. It remains in statutory and doctrinal realms in order to guide the common law judge in deciding a situation that has never arisen before or escaped the vision of the legislature. In its modern avatar, public policy remains a check to prevent actions that are obviously against the very grains of contemporary society but is not prevented specifically by positive law. Such conduct is considered to be illegal nonetheless.[190]

The public policy that *Saw Pipes* discovered is not the evolved public policy of the common law. The *Saw Pipes* public policy is too simplistic to be a definite legal doctrine. In the penultimate paragraph of its discussion on the meaning of public policy, the Court noted that an 'award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest'.[191] Ergo, anything not in public interest is in violation of public policy. Inarguably, this needs effective legislative intervention to clarify the connotation of the term public policy or to replace it altogether with an appropriate term for the purpose.

B. *Proposed Amendment: The Genie Escapes Again*

The Consultation Paper does not seem to have assessed this impact of the apex court's decision on the definition and connotation of the term. Neither has it attempted to realign the term to the meaning it was proposed to have in the context of the Model Law.[192] It suggests an elementary solution. *Saw Pipes* had accepted the three criteria laid down in *Renusagar* and added 'patent illegality' as the fourth element to it.[193] The Consultation Paper seeks to introduce an explanation at the end of section 34, which shall read as:

> For the purposes of this section "an award is in conflict with the public policy of India" only in the following circumstances namely:-
> When the award is contrary to the-
>
> (i) fundamental policy of India; or
> (ii) interests of India; or
> (iii) justice or morality.[194]

[189] See eg, *In re Houghton*, (1915) 2 ch 173 cited in Winfield (n 183) 98.
[190] See Enonchong (n 160) 10.
[191] *Saw Pipes* (n 12) 30.
[192] See (n 182) and the accompanying text.
[193] See (n 151 and 154) and the accompanying text.
[194] Consultation Paper (n 8) 29.

Thus, by providing an exhaustive list of circumstances that would lead to public policy violation, the proposals seek to nullify the additional element added by *Saw Pipes*. However, in the process, it adds three vague terms to the statute, which is an extremely troublesome proposition. It is true that these three criteria have existed in the past by way of precedent. However, to provide it in the text of the Act changes the dynamics entirely. The elements proposed to define the term are vague, inviting mischief by providing three new indefinable elements—scope of which is limited only by imagination.

Probably the thought that led to this proposal was the comparatively limited expanse of public policy since *Renusagar* until *Saw Pipes*. However, *Renusagar* is not limited because of the three criteria; one might say it is despite them. The elements enumerated in *Renusagar* are supplemented with discussion in context for the use of the term public policy in the Act under review.[195] Adopting these elements without context could have the opposite effect than intended.

C. *Some Suggestions for the Draftsmen*

It is disappointing that the proposal suggests a simplistic solution to nullify *Saw Pipes* effect on the definition of public policy under the Indian Act. Discussions on the problems caused by the term 'public policy' in arbitration are extensive. It has been noted that public policy is the most common point of failure of the Model Law in harmonizing arbitration regimes around the world.[196] In fact, the Committee on International Commercial Arbitration of the International Law Association extensively worked on this problem for over 6 years. They submitted a report outlining important observations and recommendations on the use of the term 'public policy' and the meaning it should be assigned. The Report concerns itself with the 'public policy' issues that an enforcement court faces.[197] However, they are relevant to annulment courts, as the definitional realm of the term remains similar, though the specific content of it may change in the two scenarios.

It is true that there is no consensus on what constitutes a public policy violation. It must necessarily be left to each jurisdiction to decide for itself. There is also difference of opinion on the extent of review courts should enter to check its violations.[198] The basic idea of the public policy defence is to ensure that arbitration does not become a means to avoid the applicability of

[195] See *Renusagar* (n 151) 64.

[196] cf Peter Binder, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions (3rd edn, Swt & Mxw 2010) 382.

[197] See generally Pierre Mayer and Audley Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 Arb Int 249.

[198] See Bernard Hanotiau and Olivier Caprasse, 'Public Policy in International Commercial Arbitration' in Emmanuel Gaillard and Dominico de Petro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2008) 787, 804.

an otherwise mandatory provision.[199] In addition, a State court cannot be forced to exercise its powers to enforce an award that is opposed to fundamental principles of that legal system. Accepting these premises, some principles have evolved over years.

There are those principles of public policy that may not be a part of any statute but are obvious exceptions. For instance, not allowing a party to benefit from a fraud is considered universally as one such principle. It is this realm of public policy that is essentially indeterminable and requires the element of discretion to be retained in determining the content of the term. However, in arbitration, a special part of the public policy debate is the non-application of mandatory rules of statutory provisions.

This aspect of public policy in arbitration received significant consideration of many US and European courts including that of the European Court of Justice (ECJ) in the context of Competition Law. The controversy related to the conflict of two fundamental principles. First, many rules of competition law are part of public policy in modern society; and second, reviewing every arbitral award to see whether the arbitrator correctly applied the mandatory rule of competition law is opposed to an effective arbitral process. Eventually, the US courts resolved the situation by stating that as long as the arbitrators have addressed the issue and decided them in a competent manner, the court should not purport to ascertain whether competition law has been applied correctly. Similar solutions were adopted by almost all courts in Europe, with some finer distinctions.[200]

The competition law controversy represents the decisive frontier of the thin line between public policy and merits review. Principles that were recognized in these cases are extremely pertinent to challenges based on public policy. It is widely accepted that courts must check whether the mandatory rule has been taken into account. If disregarded, courts could set aside an award.[201] Non-application of mandatory rule, by itself, should not result in annulment. It must be investigated whether the award in effect violates a particular fundamental principle of the mandatory rule, which is recognized as part of public policy. Indeed, every single rule of a mandatory law does not rise to the level of public policy.[202]

A fine distinction between what constitutes public policy for the arbitrator in his role as an adjudicator of the substantive issues and for the court in its restricted role in arbitration was well formulated by the Swiss Supreme Court.

[199] See ibid 787.

[200] See generally Luca GR Di Brozolo, 'Arbitration and Competition Law: The Position of the Courts and of Arbitrators' (2011) 27 Arb Int 1 (a comprehensive description of the problem, issues involved and the solution adopted in different jurisdictions).

[201] See Hanotiau and Caprasse (n 198) 818.

[202] See Di Brozolo (n 200) 6.

After holding that non-application of EU competition law was not a violation of public policy for the purposes of vacatur, the court noted:

> An arbitrator denying jurisdiction to do so [to consider the mandatory provision of EU Competition law] would be violating [provision allowing challenge of jurisdiction award of the tribunal]. Some legal writers hold the view that it is paradoxical and somewhat artificial to compel an arbitrator to review the validity of a contract on the basis of a foreign mandatory law whilst abstaining from reviewing the manner in which that law was applied because it would not be part of publicpolicy. The Federal Tribunal has been criticized for, amongst other things, dealing with the same issue – i.e. the arbitrator's duty to take into account European law – in a different manner depending on the purely formal way in which the appeal is brought to this Court: jurisdiction of the Arbitral Tribunal or violation of public policy. However, as pointed out by Antonio Rigozzi, the contradiction is only apparent if one bears in mind that . . . *public policy within the meaning of art. 190 (2) (e) PILA should be distinguished from public policy as to how the Arbitral Tribunal applied the law. In other words, the arbitrator's public policy is not the public policy of the appeal judge* . . . (notes omitted; emphasis supplied)[203]

Both the contours of the problem and the possible solutions to the nature of public policy defence in arbitration law has evolved and is no more as unruly a horse as made out to be. Discretion remains an essential aspect of this defence. However, given the *Saw Pipes* like tendencies of limitless expansion of this concept, some guidelines as to the nature of review that a public policy defence must take is essential.[204] The recommendations of the ILA Committee and the lessons from the competition law debate are a good starting point in framing those.

6. *Should the Indian Act be Bifurcated?*

The dualist approach to arbitration legislation—i.e. to have two separate statutes governing international and domestic arbitrations—has found strong support in India. Since the legislature is not currently mooting a repeal or substitution of the 1996 Act, the Consultation Paper does not specifically deal with this idea. However, the proposal to introduce a new ground for review of purely domestic arbitral awards—a distinction that does not exist in the Indian Act currently—signifies sympathy towards the proponents of dualist theory.

The Law Commission provided the first validation to the dualist theory when it agreed that adoption of Model Law for domestic arbitration was not a correct move. It also suggested certain unique treatment of domestic

[203] X SpA v Y Srl, 'Swiss Supreme Court, 1st Civil Court (4P.278/2005) (English Translation)' (2006) 24 ASA Bull 550, 558.

[204] The Indian Act could provide that in interpreting the provisions, regard shall be had to the legislative history of the Model Law. Such language is present in common law jurisdictions like Australia and Canada. See eg, Gerold Herrman, 'The UNCITRAL Arbitration Law: a Good Model of a Model Law' (1998) 3 Unif L Rev ns 483, 497.

arbitration, especially on the grounds available for review of awards.[205] Many renowned Indian experts in the field have voiced the same opinion.[206] The author begs to differ.

It must be conceded that many countries have successfully adopted the dualist approach, including widely perceived arbitration friendly jurisdictions like the France, Switzerland and Singapore. However, that does not necessarily mean that a common legislation is inadequate. The best example is the UK, where the English Arbitration Act, 1996 has been successfully administering both domestic and international arbitrations. In any case, this question does not find answer in statistics.

The starting point to answer this question must be to analyse the reason for such a demand in India. One of the most prominent ones is that domestic arbitrations need to be supervised more strictly by the Indian courts. This is a fallacy, based on a misunderstanding of the distinction between domestic and international arbitration. Arbitration is a process rooted deeply in contractual theory.[207] In case of international commercial arbitration, its foundations additionally lie to a large extent in private international law.[208] Therefore, a valid question to ask is—is limited review of awards rooted in contractual or private international law character of arbitration? The answer is definitely 'contractual'.[209] Finality of arbitral awards derives from the fact that parties have agreed for the arbitrator to decide such questions, and must abide by it. From a theoretical point of view, therefore, there is no justification for a more extensive review of domestic arbitral awards.

Many commentators argue for a separate legislation for international arbitration so that shortcomings in domestic arbitration precedents should not affect international arbitration.[210] They believe that the tendency of courts to interfere with international arbitration would be less, if they were allowed to keep domestic arbitrations in check. Though tempting, this argument must be rejected. Statistically, out of the three most disastrous precedents governing arbitration in India today, two emerged off international arbitration.[211] It is submitted that the problems caused by *Bhatia International* and *Satyam Computers* are a result of serious theoretical errors by the Supreme Court and careless drafting by the legislature. Their solution lies in correction of the statute and not in bifurcation.

[205] See 176th LCI Report (n 14) 8.

[206] See eg, Nariman (n 6) 121. See also Arvind Datar, *Introduction to the Fifth Edition* of Justice RS Bachawat's Law of Arbitration & Conciliation, at xxii (AnirudhWadhwa and Anirudh Krishnan eds, 5D LexisNexis Wadhwa 2010).

[207] cf Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010) 13.

[208] cf ibid 1.

[209] A purely private international law investigation would concentrate on which court would have jurisdiction to review and under what law; it would not necessarily mandate deference to arbitral awards.

[210] See Datar (n 206).

[211] Reference here is to *Bhatia International*, *Satyam Computers* and *Saw Pipes*—of which only the last related to domestic arbitration.

Another consideration that must go into this debate is the special needs for growth of domestic arbitration in India. Judicial delays and massive number of pending cases is a well-acknowledged fact in India.[212] Domestic arbitration is an effective means to redress this situation. If commercial disputes and lengthy trials are taken off the dockets of court, it can only result in a more competent justice delivery system in India. However, arbitration for sake of it is not the answer. If domestic awards are reviewed for errors in law, the result is only in the timing of when the dispute gets to the court dockets. Therefore, to provide a tangible alternate dispute settlement mechanism—which is an urgent requirement for India—domestic arbitrations must develop a culture of non-intervention, party autonomy and efficiency. In short, all that international arbitration aspires for.

The dualist approach in Indian context is biased in favour of international posturing against an attempt to truly develop an 'arbitration culture'. The reason why the France, UK and Switzerland have developed into prominent arbitration hubs is because over years all the players in these jurisdictions—parties, arbitrators, lawyers and judges—have come to trust and understand the system better. The dualist demands in India are more akin to treating domestic arbitration as a stepchild. In any give and take between the conservative and liberal groups in arriving at a consensus, all advantages would be reserved for international arbitration—domestic arbitration would be a pre-judged loser.[213]

Dualist theory is a short-cut aspired by many in India that want to see a success story of arbitration. However, success is akin to no short-cuts. One can look at arbitration as an evolved process, which must be respected and confirmed in compliance with the principle tenets it is based on; or one can look at it suspiciously as a means to defy strict application of statutes—it is a matter of attitude towards the arbitral process. If the interpretation given to the Model Law in India has been more intrusive than in many other countries, it is not because India adopted it for domestic arbitration but because the players in India have not had an evolved approach to the process. A modern legislation to govern domestic arbitration based on transnational standards shall be instrumental in developing that approach and consequently would be remarkable for international arbitration as well.

7. *Conclusion*

It is true that Indian arbitral regime is far from ideal. However, it is also true that the volume of commerce and consequently the experience in arbitration is comparatively at its young stages of development in India. The natural

[212] See PRS Legislative Research (n 173).

[213] An example is in the Consultation Paper itself—in the struggle to limit merits review while dealing with demands for appeal against patently illegal awards, the compromise solution was to provide a special ground of review of domestic awards.

tendency of common law jurisdictions to go through a relatively hostile period in the development of its arbitral regime has been witnessed in some of the most trusted jurisdictions. When judged from that standpoint, India is on a reasonably progressive path. Though, it might still take few years before it truly aligns itself with transnational standards in arbitration.

However, complacence is the enemy of progress. The resolve and intent must be evident in action. Recently, the Indian government approved the 'National Mission for Justice Delivery and Legal Reforms', assigning it a budget of over 400 million dollars over the next 5 years. One of the specific points on the agenda of this programme is to amend the arbitration law to promote arbitration and other alternate dispute resolution mechanisms.[214] These plans need effective and urgent implementation.

The fact that the *Bhatia* ratio, which has kept India in a parallel universe with respect to territorial scope of the Act, has acted as binding precedent without any legislative intervention for over 9 years—must be of grave and urgent concern. This invites attention to the manner in which the Consultation Paper proposals must be implemented. There is a near consensus in India that *Bhatia International*, *Satyam Computers* and *Saw Pipes* need correction. On some other issues, there might still be a need to investigate further. But is it prudent to let the arbitration regime suffer in the meantime?

The author suggests that the law ministry must introduce a Bill to amend the provisions that will nullify the damaging effect of these decisions. In the meantime, the ministry must also set-up an expert committee consisting of wide representation to suggest other amendments to shape up the Indian Act, which could find place in a second phase of reforms. The second phase should also consider implementing amendments made to the Model Law in 2006,[215] which surprisingly find no mention in the Consultation Paper.

In the final analysis, there is a positive and a negative conclusion to make of the Consultation Paper proposals. The positive one is that unlike the Law Commission draft Bill of 2001, the Consultation Paper does not seek to disturb the fine equilibrium of the 1996 Act; it intends to refine it. The negative is that despite having taken over 4 years to come up with these proposals, the ministry has failed to conduct a penetrating analysis of the problems it seeks to address. Also, on the issue of methodology, it does not break any radical ground—the ministry has failed to constitute any expert committee with academicians, practitioners and arbitrators of both domestic and international repute—and

[214] See Special Correspondent, 'Reforms Could See Disposal of Cases in Three Years' *The Hindu* (24 June 2011) <http://www.thehindu.com/news/national/article2129739.ece> accessed 20 November 2011; see also Times News Network, 'For Court Infrastructure, Centre Increases its Share by Rs 2,000 cr' *Times of India* (24 June 2011) <http://timesofindia.indiatimes.com/india/For-court-infrastructure-Centre-increases-its-share-by-Rs-2000-cr/articleshow/8970474.cms> accessed 20 November 2011.

[215] See GA Res A/61/453 (2006) <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/a61-33-e.pdf> accessed 20 November 2011 (adopting the 2006 amendments to the Model Law).

sticks to traditional methods of legislative drafting that have proved to be ill suited to the task at hand in the past.

The work of amending the Indian Arbitration Act needs to be a restrained exercise. The successful use of a statute depends as much on the legislation as on the actors.[216] Therefore, it would bode well for the arbitral regime in India if the draftsmen at the ministry keep in mind that sometimes, 'the true problem is precisely the opposite one: the fact that, when we observe a thing, we see too much in it, we fall under the spell of the wealth of empirical detail which prevents us from clearly perceiving the notional determination which forms the core of the thing'.[217] The exercise of amending the Indian Act is not a Copernican revolution but a Ptolemization[218]—where the legislature merely should do that which facilitates arbitration 'become in order to be fully what it is'.[219]

[216] The author is reminded of Lord Bingham's advice on introducing the 1996 English Arbitration Act, '[T]he success of the Act will depend on these tools being skillfully used to fashion the product for which they were designed. This means, above all, that they should be knowledgably used, with an understanding of their origin, and of why they were designed as they were'. See The Rt Hon The Lord Bingham of Cornhill, Lord Chief Justice of England, *Foreword to Bruce Harris, Rowan Planetrose, and Jonathan Tecks, The Arbitration Act 1996: A Commentary* (1st edn, Blackwell Science 1996).

[217] See Slavoj Zizek, *The Sublime Object of Ideology* (Verso 2008) xi.

[218] ibid, Zizek calls change or supplement of a discipline within its current framework as a process of Ptolemization, inspired by Ptolemy's earth-centered astrology; and a process that seeks to change the basic framework itself is referred to as Copernican revolution.

[219] Zizek (n 217).