JETIR.ORG ISSN: 2349-5162 | ESTD Year : 2014 | Monthly Issue
JOURNAL OF EMERGING TECHNOLOGIES AND INNOVATIVE RESEARCH (JETIR)
An International Scholarly Open Access, Peer-reviewed, Refereed Journal

NEED & EFFICACY OF COMMERCIAL ARBITRATION IN INDIA

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CHAPTER 1- INTRODUCTION

1.1 Introduction

Nowadays, arbitration is referred as one of the popular method for resolution of international commercial disputes. Even parties want their matters to be settled early which cannot happen in litigation as it is regarded as age old court system. Generally, parties also want to settle disputes with such a mechanism which involves less procedural formalities. These are the reasons that parties[1] are opting for arbitration as a private dispute settlement method and with the help of this alternative parties can easily conduct hearings without going to court and parties have certain liberties such as choosing of arbitrator who are having experience with respect to arbitral proceedings. When we compare both these methods litigation and arbitration then arbitration is referred as settlement method which is conducted privately where entire proceedings is based on the parties consent. Therefore, the term ‘party autonomy' have certain liberties such as choosing of arbitral institution, conduct of proceedings, and choosing of arbitrators etc.

Therefore, it can be said that procedure of arbitration operates according to party autonomy and with the help of this doctrine parties can at any stage decide whether they want the jurisdiction of courts and can settle their disputes with the help of arbitration with respect to arbitration agreement. Here parties are the sole authority of their proceedings. With this principle parties can easily control all the aspects of arbitration. Due to the above stated arguments, it is quite obvious that ‘parties autonomy' is completely based on ‘freedom of contract[2]’ and it is also referred as important aspect of arbitration. This principal party autonomy allows the parties[3] to meet with their aspirations without any external or internal interference. When it comes to drafting of arbitration agreement then

[1] Anoosha Boralessa, “The Limitations of Party Autonomy in ICSID Arbitration” (Rev. Int’l Arb, para 253, para 266) (2004).
[2] Thomas E. Carbonneau, “The Exercise of Contract Freedom in Making of Arbitration Agreements” (Vanderbilt Journal of Transnational Law 1189, 1189-1196) (2003).
[3] C. Chatterjee, “The Reality of Party Autonomy Rule in International Arbitration” (Journal of International Arbitration 539) (2003).

parties ensures an upper hand with respect to conduct of dispute resolution system. Arbitration involves two types of arbitration i.e., institutional or ad-hoc arbitration, where parties can decide qualifications of arbitrators, number of arbitrators, and language of arbitration which will be followed with respect to procedure. Additionally, parties need to ensure that they have a right to make modifications under arbitration agreement but that can be done before the beginning of arbitration and after the arbitration agreement has been concluded.

Thus, the principle of party autonomy is so popular throughout the world. On International basis there are certain bodies which had addressed this principle such as "English Arbitration Act, 1996, International Chamber of Commerce (ICC) and UNCITRAL Model law etc." The actual meaning of this principle is that parties have broad freedom under the procedure of arbitration with regard to arbitration agreement and this principle also ensures the protection of public interest. It was somewhere around 19th century[4] when this principle 'party autonomy' came into knowledge. The term 'party autonomy' implies upon choice of law with respect to the contract. But, when it comes to international commercial arbitration[5] this principle had broader sense and meaning. This principle party autonomy is not only restricted to opting for law but also includes powers related to arbitral proceedings. This fact cannot be declined that this principle always used as a rule with regard to the international commercial arbitration. This principle also subject to certain restrictions. In order to under this principle one must understand the nature and role of party autonomy.

The concept autonomy comes from politics, but it has found a lot of use in law[6] as a result of the growth of interdisciplinary research. In law, the term autonomy refers to a qualified civil subject. In this scenario, eligibility applies to a person's ability to carry out civil justice. is able to make decisions and control its own rights and responsibilities without being disrupted.

The concept of party autonomy primarily refers to free will in relationships between private parties, in the sense that they are legally capable of acting without government or private intervention[7]. This autonomy (party autonomy) implies the parties' free will. To define rights and responsibilities, but also to give them the freedom to choose how they want to live their lives disagreements. The concept of party autonomy ensures that the parties would have the freedom to select the relevant laws/rules to this settlement and they have the right to freely resolve their disputes. In this way, others have conflated the concept of party autonomy with the right to choose the rule that applies to them. As an additional point, it is important to remember that in the context of international commercial arbitration, parties have a chance with respect to party autonomy, and no one can interfere in the path of parties refers while opting for the substantive law, even though this is not how the term is typically used. A more inclusive definition of parties' sovereignty in the context of this term would be the parties' power to independently negotiate all parts of

[4] Dicey, Morris and Collins, "The Conflict of Laws", para 32-004 (14th edn, Sweet & Maxwell) (2010).
[5] Andrew Tweeddale and Keren Tweeddale, "Arbitration of Commercial Disputes" (Oxford University Press, 2007).
[6] M. Zhaohua, Party Autonomy, "Private Autonomy, and Freedom of Contract" (Canadian Social Science 212, 2014).
[7] H. Liang, General Principles to Civil Law, p.156, 1997.

an international arbitral settlement.[8] Lord Mansfield accepted the concept of party autonomy in a common law country for the first time in Robinson v. Bland in the 18th century. It is a seminal case that is credited with establishing the concept of party autonomy in the United States. The rule of England. Lord Mansfield claimed in the court's opinion that the parties had a view according to English law. Basically, Lord Mansfield meant that the rule will be applied on the basis of the transaction where the parties came into an agreement between them only that country's law will be applied and if then also parties do not agree on that then in that case matter can be referred to the Arbitral Tribunal

Nonetheless, Friedrich Carl von Savigny's contribution to the general acceptance of the party autonomy theory in Europe today is credited in large part to his work in the nineteenth century. The presumption of generality was Savigny's key contribution to this issue. He developed concrete conflict rules for international contracts based on these premises. Savigny began with the general principle of option equality. Despite the fact that this was not Savigny's original idea, he believed that parties should be able to assign the rule that governs their contract. Conflict rules, according to Savigny, must be impartial, meaning they cannot be tied to specific persons, states, or laws.[9]

According to Savigny's theory, the law of the state in which the parties to a legal dispute reside determines the nature of that dispute. In cases where the parties live in different states, however, the law of the state in which the transaction takes place is deemed to apply.

Savigny, however, did not want things to be completely up in the air, so he drafted a presumption to apply in the event that the parties' intentions were not crystal obvious. Savigny reasoned that the law of the place of performance would prevail in the case of a dispute since it is the law that the parties would have intended to use. This gathering Lastly, Savigny argued that reasonable choice-of-law methods should be employed wherever they are available. Rules should be suspended if they conflict with public regulations and laws.[10].

According to the Secretary-General, the right of the parties… to adapt the 'rules of the game' to their particular needs[11] is probably the most relevant concept on which the Model Law should be based. As a result, as one of the most important foundations upon which this law was established, the entire scheme of the Model Law allows for a broad scope of party autonomy. The theory of party autonomy has been enshrined in many of the articles of the New York conventions. Here parties have an opportunity in context of international commercial arbitration agreement to select, even tailor, their own applicable law or several applicable systems with reference to the model law. Furthermore, one of the Model Law's distinguishing features is that it provides for very small and well-defined instances of judicial interference in arbitration proceedings. This is owing to the drafters' attempts

[8] E. Friedler, "Party Autonomy Revisited A Statutory Solution to a Choice-of-Law Problem" 37 (Kansas Law Review 471, 1988-1989).
[9] M. Reimann, Savigny's "Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century" (39 Virginia Journal of International Law 571, 1998-1999.
[10] F. Juenger, "A Page in History" (35 Mercer Law Review 419, p.448-454, 1981.
[11] UN, "UNCITRAL Report of the Secretary-General on the Possible Features of a Model Law of International Commercial Arbitration" (XIII Y.B. UNCITRAL, U.N. Doc. A/CN.9/207, p.78, 1981.

to strike a proper balance between national courts and foreign courts and adjudication as well. For this reason, Article 5 of the Model Law declared unequivocally that [n]o court shall interfere in matters regulated by this law except where so given in this Law. The Model Law goes on to detail the circumstances under which a court (of a State that has adopted the Model Law as its national or international arbitration law) can interfere in an arbitration. Furthermore, the Model Law states that such functions must be conducted by the court or a designated authority [12].

The Model Law aims to create a connection between national courts and arbitrations that is more of an assistance/supervisory nature than a dilatory one by limiting the role of courts to such narrowly specified cases.

Given the importance of the arbitration agreement as a symbol of the parties' independence, it is crucial to determine the validity and worth of the arbitration agreement in order to evaluate the role and extent of the parties' independence in the arbitration process. It's important throughout the whole of an arbitration case.[13]. A binding arbitration arrangement is one in which at least two parties consent to have their dispute resolved by arbitration. According to the English Arbitration Act, an arbitration arrangement is an agreement to apply to arbitration current or future conflicts.[14]

There are two types of arbitration agreements a binding arbitration agreement and a nonbinding arbitration agreement.

1. Acceptance of the submission

2. There is an arbitration clause.

As per the provision of these international bodies such as Model rule and New York stipulate that arbitration agreements must be written. The first and foremost requirement of these international arbitration bodies is that an agreement needs to be in writing. The next requirement with respect to an arbitration agreement is that it should be maintained in specific format and the first format which is accepted for arbitration[15] agreement is that it can be in the form of telegram or it can also be placed in the form of e-mail or there are various other formats and these are basically sent electronically. The provision of arbitration requires that an arbitration agreement will be accepted only when it has been acknowledged and undersigned by both the parties, according to the New York Convention. Exchange of letters or telegrams is permissible in lieu of being in writing. When modern communication devices are taken into account, however, this condition should be relaxed. Model Law is used to explain the law.

[12] Articles 11, 13, 14, 16, and 34 of the Model Law.
[13] Tweeddale and Tweeddale, "The Reality of Party Autonomy Rule in International Arbitration" (20(6) Journal of International Arbitration 539, 540) (2003).
[14] English Arbitration Act, 1996, (Act of 1996).
[15] Redfern and Hunter, "The Reality of Party Autonomy Rule in International Arbitration" (Journal of International Arbitration 539, 540, (2003).

The second requirement in case of arbitration agreement is about that relationship which arise legally, and the next thing which is noted in agreement is that parties are bound by the provision of contract or not, according to the second provision. As a basis for arbitration, there must be a contractual agreement between the parties.

The third requirement in the context of international arbitration agreement is concerned about the subject matter and must be capable of being settled by arbitration, as stipulated by both the New York Convention and the Model Law. Arbitration is a private method with public implications, which is why this provision exists. In this context, national law or judicial authority[16] prohibits certain disputes from being resolved by arbitration. Public policy underpins the problem of arbitrability. In general, family law and criminal law issues are treated as matters of public policy, and hence cannot be resolved by arbitration.

The agreement's parties must have legal capacity to enter into it, according to the fourth re-requirement.

1.1.1 Survey of Literature

Books

A Guide to the UNCITRAL Arbitration Rules, C. Croft, C. Kee and J. Waincymer (2013)[17] This book gives a thorough description of the UNCITRAL Arbitration Laws, reviewing each of the rules' articles and offering practical advice for practitioners.

A Practical Guide to International Arbitration in London, H. Heilbron (2008)[18] This book offers a brief introduction to the practice and procedure which is applicable to the English law, and apart from this it also provides knowledge and practice of the conduct arbitration proceedings and these proceedings are applied in accordance with the procedure of arbitration act of 1996. It is applicable for arbitrations with a seat in London.

Arbitrability International & Comparative Perspective, L. Mistelis, S. Brekoulakis (2009)[19] Not every conflict is arbitrable, or it also provides alternative which can be sort with the help of procedure of arbitration. The main objective of this book is to operate the doctrine of arbitrability in accordance with the International conventions such as Model law and New York, as well as the limitations of arbitration in particular types of disputes, such as tax and insolvency disputes. The book is well-written, despite the fact that it is largely academic in nature.

There was one renowned author R. Merkin, L. Flannery who published his book in the year of 2014 When this book was published it came with relevant procedures and rules which are used in the English Courts of Arbitration, explores in depth the English legal system in accordance with the year of 1996, and it also follows the procedure of International convention such as Model law and New York Convention. This book also talks about

[16] Laurence Shore, "Defining 'Arbitrability" (New York Law Journal) (15 June 2009)
[17] C. Croft, C. Kee and J. Waincymer, "A Guide to the UNCITRAL Arbitration Rules" (2013).
[18] H. Heilbron, "A Practical Guide to International Arbitration in London" (2008).
[19] L. Mistelis, S. Brekoulakis, "Arbitrability International & Comparative Perspective" (2009).

the arbitration procedure which is followed according to English law and which is applied both domestically and international basis as well and also talks about the matters concerned with seat of arbitration in England.

There is a book known as Advocacy which is followed under arbitration in recent times which is written by A. J. van den Berg in the year of 2011[20] When this book was published in the year of 2011 it was found that there are certain professionals who have great experience in the field of arbitration and also focused on the social issues which are linked with investigation purpose, and these professionals also focused on the functions of media in relation to the general issues, and also focused on the functions of witness and the practice of arbitral awards. These number of discoveries under this book are found to be the relevant document for arbitrator.

There is very popular book on International Contracts, written by J. Frick which was published in the year of 2001[21] Though this book is said to be very popular but also lack some of the provisions cited by many scholars, and the author of this book also throws light on the disputes which are complicated internationally and which are solved in accordance with the application jurisdictions.

Arbitration Law of Canada Practice and Procedure, J. Casey (2012)[22] Centered on both federal and provincial law, this book offers a good guide to arbitration practice and procedure in Canada.

Arbitration of International Business Disputes, W. Park (2012)[23] this book, written by Professor William W. Park, offers an overview of arbitral practice and practical standards, reviewing a range of international arbitration jurisprudence from around the world.

Arbitration Rules-National Institutions, L. Mistelis, L. Shore (2010)[24] while other books go into greater detail about institutional arbitration rules, but the main intent of this book is to provide an actual picture of the procedure and practice of arbitral institution which is followed in Australia, Dubai, Japan and Serbia. If there is any issue with regard to the use of arbitration procedure then that person can refer this book in context of international countries.

"A Guide to the ICC Rules of Arbitration, Y. Derains, E. Schwartz (2005)"[25] This classic book contains extensive article-by-article commentary and these articles are based on the rules provided by International body such as ICC which stands for International chamber of commerce, and apart from articles it also provides for certain other discussions which are made by the international and national courts and also provides for references related to arbitral awards. But this book sought for certain modifications but on the other hand it also provide help when the case is regarding rules of arbitration.

[20] A. J. van den Berg, Advocacy (2011).
[21] J. Frick, International Contracts (2001).
[22] J. Casey, Arbitration Law of Canada Practice and Procedure (2012).
[23] W. Park, Arbitration of International Business Disputes (2012).
[24] L. Mistelis, L. Shore, Arbitration Rules-National Institutions (2010).
[25] Y. Derains, E. Schwartz, A Guide to the ICC Rules of Arbitration (2005).

"A Guide to the ICDR International Arbitration Rules, M. Gusy, J. Hosking and F. Schwarz (2011)"[26] With the help of this book one can easily take a glimpse into the aspects of International Commercial Arbitration. Under this book there are various articles which are applied in accordance with the reference of International commercial arbitration and also provides for other aspects related to international arbitral institutions.

"A Guide to the LCIA Arbitration Rules, P. Turner, R. Mohtashami (2009)"[27] This book covers the procedural aspects of arbitration which is followed in London Court of Arbitration, and this book got the special preference internationally when it was published. This book contained relevant provisions and also provide for an appropriate study of each and every aspect with regard to the arbitration.

"Carbonneau on International Arbitration Collected Essaye, T. Carbonneau (2011)"[28] from the perspective of eminent professor and arbitrator Thomas Carbonneau, this scholarly tome examines important factors under the procedure of Arbitration these are described as nature and scope of court system and also deals with the judicial systems as well.

"Comparative International Commercial Arbitration, J. Lew, L. Mistelis, S. Kröll (2003)"[29] This is one of the great book in the history of international arbitration and the purpose of this book is very broad. This book explains the complete overview of the conduct of arbitration, appointment of arbitrator, governing law of arbitration and how parties opt for the arbitral institution. This book is preferred mostly when it comes to procedure of arbitration and arbitral awards.

"Comparative Law of International Arbitration, J.-F. Poudret, S. Besson (2007)"[30] This revised edition is a very good sample in order to understand arbitration in different countries and this book is available in all over the world. This book covers all the aspects of litigation and anybody can refer this book when it comes to litigation purpose. This book also focuses on the conduct of international commercial arbitration and it takes to conduct, execute and termination of arbitral tribunals and awards which is explained in the form of comparative study.

There is one book which is known as complex arbitrations where issues and contracts are explained between two or more parties and the author of this book is Hanotiau who published this book in the year of 2006[31] The background of this all about how contracts are conducted and between two or more parties when any dispute arises due to agreement and this book also covers other aspects such as relation between states and companies as well. In this book it has also been explained at which stages parties or claimants can join the proceedings with respect to

[26] M. Gusy, J. Hosking and F. Schwarz, International Arbitration Rules (2011).
[27] P. Turner, R. Mohtashami, LCIA Arbitration Rules (2009).
[28] T. Carbonneau, International Arbitration (2011).
[29] J. Lew, L. Mistelis, S. Kröll, Comparative International Commercial Arbitration (2003).
[30] "J.-F. Poudret, S. Besson, Comparative Law of International Arbitration (2007).
[31] Hanotiau , complex arbitrations (2006).

the agreement and how far this book is valuable for advocates, companies etc. With the help of this book one can easily refer in the stage of proceedings before or after the trial.

This book is written by "A. M. Steingrube in the year of 2012" and this book highlights the Consent aspect with reference to the International Arbitration[32] The main intent of this book is to explain how concept of concept plays an important role when it comes to international arbitration and if consent is absent no proceedings can be continued and the arbitrator will not able to perform further. With the help of this sample of this book one can easily had an idea how far consent is need in relation to the agreement between the parties and that consent should not be given any undue influence or pressure otherwise the agreement is said to be void.

Electronic Disclosure in International Arbitration, D. Howell (2008)[33] The book examines e-discovery in the light of international arbitration and offers advice on e-disclosure from both a common law and a civil law standpoint.

"Fouchard, Gaillard, Goldman on International Commercial Arbitration, P. Fouchard, E. Gaillard, B. Goldman, J. Savage (1999)"[34] While this popular treatise is now out of date, but when this book was published it was sold on a large scale because this book was so knowledgeable and covered all the aspects of international arbitration along with recent case laws and statutes as well. The presence of this book can be seen when it used by various advocates, companies and scholars etc. in their practice and for experience as well.

Guide to the SIAC Rules, M. Mangan, L. Reed, J. Choong (2014)[35] this long-overdue book, written by leading international arbitration experts, offers article-by-article guidance on the SIAC Rules of Arbitration. Anyone participating in a SIAC arbitration would find it useful.

ICC Arbitration in Practice, E. Schäfer, H. Verbist, C. Imhoos (2004)[36] this book isn't as comprehensive as Derains' and Schwartz's, but it's well-written and offers a helpful article-by-article analysis of the ICC Rules of Arbitration.

ICDR Awards and Commentaries, G. Hanessian and J. Kaplan (2012)[37] This book reviews ICDR arbitration practice, electronic discovery in international arbitration, arbitrator disclosure standards, and provides commentaries on a number of ICDR arbitral awards. It is a collection of works by many authors

This book was written by one of the great experienced authors Sabahi and Laird on the concept of Interim and Emergency Relief in the field of International commercial Arbitration which was published in the year of

[32] A. M. Steingrube, International Arbitration (2012).
[33] D. Howell, Electronic Disclosure in International Arbitration (2008).
[34] Fouchard, Gaillard, Goldman, International Commercial Arbitration (1999).
[35] M. Mangan, L. Reed, J. Choong, SIAC Rules (2014).
[36] E. Schäfer, H. Verbist, C. Imhoos, ICC Arbitration in Practice (2004).
[37] G. Hanessian and J. Kaplan, ICDR Awards and Commentaries (2012).

2015[38]. Under this book it has been explained the procedures, powers and appointment provisions of arbitrators, arbitral tribunal and other aspects such as International and National Courts and this book is very advantageous when it comes to any procedure and concept of arbitration.

This book is found to be the greatest edition of Garry Born the abstract of this book highlights upon the concept and scope of arbitration on international level and what is the procedure of selection of agreement when it comes to forum requirements and it was published in the year of 2010. This book firstly talks about the achievements of Gary Born that he is such a great arbitrator in the field of arbitration and with the help of this book Gary Born wants to explain the process of drafting benefits in the process of arbitration and also provides other mechanisms which helped in achieving resolution of disputes. Apart from drafting Gary Born had also provided certain clauses and articles in the concept of arbitration and also focused on the procedure of forum selection as well.

There was a book written by Mistelis and, Rogers who was very renowned authors in the field of international arbitration and the title of their book was on Arbitration on Commercial law which was practiced internationally and it was published in the year of 2011[39]. The author of this book thrown light on important aspects of international arbitration including conduct of Arbitration in Romania along with modified clauses. Though, this book was very costly but still people find very helpful in terms of gaining knowledge and experience.

This book on , International Arbitration and Mediation served as a Practical Guide and it was published by M. McIlwrath, J. Savage in the year of 2010[40]. This book was found to be more beneficial for advocates and practitioners as compared to in-house counsels and along with international arbitration the author of this book draws attention towards the practice of mediation.

This recent edition of J. Moore known as, International Arbitration which was published in the year of 2013[41] which deals into issues which are contemporary in nature and along with current innovations. The main objective of this book is to give an outcome which helps in dealing with current issues in reference to the international commercial arbitration. This book also provides a brief introduction to the relationship between law and sea and also deals with clauses of international arbitration and apart from this it also deals with human rights issues in international arbitration.

This is one of the most popular book on, International Arbitration which is applied on law and practice published by the author known as M. Rubino-Sammartano in the year of 2001. This book was published with revised changes and the author of this book able to benefit the number of advocates not with the book but also with

[38] Sabahi and Laird, Interim and Emergency Relief (2015)".
[39] Mistelis and, Rogers, Arbitration on Commercial law (2011).
[40] M. McIlwrath, J. Savage, International Arbitration and Mediation (2010).
[41] J. Moore, International Arbitration (2013).

the thesis and articles on web. Though, this book sought certain changes but still able to cover brief overview on practice and procedure of international arbitration.

There is one of the greatest editions of Gary Born on the concept of International Commercial Arbitration which was published in the year of 2014[42]. This edition of Gary Born focused on the comparative study of international arbitration rather than narrow study and this book can easily be accessed from the market and internet source. This book also beneficial when it comes to research and knowledge and advocacy found it very valuable and helpful in terms of practice and experience.

This book was based on Asian perspective and found to be very helpful when it comes to practice in India and other parts of India as well. The author of this book was Greenberg and Weeramantry which was published in the year of 2011[43]. Well, this book is not limited only to the concept of International arbitration but also provides references with respect to cases in the international commercial arbitration in India.

This book provides a classic overview of the concept of arbitration and arbitral process and along with that it helps in providing appointment and termination procedure of arbitrator. The title of this book was known Concept of International arbitration and the author of this book are iRedfern & Hunter which was published in the year of 2004.

Articles

The first article is based on International arbitration presented by Gilles, where he expressed his views related to rise of international arbitration and also talks about the growth of international arbitration and arbitration is preferred as default mechanism and it is also stated that arbitration is referred as a contract creature. Isn't this the most important and unbreakable law in international commercial arbitration...or is it?[44] Gilles Cuniberti's book Rethinking International Commercial Arbitration into Default Arbitration proposes that since arbitration settles the vast majority of international commercial disputes, it should be the default venue for hearing such cases. Currently, the arrangement that parties will settle their differences through arbitration rather than in national courts is the key to arbitration.

International Commercial Arbitration – Procedural Approaches[45] Civil Law versus Common Law The legal systems of Civil Law and Common Law countries will differ significantly. Typically, common law judges will let the parties present their cases to the court and then render a decision based on what they have decided to present to the court. In most civil law countries, on the other hand, the judge has greater authority and here judge possess the

[42] Gary Born, International Commercial Arbitration (2014).
[43] Greenberg and Weeramantry, Asian perspective (2011).
[44] Gilles Cuniberti, "Rethinking International Commercial Arbitration into Default Arbitration proposes that since arbitration settles the vast majority of international commercial disputes."
[45] International Commercial Arbitration Procedural Approaches.

most of the powers and played a most important role when it comes to prosecution, collecting of evidence and also includes examination of witness etc.

The third article represents the procedure of international arbitration practiced on legal terms[46] Under this article there are certain international authorities which established legal department such as Bar Association, Arbitration Courts and even ICC which stands for International chamber of commerce etc. which have the powers to regulate any sort of established codes, rules, and guidelines regulating international commercial arbitration based on common law and civil law principles. It was thought that by balancing these two great legal traditions, they would constitute a hybrid legal tradition regulating international commercial arbitration. Apart from codes and procedures certain other works are highlighted which are concerned with principles, ethics and values related to conduct of international arbitration in different countries all over the world.

There is an article termed as Harmonization in terms of practice and procedure of International Arbitration[47] This article was circulated after having certain conference headed by International Bar Association and numerous other scholars and advocates were also present when it was passed and it came somewhere in the year 2008. After this article is published it passed a resolution where it sought to formulation of rules and contents under international arbitration and proved to very advantageous for lawyers and judges as well. Many influential legal writers have written and planned to revise the concept of Jura Novit Curia in international arbitration, and state courts have provided numerous decisions on the subject. After introduced the concept there was a conference which was controlled and managed by Professor Bernardo and it was made in the Arbitrators Club which is in Scotland.

There is an article which had been referred as Where do we Stand in terms of international arbitration and Where Should we go on arbitration basis. Under this article it has been discussed recent trends with respect to international and investment arbitration and also includes the cost procedure. This article explains the basics of contract and capacity who all can enter and also explains the essential requirements to enter into international arbitration. In this article cost allocation is also explained in terms of arbitration matters. In contrast to the former assertion, this article first indicates that investor-state case law on arbitration cost allocation is moving toward acceptance of a loser pays approach, taking into account specific case law, while international commercial arbitration appears to be stuck shifting entirely or partially the…

Party Autonomy [48] The Choice of Place In this journal it had been stated that under the procedure of arbitration venue cannot always be declared for the arbitration proceedings. The Court of Arbitration, not the parties, was to determine the location of arbitration, but in practice the Court did not interfere unless there was a dispute between the parties. The ICC Rules were updated as arbitration progressed to reflect the international nature of ICC

[46] Bar Association, "Arbitration Courts and even ICC, international arbitration practiced on legal terms."
[47] International Bar Association, "Harmonization in terms of practice and procedure of International Arbitration."
[48] Party Autonomy The Choice of Place (1955).

arbitration. As a result, the 1955 Rules specifically allowed the parties to agree on the arbitration venue. Parties, on the other hand, were travelling at a snail's speed…

The second journal talks about the Comparative study and also deals with the nature and scope and limitations under the concept of Party Autonomy which takes place under international commercial contracts. In most nations, party autonomy is not formulated or enforced in the same way. Group sovereignty, or the concept that parties to a multistate arrangement should be able to agree in advance, along with certain terms and conditions. Under party autonomy state has the supremacy and every decision taken by state will be binding and this had been adopted by number of countries. This virtual unanimity at the level of general theory, however, is accompanied by major differences in the details.

The third journal is on party autonomy in the field of International Commercial Arbitration that Whether party autonomy in international commercial arbitration is found to be a Proven Fact or not? The term arbitration is preferred as first alternative to litigation in national courts for parties to cross-border disputes. In other words the parties under arbitration have liberty to make decisions independently which is provided after the introduction of the party autonomy and in this way arbitration is conducted much in number on a global scale.

The fourth journal had been linked with Party Autonomy and how it is useful in arbitration proceedings. Under this journal question arises that whether international arbitration is found to be helpful or vice versa and the another question is about who has the authority to determine that up to what extent party autonomy can be used and up to what stage. One more question was their that who will going to pass decision and what rules will be adopted while passing the judgement? Here, the importance of the term had been reflected and that term is party autonomy and this had been presented in the form of lecture by Catherine Walsh. The term party autonomy has been in discussions and generally increased over the last few decades, but there are still some limitations. It will appear that the parties' rights and interests have been secured and along with that if the law has already been imposed by the adjudicator or rules are proposed then it should be taken into force.

Party Autonomy, Repeat Appointments and 'Halliburton'[49] When a party regularly appoints an arbitrator, it poses concerns about whether that arbitrator will work without benefiting that party or, at the very least, appearing to be reliant on that relationship in a way that would impair the arbitrator's ability to make independent decisions.

1.1.2 Statement of Problem

Public policy is one of the most often encountered limitation under international commercial arbitration. There is no clear concept of public policy. However, it can be assumed that it applies to the minimum set of laws that all parties must follow. The principle of state sovereignty gives rise to this limitation, which allows each state to define the limits within which arbitration will take place. When an arbitral tribunal talks about public policy,

[49] Party Autonomy, Repeat Appointments and 'Halliburton'.

it usually applies to morality and equity legislation in the country where the award is likely to be implemented[50]. However, such an approach is discouraged because the consequences of international arbitration are much greater than those of domestic arbitration; indeed, all nations' foreign policy should be respected and held in mind[51]. This idea is influenced by each country's cultural, social, and economic traditions. A judge may refuse to administer and recognize an award if he believes it conflicts with the basic tenets of the legal framework under which the award is to be applied. It is essentially a safeguard for society as a whole, ensuring that they do not breach any universal values that fall within the purview of public policy; in reality, it is an effort to prevent parties from entering into unlawful contracts.

Apart from this there are certain other restrictions which are posed under the concept of party such as arbitration agreement, applicable laws, natural justice and Lex arbitri etc. The parties may have the freedom to determine the relevant procedural rule[52] under the lex arbitri (as in article 19(1) of the Model Law). However, institutional laws, which the parties may have included in their arbitration agreement, may limit this. Another limitation is the laws that apply. In general, the parties can select any legal framework to apply to the substance. This decision, however, must not be made in violation of law or public policy. This type of problem often occurs during the enforcement or acceptance of awards. The arbitration arrangement is the subject of the third constraint. In this context, certain disputes are not amenable to arbitration, which is also one of the arbitration agreement's validity provisions. As previously stated, conflicts involving family and criminal law, patent grants, and other public policy issues are not resolved by arbitration[53].

1.1.3 Research Questions

1. Examination of the principle of party autonomy under mixed approach?
2. How far the separability provision plays a key role under International Commercial Arbitration?
3. Does party autonomy opposes the concept of public policy?

1.1.4 Hypothesis

The report of the researcher is based on the following hypothesis-

1) Whether the concept of Party Autonomy plays an active or passive role under the study of International Commercial Arbitration.

2) The procedural problems which are kindly associated with the concept of party autonomy and public policy.

[50] Model Law, English Arbitration Act, 1996, (Act of 1996), s 103 (3).
[51] Dursun AS, ' "A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an assessment of its Role and Extent," (2012).
[52] Cordero-Moss G, "Limits on Party Autonomy in International Commercial Arbitration'," 4 Penn State Journal of Law and International Affairs 186, (2015).
[53] English Arbitration Act, 1996, (Act of 1996), s. 18; Model Law, art 11.

1.1.5 Scope of the Study

At this time, at least 150 nations recognise the notion of party sovereignty, or the idea that parties to a multistate arrangement should be allowed to agree in advance, subject to certain requirements and constraints, on which state's law would dominate their contract. The concept of party autonomy is not stated or implemented in the same manner in different countries. Notwithstanding this near-unanimity on the level of broad theory, there are significant disagreements when it comes to the finer points.

There are also variations in the public-policy standard that must be met in order to regulate party autonomy and in the country whose standard must be used in the absence of party choice against the forum state or a combination of the two.

There are significant distinctions in the interpretation of this theory and the scope of its use. Different legal systems, for instance, have different requirements for when parties may choose the applicable law, whether they can pick rules that straddle the boundary between content and practise, and whether they can pick rules published by non-state agencies.

1.1.6 Objectives

The researcher aims to examine these following aspects

- The objective of this dissertation is to critically examine the importance of party autonomy under mixed approach.
- The next aim of the dissertation is to observe the provision of separability with reference to international commercial arbitration?
- The final objective of this dissertation is to understand the relationship between how far the concept of party autonomy opposes the concept of public policy.

1.1.7 Methodology

The dissertation will be based on a particular observation of party autonomy and will also focus on loopholes under current provision of party autonomy. Under this research the method which will be undertaken is doctrinal, and explanatory method.

Under this research the researcher has collected data from both primary as well as secondary resources. Basically, the researcher has gathered data on the basis of statutory provisions and conventions. Under primary source researcher has referred current procedures with respect to party autonomy both on national and international basis. Whereas under secondary source the researcher has collected data from old and current literature, tools and web sources.

1.1.8 Proposed Chapterization

The dissertation consists of 5 chapters.

Chapter 1 consists of Introduction, Statement of Problem, Research questions, Hypothesis, Scope of the study, Objectives, Methodology and Proposed researched outcomes.

Chapter 2 deals with the commercial arbitration in India and its relevant regulations.

Chapter 3 of dissertation will provide a brief overview on the examination of the principle of party autonomy under mixed approach?

Chapter 4 of the dissertation deals with how far the separability provision plays a key role under International Commercial Arbitration?

Chapter 5 of the dissertation discuses about the relationship and how party autonomy opposes the concept of public policy?

Chapter 6 talks about the conclusion and suggestions.

CHAPTER- 2 INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA

2.1. International Commercial Arbitration in India

2.1.1. The Arbitration and Conciliation Act, 1996:

The Act of 1940 has long been viewed by many in the arbitration community to have shortcomings that render it unsuitable for present day needs. On July 27, 1977, the Secretary of the Department of Legal Affairs requested a review of the 1940 Arbitration Act to examine whether the excessive length of time and disproportionate expenses associated with arbitration hearings might be mitigated. This was done because the Public Accounts Committee had found fault with the way the Act was being implemented. In 1977, the matter was sent to India's Law Commission for further investigation. This led to the 76th report from the Law Commission of India being published in the month of November the same year.

In case of food *Corporation of India* v. *Joginderpal*[54], the Apex Court observed that, "law of arbitration must be simple with lesser technicality and more responsible to the actual reality of the situations, responsive to the canons of justice and fair play, That being the command of law pronounced by the highest court of the land it made the Law Commission as well as legislature and thinkers think over the issues rather seriously to consider amending the law."

An effort was made to promote uniform national arbitration laws across the globe under United Nations Commission on International Trade Law, observed it good, in 1985 to recommend the "UNICITRAL Model Law in respect of International Arbitration. Now it becomes necessary and vital to introduce reform in the existing law related to arbitration. Here a question was aroused that whether the aforesaid 1940 Act ought to be amended or a new law be enacted. Apart from 76th Report, various recommendations from the Indian Council of Arbitration (ICA), the Indian Society of Arbitrators (ISA), the Confederation of Indian Industries (CII), the Federation of Indian Chambers of Commerce and Industry (FICCI), the Associated Chambers of Commerce and Industry (ACCI), were proposed to introduce amendments in 1940 Act."

2.1.2 The Act of 1996 according to 176th Report of Law Commission and its analysis

The commission was tasked with analysing the effectiveness of the aforementioned Act after complaints about its operation in its 176th report. The Commission heard arguments supporting the contention that the UNCITRAL Model was designed to provide nations a standard framework within which to conduct international commercial arbitration. Some implementation challenges have arisen since the Indian Act of 1996 include provisions that are

[54] AIR 1981 SC 2075

comparable to the model legislation and makes them relevant to instances of exclusively domestic arbitration involving Indian persons.

Both domestic and foreign arbitration decisions are subject to the grounds for appeal outlined in Articles 34 and 37. In India, laymen who aren't familiar with the applicable legislation bestow several rewards to Indian nationals, hence it was claimed that the concept of least judicial intervention would be a sound one for foreign arbitral awards but shouldn't be applied so tightly to domestic arbitrations.

From the foregoing text, one gets the impression that the Indian government may ask the courts to exert more authority over domestic arbitrations involving Indian citizens. The Commission did not intend to promote an increase in judicial involvement in matters properly handled via domestic arbitration. The Model Law and the Act of 1996 already restrict judicial participation, but the Commission had advocated going far further. It was suggested that a preliminary hearing be set for all of the ongoing challenges to the award, at which time the challenges might be dropped. It was also proposed that a provision similar to Section 99 of the Civil Procedure Law be enacted to underline that awards should not be tampered with lightly until severe injury is shown. It was further contended that the complications generated by Section 36 may be avoided if the mere filing of an application to vacate an award did not result in an automatic stay of the decision. The panel also recommended that the court be given the authority to impose conditions on the enforcement of the award pending the outcome of any challenges to it.

One of the proposed additions to the list of Courts in subsection (e) of section 2 is the Court of the Chief Judge, City Civil Court of a city with original jurisdiction (1). It was expected that arbitration might take place in countries other than India according to Articles 8, 9, 27, 35, and 36. It was proposed to add "Section 8(4) so that courts could make initial determinations on issues like (a) whether there is no dispute, (b) whether the arbitration agreement is void or inoperative, (c) whether the arbitration agreement can be performed, and (d) whether there is even an arbitration agreement. The judicial authority may not decide the above issues referred to in the proposed subsection if (a) the relevant facts or documents are in dispute, (b) oral evidence is required to be adduced, (c) enquiry into the preliminary questions is likely to delay reference to arbitration, (d) the request for a decision is unduly delayed, or (e) the decision on the questions is not likely to produce substantial savings (4)."

The court will decide whether to rule on the case or send it to arbitration based on the evidence presented. For the orientation to go well, it was necessary to guarantee that all of the aforementioned prerequisites were satisfied. If the aforementioned issues can be resolved quickly and without the need for witnesses to provide oral testimony, it may be possible to avoid the costs associated with arbitration.

A number of changes were sought to be made to Section 11, with special attention paid to avoiding any unnecessary delays in the arbitration process. It was proposed that the phrases "Chief Justice of India and Chief Justice be replaced with Supreme Court and High Court in subsections 11(4) to (12), making the nomination of the arbitral panel a judicial function. It was also suggested to include Section 24B, which would have allowed the parties and

the arbitral tribunal to seek court approval for the implementation of interim orders issued by the arbitral tribunal according to Sections 17, 23, and 24."

In an attempt to maintain tight control over delays before the arbitral tribunal, amendments to "Articles 23, 24, and 82, as well as the inclusion of Sections 24A, 29A, and 37A, were suggested. Time limits for completing awards that may be extended by courts were also proposed, with the caveat that arbitration would continue until the Court's decision on the application."

For a while, there were also conflicting High Court rulings on how to apply various parts of the 1996 Act. The Commission was also made aware of various issues related to the implementation of said Act. The Commission's primary action was to draught a Consultation Paper (Annexure II of the Report), distribute it widely via the internet, and host two seminars in Mumbai and Delhi in February and March of 2001. The workshops included prominent attorneys and retired judges. There were also written notes supplied by several luminaries who participated in the seminars and offered their comments. Ideas that weren't included in the Consultation Paper were proposed and debated at length. In-depth research of the applicable legislation, with an emphasis on how other countries' legal systems see the same issue

The Commission proposed many changes to the 1996 Arbitration and Conciliation Act. The suggestions of the Law Commission of India included in its 176th Report and the Arbitration and Conciliation (Amendment) Bill, 2003 were taken seriously enough to warrant the formation of another Committee, often known as the Judge Saraf Committee on Arbitration. In January of 2005, the Committee released its final report. In addition to proposing relevant lines on which the 1996 Act may be altered to improve the arbitration system in India, the Report included a thorough examination of the Law Commission's suggestions. The government 'withdrew' the bill in April 2006 after introducing it in the Rajya Sabha.

2.1.3. Foreign Awards under Arbitration and Conciliation Act, 1996

The Arbitration and Conciliation Act of 1996 provides for the recognition and enforcement of arbitral judgements issued in other countries that are parties to the New York Convention of 1958 or the Geneva Convention of 1927. An international arbitration award may be recognised and enforced in Indian courts if it is either a Geneva Convention or New York Convention award.

In *Bhatia International* v. *Bulk Trading* the Supreme Court held that "An arbitral award not made in a convention, country will not be considered a foreign award and as such, a separate action will have to be filed on the basis of the award. The New York Convention delivers a common yardstick on the benchmark of which these agreements and awards are recognized and enforced in the countries which have accepted it. Thus, generating confidence in the parties, who may be unfamiliar with the diverse laws prevailing in different countries with which they are trading,

the arbitral agreements and awards flowing from it will be respected and enforced by the courts of the states where the enforcement is sought."[55]

In *Oil & Natural Gas Corporation Ltd.* v. *Saw Pipes Ltd.*[5], "As the interests of the parties are at stake, the Supreme Court looked into whether or not the decision might be vacated if the Arbitral Tribunal did not follow the requisite process established by Sections 28. Clause 28(a) directs the Arbitral Tribunal to make its decision in conformity with the substantive legislation currently in effect in India. The Transfer of Property Act and the Indian Contract Act are two examples of substantive laws now in effect. The issue arises, for example, whether an award may be vacated if it is made in contravention of the Transfer of Property Act or the Indian Contract Act. Similarly, in subsection (3), the Arbitral Tribunal is instructed to reach a decision in accordance with the terms and circumstances of the contract and after considering the customary practises of the relevant trade. May an award be challenged if an arbitral tribunal disregarded the provisions of the contract or the customary practises of the relevant industry? After reviewing Section 34 in conjunction with the rest of the Act, the Supreme Court concluded that it was unlikely that lawmakers intended for awards to stand even if they were made in violation of the law. The whole idea of justice would be undermined if such an award could not be challenged. It is possible to vacate an award under Section 34 of the Act if the Arbitral Tribunal acts outside of its authority by failing to adhere to the obligatory process provided by the Act. The Supreme Court also ruled that Section 34 allows for interference with an award that is clearly unconstitutional because it violates the law or the Act or the conditions of a contract."

If the court finds that the foreign award is enforceable, it will be treated as if it were a decree issued by that court. Any party aggrieved by a court's refusal to enforce a foreign award under Section 48 may file an appeal with the highest court with jurisdiction over their particular jurisdiction. Nevertheless, if the foreign award is implemented, no further appeal lies from the order granted in appeal, however this does not impact or remove the ability to appeal to the Supreme Court.

2.2. Judicial Approach towards International Commercial Arbitration in India

2.2.1. Challenges to the Foreign Awards:

Arbitration law stands on two plinths: - Independence of adjudicating parties and finality of awards. The ultimate objectivity and spirit of arbitration law are at stake if these two pillars are misled by judicial interference. The Colonial Act and subsequent legislation in 1961 created indiscriminate court interventions; the more modern Act based on the Model Law shows the significance of minimum judicial participation in arbitration in India. The idea of public policy, let alone as a basis for vacating an arbitral ruling, is nebulous. International commercial arbitration is severely harmed by court rulings that expand the scope of public policy such that the verdict may be challenged in court almost indefinitely.

[55] Gas Authority of India Ltd. v. SPIE CAPAG, S.A. AIR 1994 Del. 75 [5] (2003) 5 SCC 705

2.2.2. Intervention by Courts

The primary goals of the 1996 Act are thought to be expedited arbitration and little judicial involvement. Under Section 5 of the Act, judicial involvement is likewise prohibited. All other nations whose legal systems are based on the UNCITRAL Model have this fundamental clause. According to the 1996 Act's Declaration of Objectives and Reasons, its primary goals are to ensure that every final arbitral judgement is enforced in the same way as a decree of a civil court and to reduce the courts' supervisory role in the arbitration process. When an arbitration clause is in place, Section 5 of the Act creates a wide bar on court participation in disputes. The new Arbitration Act dramatically limits the involvement of the court in the arbitration procedure, the arbitrator's ruling, and the award, as compared to the 1940 Act.[56]

2.2.3. Post Bhatia Case Mystery

As a result of the Bhatia case, which held that an Indian court might issue interim orders prior to the commencement of arbitral proceedings, many petitions for interim relief under Section 9 have been made in Indian courts in connection with arbitrations situated elsewhere in the world.

The Court made no exceptions for anything, save for the parties' ability to exclude Part I either explicitly or implicitly. No rules were provided for determining what constituted a implied exclusion of Article I. Given that Part I also featured crucial rules for nomination of arbitrators and setting aside of verdicts, among others, this just added extra complexity. Indian courts have recently begun appointing arbitrators in arbitrations seated outside of India "(see, for example, National Agricultural (2007) and Indtel (2008)) and permitting setting aside of foreign awards (see, for example, Venture Global (2011)) due to uncertainty regarding whether Part I had been impliedly excluded or not in particular instances (2008)."

2.2.4. BALCO & White Industries

"On the day of 6th September 2012, a Five Judge Constitution Bench of the Indian Supreme Court laid down its decision in *BALCO* v. *Kaiser Technical Services Inc."*[57] *"*The decision in BALCO came about in the context of several related cases that were referred to a larger bench of the Supreme Court by a 2- judge Bench which was unable to agree on the correctness of the Bhatia decision. A connected case which also came to be heard by the Court along with BALCO and raised the same legal issues is the famous *White Industries Case*, which as many will know resulted in the first ever BIT award against India."

The findings in Bhatia and Venture Global were overturned because the Supreme Court of the United States decided in the case of BALCO that the 1996 Act did not give it the authority to issue temporary restraining orders in connection with arbitrations that were held in other jurisdictions or to hear objections to foreign judgements.

[56] Supra Note 25, Para 4 (v) and (vii) of the Statement of Objects and Reasons
[57] 2012 (9) SCC 552

Because of this, the Court rejected the findings in Bhatia and Venture Global. The Court ruled that the 'board' reading of Bhatia, which held that all of Part I extended to arbitrations situated outside of India, was not supported by the language of the 1996 Act. The Court found this to be the case because of the Act that was enacted in 1996.

For the purposes of determining whether or not the courts have jurisdiction over an arbitration, this decision is noteworthy since it confirms the Court's prior judgement that the seat of arbitration is the centre of gravity of an arbitration. This was a crucial stage of the procedure. The difference between the law that rules the arbitration agreement and the law that regulates the substantive governing laws of the contract is also made clearer, which is an additional benefit in India. In the past, this was a major issue. The Court has taken the position that there can be no dual jurisdiction of courts in the seat and the jurisdiction, the law of which governs the arbitrations; rather, only the court at the seat of arbitration can exercise such jurisdiction in dealing with a challenge. This may be the most important part of the document. Despite the fact that this term has been the subject of heated discussion all throughout the globe, it remains. The court in the BALCO case also gave potential witnesses a chance to present their case before the trial began. The Singapore International Arbitration Centre (SIAC) was one of the intervening parties; it argued Singapore's position on the issues by referring to Singaporean decisions on the same subjects, such as Swift Fortune (2007), Sui Southern Gas (2010), and PT Asuransi Jasa (2007), as well as amendments to the Singapore International Arbitration Act made in 2009. In particular, with regards to the scope of the judicial authority to issue temporary protective orders. The SIAC has not shifted its focus away from Indian case law. The number of cases involving Indian parties presented before the Singapore International Arbitration Center has increased by more than 200 percent during the last three years (SIAC). These cases are drawn from a wide range of economic settings, including international trade, building, partnerships, energy, natural resources, transportation, and maritime disputes. The increase in the number of lawsuits may appear less significant when compared to the increase in the amount of money at risk, which has increased by more than 140% in conflicts involving at least one Indian party over the same time period."

The Supreme Court's interpretations in the BALCO case are important, but they are limited by the fact that the Court's understanding of the law only applies to arbitration agreements established after the Court's verdict, or after September 6, 2012. One crucial feature of the case is the scope of the Court's interpretations. The Supreme Court seems to have been motivated by practical concerns and potential problems in retroactively enforcing its judgements in reaching its conclusion. This raises some intriguing considerations concerning the potential future rulings of Indian courts in litigation involving agreements that are still in existence but predate the Court's order, as well as ongoing arbitrations and litigation relating to such agreements. It also provides some intriguing possibilities for how ongoing litigation in Indian courts may be decided. It would be interesting to watch whether the parties rework their commercial contracts to include arbitration clauses purely for the goal of evading BALCO's jurisdiction.

The fact that Indian courts are not permitted to provide provisional safeguards in connection with internationally seated arbitrations raises the question of whether or not there are any other options open to parties who wish to

pursue such protective measures against an Indian party or assets located in India. This is a question that arises as a direct result of the aforementioned prohibition.

Considering the prevalence of arbitrations involving Indian parties, the SIAC Rules' emergency arbitrator provisions provide a workable solution for a case such as this one. SIAC has received and accepted a total of 10 applications as of this point, and three of those applications include Indian participation. Either the parties negotiated agreements with one another or they complied with the interim injunctive and other reliefs that were awarded in these instances.

The Madras High Court said in its decision titled Unknown (2011) that the SIAC Rules had provisions for the appointment of emergency arbitrators. Yet, debates continue to rage over the question of whether or not the rulings made by emergency arbitrators are legally binding. In 2012, Singapore made it explicit that an emergency arbitrator can be deemed a arbitral tribunal by revising Section 12(6) of the IAA. This made it feasible for such judgements, directions, or awards to be enforced in Singapore. In addition, the IAA was updated to reflect this change. Since it brings Indian policy and practise into line with the standards of international arbitration, the decision represents a significant advance in the right direction for India. As a natural result of this decision, there will be more trust in the legal system in India. In a similar vein, an approach to the law that is more standardised and consistent would, in the long run, be to the advantage of both Indian and non-Indian parties since it will make the process of dispute resolution more efficient.

CHAPTER 3- EXAMINATION OF THE PRINCIPLE OF PARTY AUTONOMY UNDER MIXED APPROACH

In human relationships, conflict is inevitable. It is undeniably widespread. This fact is quite obvious that when any sort of dispute arises between the parties with respect to the agreement that should be dealt as soon as possible and it is upon the parties which method they want to adopt in order to solve their dispute. Nowadays parties have so many options when it comes to dispute settlement with reference to the court provisions for example litigation, mediation, conciliation, early neutral evaluation (ENE), expert determination and dispute review boards etc. Under the provisions of arbitration if the parties with respect to the agreement are unable to reach up to a conclusion, then it is the duty of the court to provide administrative assistance. Today if we observe the methods of Alternative Dispute Resolution (ADR) and compare all these methods there is a kind of towards arbitration as compared to other methods of ADR. The reason behind this is advancement and also saves time and money.

Under the procedure of arbitration, it is upon the parties that they must follow the requirements of the procedure of arbitration which has been provided under the arbitration clause and apart from this requirement there are certain other requirements as well which are related to seat and venue of arbitration, which law will be applied while keeping in mind agreement between the parties and provision for selecting for the arbitrator etc.[58] Even parties will have complete control over the arbitrators, the arbitration venue, which implies that parties will have complete liberty to choose any form of terminology which will be undertaken before or after the arbitration proceedings and parties can also refer elements which are convenient for them with regard to the arbitration proceedings. This change in focus can be attributed to a number of factors, including the advantages that arbitration has over litigation. Arbitration, for example, is quicker, more private and confidential, and encourages a more cooperative environment in the settlement of disputes than litigation. In litigation, both of these are missing. One thing is also important that the arbitration is referred as a court where proceedings are conducted in a private mode and information is considered confidential. Here, under the arbitration proceedings whatever decision will be considered by the arbitration the moment that arbitration pronounced that judgement that is considered binding and it should be followed in that specific manner and that judgement passed by the arbitrator is known as award.

The mode of ‘arbitration’ is used often in order to neutralize conflicts, including those involving technology, transportation, manufacturing, matters concerned with gas industry, matters related to intellectual property rights, construction disputes, finance, corporate services, bond purchases, and also disputes related to jobs, sale and purchase of property and also covers insurance matters. Arbitration can be conducted on a national or international level. The main element in the concept of ‘international commercial arbitration' which is referred

[58] The Kaplan Lecture, “When is an arbitration agreement waived?” (27 (2) Journal of International Arbitration 105 edn., (2013).

under international transactions which can also be termed as cross-national borders is 'party autonomy' that is the essence of this report. Here, parties can easily settle their matter linked with their agreement under the supervision of their arbitrator.[59]

Under the procedure of arbitration agreement there is a first and foremost requirement of permission of the parties which is also reflected in the ideologies of Redfern and other authors. Any form of dispute settlement outside of the national courts requires consent.[60] The parties to such an arrangement agree to refer to arbitration any conflicts or differences that can interfere at any stage or there is a possibility of non-interference as well and these differences belong to established relationships which are legal in nature. Party sovereignty meant to operate functioning under the agreement which applies under arbitration at international level. This principle is considered as backbone which can intervene at any stage of the proceedings under arbitration.[61]

Mankind was not created for the legislation; rather, the law was created for humanity.[62] Acts are only justified by law if they are warranted, verified, and absolved from blame. This acknowledges that man existed before law, which arose as a form of social control in an era when liability for actions was frequently out of proportion to the actions. Similarly, the Arbitration and Conciliation Act of 1996 [The Act] was created for man, not the other way around. This raises the question What does the Act justify, legitimize, and absolve?

The Act is by its very nature liberal; it offers parties liberty and permits them to deviate from the Act's provisions in certain areas. When the law and the arbitration agreement are silent, it is up to the arbitrator[63] to lead the way. This gives for a lot of flexibility, which could explain India's strange devotion to ad-hoc arbitration. Furthermore, despite its flexibility, this system is plagued by procedural issues, inefficiencies, as well as a low percentage of effective hearings. In this light, it is crucial to consider whether the law should be permissive, restrictive, or something in between.

This is because, even if ad-hoc arbitration is cost-effective, considering the time value of money and the need of investment predictability, Institutionalized Arbitration may be more cost-effective. We've also seen cases drag on in order to induce parties to settle or at the very least postpone looming consequences. After losing the dispute, the award-debtor can try to avoid enforcement by using a loophole or prolonging challenge processes. Such circumstances should be made illegal or at the very least exceedingly unlikely by legislation.

'Abdulhay' defined party autonomy in his own interpretation where he stated that the parties' freedom to build their contractual relationship as they see fit.[64] To put it another way, it is entirely up to the parties to arrange

[59] Andrew Tweeddale and Keren Tweeddale, "Arbitration of Commercial Disputes" (Oxford University Press 256, 2007).
[60] Allan Redfern and others, "Law and Practice of International Arbitration," (4th Edn, London Sweet and Maxwell 131, 2004).
[61] Jamshed Ansari, "Party Autonomy in Arbitration A Critical Analysis" (2014).
[62] Law Commission of India, "Need for Justice-dispensation through ADR etc.," 222nd Report, 9 (Apr. 2009).
[63] § 2(l) (d)The Arbitration & Conciliation Act, No. 26 of 1996
[64] Abdulhay, S., "Corruption in International Trade and Commercial Arbitration, (London United Kingdom Kluwer Law International, 2004) 159."

their arbitration arrangement on their own, with no outside influence. The concept of party autonomy is accepted by the UNCITRAL Model Law, which has been adopted in its entirety or with modifications by several countries, including Australia.

The concept of arbitration deals with numerous conditions and one of the significant condition which is applied mainly is that whatever will take place under the contract between both the parties that must be based on a written submission, and that submission must state how both the parties enter into contract and under what circumstances which should be produced in a specific manner. Here, parties can easily enter into contract and they have complete liberty and no one can interfere under their contract because the concept of party autonomy provides this opportunity. Under the concept of international commercial arbitration the concept of 'party autonomy' is not limited in nature. Therefore, it has provided by Russian Federation that under the 'law of Arbitration'', one of the key aspects taken into consideration is an 'arbitration clause' and that is linked with such form of arrangement that is independent of the contract's other terms and conditions other than the parties' will.

Therefore, the main objective of this research is focus on the principle of 'party autonomy' and emphasize how this principle or doctrine plays a dominant role and also considered as most important factor around the world under arbitration at global level, and one next issue which has been striking in everybody's mind is that whether the degree of a 'independence or autonomy of parties' under the concept of arbitration has not yet solved and has become as issue of discussion. There was one other issue which deals with that in order to form a legal agreement which is binding upon the parties what are the factors that are involved? In commercial arbitration, how far does the concept of party autonomy go? Or whether parties should compromise to whatever they want, whenever they want, are issues that have yet to be resolved?

3.1 Importance of Agreements Related to Arbitration

A valid arbitration agreement requires at least some connection between the parties. Several other justifications have been advanced in light of the agreement's relevance in arbitration processes. This firstly demonstrates that the parties have the power to choose the means of dispute resolution and have chosen arbitration over litigation. According to Odoe, an arbitration agreement is a binding promise to utilise arbitration to settle any and all issues between the parties, including those that occurred in the past and those that have not yet arisen. This means the parties have a lot of leeway in deciding how to resolve disputes when they draught an arbitration agreement.[65]

The clause of arbitration states that with the help of parties agreement derived the sovereignty. Secondly, party autonomy also allows both the parties with regard to arbitration agreement to set certain provisions which is beneficial for themselves but up to some extent and also they can adopt a suitable alternative which helps in

[65] Laurence Shore "A Critical Examination of the Role of Party Autonomy In International Commercial Arbitration and an Assessment of Its Role and Extent" (2015).

achieving their desires. Third, judges are prohibited from settling disputes because settlement is in the hands of parties and arbitrator and the role of judges is to pass the judgement. In the matter of arbitration any of the party files any complaint related to those issues, the party who has been involved can raise their issues with regard to jurisdiction of the courts and such jurisdiction can also be waived. Even if the parties agree with regard to waiving of arbitration agreement directly or indirectly, then also courts cannot refer the matter for settlement based on subject matter.

Under the arbitration the most important condition which is taken into the account of arbitration agreement is approval of the parties. Their decision to appeal to arbitration must be unmistakably based on an openly entered into agreement. For example, if one of them has been persuaded to act against his will by deception, bribery, or under provocation, and the last thing which is included is that consent is not genuine which results the agreement as void. New York Convention under its article 11 stated that, Every contracting state must recognize a written agreement in which the parties agree to refer their disputes to arbitration. This clause has two implications. Firstly, this arbitration clause focusses that agreement must be conducted on mandatory basis and it should not be avoided when it comes to, commitment concerning arbitrate any disputes. Secondly, rather than another form of dispute settlement, the agreement must allow for arbitration.

Finally, ‘Arbitration and Conciliation Act' in the year of 2004 stated with respect to Section 51 clause (2) sub clause (a) that the value of party autonomy, stating, that arbitral award will be applicable only when the agreement related to arbitration will be valid and with respect to such law which has been adopted by both the parties.[66]

3.2 Party Autonomy's Sources

The theory of party autonomy, in essence, is what allows the arbitral mechanism to be flexible. The concept of party autonomy in its broadest sense emerged in the nineteenth century.[67] A contract’s choice of law determines a party’s sovereignty. The concept of ‘party autonomy' has greater meaning and scope as well under arbitration internationally rather than domestically. Here, parties have an opportunity under the arrangement of international commercial arbitration to select their own rules and even determine mode of arbitration. Further, the agreement which falls under the arbitration ensures about the rights and benefits of the parties that how to make use of their right to initiate court proceedings against another party and this right also ensures exclusion of jurisdiction. Therefore, under the concept of party autonomy the term ‘arbitration agreement' constitutes as the most powerful weapon for the contracting parties themselves and which also

[66] “Richard Garnett, Recognition and Enforcement of Foreign Awards under the New York Convention in Australia and New Zealand 25 (Journal of International Arbitration 899, 2005).
[67] Jean-François Poudret and Sébastien Besson, Comparative Law of International (para 113) (Sweet & Maxwell, 2nd Edition, 2007).

helps to determine claims of parties and due to this reason, it is also considered to be evidence under the concept of party autonomy.[68]

There are no such problems which falls restrictions in the path of fundamental principle 'party autonomy' but it is well identified by various international bodies (conventions), provisions and laws which falls under the ambit of arbitration. Therefore, arbitration agreement must deal with additional provisions in order to provide parties any option which is beneficial in terms of choice which is available under the law of arbitration and which is accessible from the international commercial arbitration where the fundamental principle provide such flexibility.[69] Whereas the fundamental principle autonomy for parties declared as the heart and soul of certain international instruments such as the "'Nigerian Arbitration and Conciliation Act', enacted in the year of 2004, 'the New York Convention'[70], 'the UNCITRAL Model Law', 'the English Arbitration Act of 1996'[71], 'the Indian Arbitration and Conciliation Act', 1996, the Ghana Arbitration and Conciliation Act, 2010[72], and 'the International Chamber of Commerce (ICC) Arbitration Rules passed in the year of 2012'[73]. That the objective of the above stated international conventions, and implemented regulations aimed to secure the provisions which have provided under the procedure with respect to express choice of law between parties. If we consider situation of international convention such as in New York, for example there is a situation where it has been provided that if the parties do not follow the award passed by the arbitral tribunal then it can be revoked on the ground of recognition by the parties."

In a similar vein, Allan Redfern and others[74] argue that tribunals under the arbitration are having least amount of scope in terms of jurisdiction which is provided for parties but on the other hand, in case of grant of jurisdiction the scope is voluntary. As a result, parties prefer arbitration as a form of dispute settlement because they want a neutral and consensual outcome. Furthermore, once arbitration proceedings initiated it is in the hands of parties that they can at the prima facie eliminate confusion and also have possibility to ensure predictability and consistency when the proceedings are at initial stage.

Additionally an objective behind provision of choice under arbitration rules and also ensure marginalization of parties are not just about violating general principles; they may also result in an award's unenforceability.[75] Under the procedure of arbitration parties also have an opportunity to grant authority to arbitral tribunals for identification of jurisdiction under specific subject matters. Incorporating an arbitration provision into an

[68] Elizabeth Shackelford, Party Autonomy and Regional Harmonization of Rules in International Commercial Arbitration (University of Pittsburgh Law Review 897, 900, vol. 67, 2006).
[69] Emmanuel Gaillard, "The Role of the Arbitrator in Determining the Applicable Law in Lawrence W. Newman & Richard D. Hill (eds), The Leading Arbitrators" (Guide to International Arbitration, 2004)
[70] The New York Convention 1958, (Act of 1958) art V (1) (d).
[71] The English Arbitration Act 1996, (Act of 1996) s 47.
[72] The Ghana Arbitration and Conciliation Act 2010, (Act of 1996) s 5.
[73] The International Chamber of Commerce (ICC) Arbitration Rules 2012, art 21.
[74] Rachel Engle, Party Autonomy in International Arbitration Where Uniformity Gives Way to Predictability 15 (Transnat'l Law 323, 341, 2002).
[75] Dursun, (n 11); Gary B. Born, International Commercial Arbitration Commentary and Materials 560 (Kluwer 2nd edn. 2001).

arrangement or a contract between parties is one way to give an arbitral tribunal authority. An arbitration agreement, according to Julian Lew, the parties have a fair chance to provide arbitral tribunals a supreme authority to rule on a jurisdiction on a dispute depending upon the subject matter but one thing which should be kept in mind that in order to access the jurisdiction of courts one must ensure whether the jurisdiction falls under the scope of arbitration agreement is valid or not and parties consent is also an evidence in these scenarios.

The right to select the governing law follows logically from the parties' agreement to adhere to a favorable form of dispute resolution. Few principles in private international law are more widely accepted as compared to the principle where parties can have an access towards the selection of governing law of contract under the arbitration agreement, which had been recognized by Arnaldez and other renowned authors. By choosing reasonable and favorable laws to apply to their dispute, it becomes very beneficial for parties in relation to the resolution of their matter rather than having proceedings which are not even in respect to their rules and procedures.[76]

3.3 The Justification for Party Autonomy

The principle of party autonomy is considered as a significant factor with respect to the arbitration at global level. The writers, Redfern and others, put it this way

In deciding the protocol to be followed in an international commercial arbitration, party autonomy is the guiding principle. It is a concept that has been accepted by international arbitral agencies and organizations as well as national legislation. The Model Law's legislative experience indicates that the idea was implemented without any interference….[77]

The International convention of 'UNCITRAL Model Law' provided that it is upon the parties that either they want to follow the procedure or not which has been provided in accordance with the tribunal under Article 19 clause 1 with in order to conduct proceedings. "Section 1(b) under 'the English Arbitration Act of 1996' states that the purpose of arbitration is to achieve the equal settlement of conflicts by a neutral tribunal without undue delay or cost and as such protections as are required for the public interest, demonstrating the reason for party autonomy. The court is also prohibited from intervening with the parties' agreement under 'Act of English arbitration' with reference to Section 1 clause (c) of the English Arbitration Act. In reference to those following words, Dursun tried to provide a situation under the situation party autonomy."

Earlier what happens that contracting parties are not ready to solve their disputes under international arbitration due to different courts where one party lives in one country and the other party belongs to another country and there exists some sort of difficulty while conducting proceedings. Furthermore, neither party wants to deal with the formalities of the legal process. But after sometime the current provisions provides ease to the

[76] Pryles and Moser, "The Asian Leading Arbitrators Guide to International Arbitration" (JurisNet, 3rdedn, 2007).
[77] Christopher R. Drahozal, "Commercial Norms, Commercial Codes, and International Commercial Arbitration" 33 (2000).

parties with the help of arbitration which provides convenient procedure while keeping both parties suitability and which also suits to their needs and wishes, such as scheduling hearings and selecting an arbitrator with appropriate experience as per disputes particular requirements.[78]

In the concept of arbitration, the above stated arguments clearly highlight the importance and scope of autonomy of parties.

3.4 Arbitration law selection

"The 1996 Indian Arbitration and Conciliation Act establishes the rules that govern the substance of a dispute.[79] The award's enforcement in national courts is likewise contingent on the application of substantive law correctly. In domestic arbitrations in India, the substantive law shall be the law in force in India. The parties to an international arbitration might choose the appropriate law to the dispute's content. The law in this context usually refers to the substantive law of the country designated by the parties.[80] If the parties do not agree on the applicable legislation, the arbitral tribunal may do so.[81] The Act also assures that the choice of law is made in a just and equitable manner.[82] In all of these circumstances, the contract conditions and trade usages that apply to the transaction are given precedence to guarantee that the applicable law is free of flaws.[83]

3.5 The freedom of the parties to choose the appropriate law Indian Perspective

The substantive law to be applied in a given case is one of the most complex aspects of international arbitration in India. In their original agreement, the parties may determine the arbitration's substantive law. In general, parties to an agreement incorporating an arbitration clause have practically complete latitude in determining the substantive law that will govern the dispute. As long as the arbitral judgement is binding, almost any substantive law chosen by the parties is enforceable.[84] The arbitral tribunal must adhere to the parties' choice of law and accurately interpret that law while deciding the dispute. The issue here is that Indian arbitrators may lack experience with international law and procedure. This will significantly disrupt the arbitration's efficiency. Unlike in international commercial arbitrations, the arbitral tribunal and the parties in domestic arbitrations do not have a voice in which substantive law will be applied to the case.[85] In all of these circumstances, the issue must be decided in conformity with the current Indian law as it applies to the dispute's subject matter. When conducting international commercial arbitration in India, the arbitral tribunal must first determine whether the parties have designated the norms of law

[78] Alan Redfern & Martin Hunter, "Law and Practice of International Commercial Arbitration" 463 (Constantine Partasides QC, 6th Ed., 2005).
[79] Section 28 of the Arbitration and Conciliation Act, 1996 (Act of 1996).
[80] Id., at 28(1) (b) (ii). "It reads, Any designation by the parties or the legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that Country and not to its conflict of law rules."
[81] "Id., at s.28 (1) (b) (iii). It reads, Failing any designation under clause (a) by the parties, the arbitral Tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.
[82] Id.,at s.28 (2). It reads, The arbitral tribunal shall decide ex acquo et bono as amiable compositor only if the parties have expressly authorized to do.
[83] Id., at s. 29 (3). It reads, In all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of trade applicable to such transaction.
[84] Notes, General Principles of Law in International Commercial Arbitration. 101. Harv.L.Rev.1817 (1988).
[85] Section 28 of the Arbitration and Conciliation Act, 1996 (Act of 1996).

of any particular country to be applied to the substance of the dispute by agreement. When the parties choose to have the arbitral tribunal use the law or legal system of a specific nation, the arbitral tribunal is bound by that legislation.

The parties seem to have settled on the substantive law of a certain nation as the law that would be applied to this dispute. A common issue in commercial contracts is whether or whether the parties' express reference to a particular piece of law is in line with general commercial principles. International commercial arbitration has lost some of its clout in the world of international commerce as a result of the growing prominence of the question of choice of law. It is crucial that the arbitrators have the right mindset and abilities to successfully deal with such difficulties. [86]

3.6 Parties who specify a national law or do not specify a national legislation

Whether or whether the parties want to define a national law is a potential source of conflict. When the parties have clearly stated the applicable substantive law of a jurisdiction, the applicability of general principles of law is constrained. The arbitral tribunal also cannot diverge from the parties' intent under certain conditions. The parties to a standard contract often stipulate which laws will govern their dealings with one another. The parties to a contract between an Indian government agency and a foreign business, for example, may have agreed to have the courts in Delhi have exclusive jurisdiction over any and all information relevant to the transaction and that Indian law shall govern the terms of the agreement. The transaction would be subject to and construed in accordance with Indian law in all respects. This similar finding was made by the Supreme Court in National Thermal Power Company v. Singer Co.

The parties may also agree to be bound by other rules, like those based on mercantile law or international trade law, in addition to those based on national law. The arbitrators shall have discretion to choose applicable legislation consistent with the interests of the parties. The agreements do not always specify the appropriate legal system. It's fairly uncommon for people to disagree on a matter of national or international law. Unlike in court, the arbitrator is not bound by the norms of procedure or precedent when deciding how to apply the law.

Parties to an international arbitration will often reach an agreement on the nature and scope of the issue to be arbitrated, as well as the procedures and rules to be used by the arbitral tribunals. But, they are under no obligation to provide the specific laws that will be utilised to resolve the conflicts. Where there is no obviously applicable law, the arbitrator may use the conflict of laws rules that the arbitrator believes to be most appropriate under the circumstances. At each of the four possible points in the resolution of a dispute—during (1) the examination of an arbitration clause, (2) the independent referral to arbitral proceedings and the method of action, (3) the arbitration procedure and the applicable law, and (4) the selection of the applicable law—a dispute may arise over the applicable law.

[86] Dr. K.I. Vibhute, "International Commercial Arbitration Some Reflections on its Problems and Perspectives," 1 S.C.C 7(Jour.), (1995).

Sometimes it's hard to tell whether a certain interpretation of an arbitration agreement is really legal. The submission may take the shape of a newly negotiated agreement between the parties. An arbitration agreement, which is typically included in a larger contract, is now widely recognised as a legally enforceable contract in its own right.[87]

3.7 International Perspective on Party Autonomy

Parties are free to select the rules that will govern the arbitral procedure, which is common knowledge around the world. The desire to escape the dramas of courtroom hearings has led parties to adopt a framework where they have access towards their liberties and as per their requirements parties can easily initiate proceedings along with the applicable rules. The theory allows parties to an international trade arrangement to select the relevant substantive rule, which then governs the parties' contractual relationship. Trade use, rules applicable to specific nations '(National law)', rules applicable to any sort of events or actions also known as '(transnational law)', lex mercotoria, rules applicable to the customs and usages also known '(merchant law)', and along with these laws there are certain other common law principles which are applicable towards law and these laws serves as beneficial for parties. International law has recognized party autonomy, and almost all national jurisdictions have recognized it as well.[88]

With the help of written texts Odoe, tried to interpret significant portions which are covered under the Act of Arbitration and Conciliation, and even some rules of international arbitration are also interpreted as well, which clearly indicate the actual and valid intent when Supreme authority to consider in effect the about the one and only doctrine that is 'party autonomy', which are applied keeping in mind the functionality of public policy.[89] Along with the most basic words, the principle which is considered often and also regarded as fundamental part under the arbitration is known as party autonomy and apart from fundamental feature party autonomy also provides authority to the parties to conduct the arbitration in their respective preferences, with the exception of oversight and implementation of the arbitral award, which the court must oversee. The related clauses of a few arbitration laws are highlighted below for clarity.

Under the national legal frameworks of nations, the rule of international commercial arbitration has undergone various changes. In addition to this the law of arbitration (lex arbitri) will affect proceedings of arbitration procedurally, whereas several procedure under the law such as jurisdiction but the main focus was to bring advancements under the model of arbitration domestically so that it will be easier to make the India as a hub and favorable seat of arbitration.[90] Along with the ratification of the Convention of NY (New York) to facilitate the execution of arbitral awards, the Model Law has figured prominently in making current arbitration legislation equally comprehensive of international arbitration.[91]

[87] "*Section 16 (a) of the Arbitration and Conciliation Act, 1996."*
[88] Raymond J. Werbicki, Arbitral Interim Measures Fact or Fiction? 57 (Disp. Resol. J. 62nd edn. 2002).
[89] See Lord Goff, "Windows on the World, in International Commercial Arbitration For Today" (John Tackaberry 6th edn. 2000).
[90] "Fouchard Gaillard Goldman on International Commercial Arbitration 47 (Emnanul Gaillad Goldman and John Sarage eds., 1999).
[91] 'Excluding the Model Law' (International Arbitration Law Review 175, 2001).

When it comes to domestic law that supports international business arbitration, the Model Law is the most extensively employed vehicle. Eighty of the 111 jurisdictions have fully adopted it, and many more have used it as a model. Although some nations have adopted the Model Law word for word, others have modified it somewhat or even enacted an entirely new statute that is otherwise indistinguishable from the Model Law.[92] Nonetheless, the Model Law has so far acted as a paradigm over several country arbitration clause, and it can be used to develop new rules of arbitration. The objective of Model law basically to bridge the gap for the simplification of legal instruments under arbitration amended around the world, even more importantly it was written to be compatible in relation to the convention passed in New York.[93] Two very different modalities keep functioning to fill alongside holes left by its opposite. Perhaps the 'Model Law' is a set of rules that governs thorny problems related to validation of judgment passed by arbitrator, compliance, along with annulment, as well as justification for appearing in court proceedings. It has been pointed out that to have an enactment up to an extreme stage law of model must exist because it is also regarded as soft law.

3.7.1 Procedure of Party Autonomy under UNCITRAL Model law

The UNCITRAL Model Law intended to propose narrow approach under the concept inherited from arbitration at international standpoint in order to reduce some burden for those courts which are established at national level and also to support the doctrine of party autonomy along with the minimum intervention of courts to enhance the will of the parties under dispute resolution system.[94] Therefore, UNCITRAL Model Law, also proposed that giving authority to the party autonomy also leads to harmful consequences towards the procedural effects of arbitration, according to Agarwal. The doctrine of autonomy was meant to provide complete control in accordance with the rules which are followed under the arbitration and which cannot be neglected and also it is the duty of the tribunal that parties do not violate the principles of autonomy.[95] But, it is also a fact that currently no specific formulation exists where it can be proved that further the Model Law's stipulations have been regarded as obligatory in nature. There seem few clauses that tend to be mandatory

Thus, under one of the Article 24 clause (2) sub clause (3) it was stated that notice of proceedings must be provided to both the parties and whatever documents will be required that must be shared to each of the parties and along with the arbitral tribunals as well, but whereas under the guidance of Article 31 clause (1) sub clause (3) it was provided that the award passed by the tribunal must contain the date and place where proceedings are conducted and another thing which is to be taken into account that the award passed while arbitration needs to be formulated in written mode and this should kept in mind by the parties while meeting with the requirements of arbitration.

[92] Pieter Sanders, Unity and Diversity in the Adoption of the Model Law, (11 ARB. INT'L 1, 1 (2011)."

[93] Cordero-Moss, Risk of Conflict between the New York Convention and Newer Arbitration, 267 (American Review of International Arbitration, 7th edn. 2012).

[94] Foreign Awards and the New York Convention' 259 (Arbitration International publishers, 60th edn. 2003).

[95] Anurag K. Agarwal, Party Autonomy in International Commercial Arbitration 7 (India Research and Publications, Indian Institute of Management, Ahmedabad, May 2007).

Under the procedural rules of Article 7 clause (2) it was stated that whatever took place between the parties under the arbitration should be maintained in writing, and under Article 18 it was proposed that equality should be monitored during the conduct of arbitral proceedings along with the fair opportunities to the parties to present their case.

"*Without the aforementioned conditions, any award which is made pursuant with regard contracting parties in compliance to the arbitration agreement that award shall be deemed as refused recognition along with compliance. Subject to the provisions of this statute, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, as provided by Model law keeping relevancy as important source under Article 19 clause (1). Whereas part 5 clause (1) presented under the guidance of 'Model law', where it tries to explain in the form of example, under which it states specific stipulation no court shall interfere in matters regulated by this law except as so specified in this law*.[96]"

The nature, scope and flexibility of the procedure of party autonomy is well stated above with the help of arbitration at global level. Under the established rules if in certain situations parties failed to comply with any law then it is the responsibility of the arbitrator to help in usage of specific law which is followed in their countries. The arbitrators are also required to apply dispute rules; they are not permitted to apply substantive law directly. Unless the parties agree otherwise, there exist some preferable Articles where most of the phrases begin from unless otherwise decided by the parties in accordance with the provisions stated by UNCITRAL. Therefore, it is provided that interpretations mentioned before are not relevant in context of existence with regard to phrases. These phrases also meant that it is not necessary to refer every article. As a result, parties are unable to decide what should be considered firstly due to uncertainty under provisions.[97]

The Model law of UNCITRAL is applicable to the doctrine of 'party autonomy' under Article 34 where UNCITRAL deals with the procedure of annulment in relation to the arbitral awards of the Model Law, but there are following conditions which need to be met The party filing the application must note that it must lead to either composition or violation in terms of agreement in accordance with the arbitral tribunal or under certain conditions it can also leads to violation with regard to the Modern provision of UNCITRAL and under that situation the parties do not have any option to derogate further. These clauses impose functional limitations on the parties' autonomy, which will be addressed later.

The UNCITRAL Model Law, in Article 4, states that a party has the right to object to noncompliance with a provision, and that this right applies both to obligatory and nonmandatory clauses. If the Model Law does not provide such appropriate recommendations, what rules would be in effect? According to the legal doctrine of party autonomy, each party has the right to raise an objection throughout the arbitration process, and this waiver is intended to ensure that any such objection is raised with the agreement of both parties. Taking into account a

[96] See G Hermann, the UNCITAL Arbitration Laws A Good Model of a Model Law, 320 (UNIFORM L. REV. 483, 485, 1998).
[97] *Ibid*.

possible situation in light of Article 19 of UNCITRAL, which governs the process for commencing arbitral proceedings and where the parties are also treated equally. Without this provision, arbitral tribunals may only conduct proceedings if doing so is deemed necessary. Nonetheless, parties must depend on procedural formalities in order to escape the effects of the aforementioned article; otherwise, they must confront certain requirements that are obligatory in nature.

3.7.2 'Party autonomy with reference to International Chamber of Commerce (ICC) 2012'

Under the arbitral rules of ICC parties have liberty to refer statute where arbitrators meet linkages in connection with rules and subject matter of disputes. But when parties failed to provide any such rules then arbitrators try to figure out applicable rules which are considered suitable.[98] The arbitrators' only condition is that the implementation of the chosen dispute rules be deemed reasonable in the given situation. The word suitable implies that there had to be some kind of excuse or reference to the particular situation. The arbitral tribunal must also consider the contractual provisions, if any, as well as any applicable trade practices.

The ICC Arbitration Rules follow the same protocol as the New York Convention for resolving disputes. This process could result in a final judgement by the tribunal whatever mode parties have chosen with respect to their dispute. Therefore, ICC Rules are designed to ensure that the dispute resolution process is transparent, effective, and equitable, while also allowing parties to choose several aspects of procedure.[99]

[98] ICC Arbitration Rules of, art 21 (1) (2012).
[99] Id. ICC Arbitration Rules, (2012).

CHAPTER 4- HOW FAR THE SEPARABILITY PROVISION PLAYS A KEY ROLE UNDER COMMERCIAL ARBITRATION

4.1 Introduction

A submission arrangement, unlike an arbitration provision, is self-evidently separate from the main contract between the parties.[100] In this context, the submission agreement's success is entirely separate from the parties' main contract. But if the submission arrangement is compared with the major from of contract and it has been intended for resolution of conflicts resulting from that contract, it is a separate agreement with its own presence (as opposed to arbitration clauses that are not physically separate).

The chapter then proposes a study which is based on the applicability in relation to separability provision which is applicable upon the relationship of contracting parties' agreement for the purpose of adjudication. Lastly, if we go into the depth of this chapter discusses about the common misunderstandings with regard to principle of '(s)eparability' including its applicability along with the settlement of disputes while adopting this principle. To that end, this chapter looks at how the New York Convention and the Model Law define and regulate the separability assumption. It also examines the ramifications of using separability in international commercial arbitration.

4.2 Arbitration Agreement Separability

In general, the relationship of the position which falls under major contractual obligation along with the provision followed under adjudication within it may be perplexing. This section examines the concept of principle of 'separability', along with arguments, and even such terms are referred for the purpose which is relevant to clear up any misunderstanding.

4.2.1 Definitions provided by authorities

The French court's Gosset judgement was widely regarded as a landmark ruling in legal history. The court reaffirmed the norm that in international arbitration proceedings, the arbitration agreement... always has, unless in rare circumstances, a full legal autonomy, prohibiting it from being influenced by the probable invalidity of that act..[101]

The purpose and definition of the separability presumption have been discussed by many commentators and authorities. The arbitral provision is autonomous and juridical separate from the main contract in which it is contained, according to one international arbitral award.[102]

According to this report, separability clearly refers to the arbitration clause continued validity in the face of weakness where arrangements of contracting parties are affected or possibility of may affected but it depends upon

[100] J. Michaelson and G. Blanke, "Anti-Suit Injunctions and Recoverability of Legal Costs as Damages for Breach of An Arbitration Agreement," Kluwer Law International, 7(4) Arbitration 12, (2008).
[101] "Ets Raymond Gosset v. Carapelli, JCP Ed. G 1963, Judgement of 7 May 1963, at p.13 (French Cour de Cassation civ. 1e).
[102] Final Award in ICC Case No. 8938, XXIV YCA 174, (at p.176, 1999).

the relationship of parties where such agreement with regard to separability gets reprimand then in those scenarios where such defect arrives. Judge Schwebel states, The parties to an agreement with an arbitration provision really engage into two agreements, with the "arbitral twin" surviving whatever infirmities the "main" agreement may have had at birth or during the course of its existence.[103]

The meaning of the separability presumption, according to a few commentators, is all about value related to arbitration provision but such provision does not come into the proximity of the major contractual obligations, or conversely.

4.2.2 Reference to Separability

While, moving on to that issue of the principle of 'separability' on an international scale, there arrives a situation of such mark where it highlights about the principle of separability which is dealt into more detail. When one gets into the concept of separability then it is pointed that such principle is referred to into two ways. The distinction falls under the applicability of common regulation as well as under civil regulation. Historically, 'separability' seems to be that terminology which areas of law tend to favor, reflecting related to genesis of the major contract as well as restricting the application for the arbitration clause being distinct related to nothing extra but the basic signed agreement.[104] While comparison, it was discovered that under proximity of civil regulation these terms were widely reference autonomy or freedom to refer to separability. Therefore, provinces based on civil procedure intend to represent such significant emphasis which is based upon the framework externally on legal basis commonly considered into the concept of arbitration from international standpoint and even suggesting the more robust implementation for distinction which is not only applicable to dispute resolution arrangement and the contract that underpins the framework of adjudication and the underlying contract, even also between enforcement measures conducted under Nations and adjudication.

To that end, this study believes that the word separability presumption is more correct than separability generated a doctrine. If the parties believe regarding their procedure of arbitration is not similar as compared to the terms of the contract, further the expression implication emphasizes the participants' willingness more clearly.

If this study had to choose between the two words, 'separability' would be the clear winner. The term autonomy or independence refers to how closely the arbitration agreement is connected with the obligations of the contract. Generally, the procedure followed under arbitration tends to be more of a supporting and ancillary feature to the underlying contract. Therefore, it resulted in while the arbitration agreement should be kept separate from the contract in which it is included, but it cannot be said that the agreement is completely autonomous here as matter of fact of that relationship, although this discussion indicated. Well this should be kept in mind while dealing with separability because it focuses upon the emphasis on the parties' purpose of forming an arrangement which is relevant under the arbitration derived from the major terms of the contract, but it should be different from such

[103] S. Schwebel, International Arbitration Three Salient Problems, (at p.179, Cambridge University Press, 1987)."
[104] "Westacre Inv. Inc. v. Jugoimport-SDPR Holdings Co. Ltd [1998] 3 A11 E.R. 570."

arrangement which is not even included under legislation domestically but under some extrinsic crucial aspects which must be interpreted in a specific way.[105]

After all of that, this study concludes that controversies about proper labelling provide no benefit. In fact, it all boils down to the parties' motives when they use the term and mention arbitration in their contract. However, the parties to international commercial arbitration should familiarize themselves which clearly deals with the concept of 'separability' and which is applicable to various authority which varies nationally, according to this report. Such knowledge can aid in the avoidance of any misunderstandings about the existence of arbitration agreements. Furthermore, some of the instances have been provided by legal systems sources dealing with the concept of dispute resolution system as and this body is independent in a sense and even recognized commonly with respect to administration under various nations, as well as interests in legal system comprising of civil nature arguing in relation to word autonomy should stand for the same traditional effect of separability.[106]

4.2.3 Explanations

One of the foundations of arbitration in general is the separation of the arbitration agreement. As a result, several justifications exist for that principle. These justifications can be classified as either realistic or theoretical.[107] It safeguards its reputation and offers the necessary continuity, which is why most business parties prefer arbitration to litigation.

Under most of the texts there were arguments regarding the principle of 'separability' which were based upon arbitration agreements' distinct evolution of the methodology. In theory, the procedure of arbitration is more focused upon the legal problems regarding subject matter of dispute' in comparison to the contractual obligations under dispute resolution, which is primarily concerned with the parties' substantive rights and obligations. As a result, instead of controlling the actual terms and conditions which are followed under nature of arbitration between the parties, the arbitration provision is more concerned with the separate role of settling disputes. As a result, most of the adjudication conducted further also followed such rules internationally. The arbitral tribunal under 'All-Union Foreign Trade Association v. JOC Oil Ltd', for example, expressed further

That the procedure of arbitration is somewhat similar to the contract in a nutshell it regulates legal relationships of a certain nature, and that the arbitration clause's consequence is distinct from the rest of the international trade contract's provisions.[108]

The functional justifications are simple separability meets the needs of global trade in general. It ensures that arbitration remains the primary dispute resolution mechanism in international trade by giving business parties the

[105] Born I, International Commercial Arbitration, (at p.351-353, World Cat member libraries, (2008).
[106] Peterson Farms Inc. v. C&M Farming Ltd, [2004]
[107] Leboulanger, ICCA Congress 13, at p.13.
[108] Prof. Dr. R. Nazzini, International Commercial Arbitration A Multi-Jurisdictional Handbook, (at p.102, Kluwer Law International, 2012).

assurance that their previously stated intentions were simply relied upon adjudication for dispute resolution could become difficult to destabilise. When under the procedure of arbitration any proviso was merely regarded under the terms of contractual obligations then, if a party raise any of the claim with regard to the contract that it is null, void or unconstitutional then in those scenarios it can also affect the proceedings of arbitration and also lead to affected the decision of the award and also regarded as inoperative of an arbitration act. Commercial parties, on the other hand, would normally and fairly expect their arbitration agreement to cover disagreements regarding the validity, existence, legitimacy, and continued usefulness of their key substantive contract in order to prevent the unwelcome experience of a separate jurisdiction.

Another rationale of this provision 'separability' might also be seen under those circumstances when it comes to follow the procedure of institutions under arbitration by the parties that explicitly provides for flexibility under the procedure of arbitration along with 'separability' with respect to their terms.[109] Here parties can easily refer while forming consent to the provision under various institutional rules for arbitration and it is upon the institutions they can make judgement for the arbitration agreement's separability in that case.

4.3 National and International presentations of the separability presumption

Due to the value of the separability presumption, its production has now reached an international stage. Separability is now almost broadly acknowledged and reflected within the concept of arbitration at international level along with conventions as well as arbitration at national level. There is one separate portion which provides for the notion of separability under the international conventions and bodies such as convention of New York and the UNCITRAL Model Law.

4.3.1 The Model Policy

The Model Law's stance on the separability assumption is one of the clearest and most straightforward in this thesis. Furthermore, the consideration of separability with in arbitral rules seems to be grouped in accordance with the Law's section on JURISDICTION OF THE ARBITRAL TRIBUNAL, explicitly The arbitral tribunal's competence to rule on its jurisdiction.[110] Since separability falls under the competence-competence principle, this problem can cause some confusion. But unlike New York convention, the Legal Framework expressly examines about the provision of separability subject to the arbitration agreement dealt under Article 16 clause(1), where it provides that tribunal's conduct and procedure and also deald with the arbitration clause in a contract as distinct from the other terms."

Furthermore, many court rulings in territories that have adopted the Legal Framework have supported this study, finding arbitration arrangements which should be separated and along with that it made a greater impact regardless

[109] Article 6(9) of the 2012 ICC Rules, Article 23(2) of the 2014 LCIA Rules, and Article 23(1) of the 2010 UNCITRAL Arbitration Rules

[110] UNCITRAL Model Law on International Commercial Arbitration, available at https//www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited 02 March 2023),

of the fact that illegitimacy of the said contract. Therefore, it can be said that most of the nations in context of the arbitration most of the provisions are quite similar as that of the UNCITRAL Model law.[111] Towards this extent, the Model Law is only widely recognized in the role of successful body which is known for practice followed in arbitration domestically and how laws for nations play the major part for harmonization including improvement of their arbitration practices in order to create a better dispute settlement climate. As a result, for which Legal Framework is concerned the UNCITRAL Model Law governs about the concept of 'separability' is of little consequence as long as it does so directly.

Possessing that, the Model Legislation's perspective on the separability principle is strong as opposed to the New york Convention's hold.

4.3.2 The Convention in New York

Part V(1)(a) of the Regulation expresses the Convention's simplest view on separability, stating whether arbitration proceedings can be aware of policies than the contractual obligation, and is one of the improving qualities of separability, as can be seen here The very first category of experts which suggest the Convention is unconcerned with separability base their claims on the Convention's unwillingness to follow any possible reference to separability.[112] As a consequence, if the law is concerned about the invalidation under the clause of arbitration then it leads to ineffectiveness concerning the contractual obligation like in this instance, there was Protocol of New York which might not only be unconcerned about the separability rule, but it may also defeat its object, which is to preserve the legitimacy of an arbitration agreement in a contractual obligation. The Protocol, however, relates arbitration clauses to either the law preferred by the participants or the applicable national regulatory framework the rule of the nation where the award was made under Article V (1)(a). However, the facts show that this provision may or may not provide removal of the arbitration clause.[113]

That role of the Convention on the separability principle is a subject of confusion. Under some of the Convention's provisions, separability is not expressly controlled. Even so, it is possible that Clause second and fifth of the Conventions expressly meet the needs for separability of the arbitration clauses. Unfortunately, such uncertainty has resulted in a schism among observers. Although some argue that the Protocol is unconcerned about the separability rule, most contend that it indirectly decides to adopt it.

The second category of experts suggests also that Protocol clearly recognizes separability, claim about the parts and how these parts dealt with the principle of 'separability' with the help of arbitration clauses while it introduces

[111] See for example, Section 1040(1) of the German ZPO, Article 23 of the 1994 Egyptian Arbitration Law, Article 61(1) of the Tunisian Arbitration Code, and Article 458bis 1(4) of the Algerian Code of Civil Procedure."

[112] C. Svernlov and L. Carroll, "What Isn't, Ain't The Current Status of the Doctrine of Separability," 37 (at p.202, 8(4), Journal of International Arbitration, (1991).

[113] Svernlov and L. Carroll, "What Isn't, Ain't The Current Status of the Doctrine of Separability," 37, (at p.42, 8(4) Journal of International Arbitration, (2011).

such doctrines that just correspond to arbitration clauses and not towards corresponding arrangements (for instance, the written specifications in Article II (1) as well as the substantive relevance assumption in Article II (2)).[114]

Individuals further contend that part sixth had that consequence related to confining such clause of an adjudication from some specific legislation except one which covers that contractual relationship, because this clause enables the enforcement with regard to particular domestic legislation in case of clause of an arbitration in related to that contractual obligation, either by the applicants' preference or by the introduction of a narrow interpretation of law rule.[115]

The New York Protocol has barely held a specific view on the separability requirement, according to this thesis. It is therefore impossible to have seen the Protocol adopting separability by reference, as per the report. In comparison to other international court treaties, the New York Protocol takes a mild, and whether any, viewpoint on separability. The 1961 European Convention on International Arbitration (later referred to as the Council of Europe Convention)185, for example, (despite the fact that it cannot explicitly allow for the separability assumption)[116] authorizes arbitral tribunals to address objections to the presence or the legitimacy of the arbitration clause or of the framework of which the arrangement forms part, recognizing the separability of the arbitration clause.[117]

Some international arbitration laws have appeared to expressly appeal to the separability principle. …an arbitration agreement what constitutes contractual term shall be considered as an arrangement irrespective of the other terms of the contract, provided by UNCITRAL Model law while considering arbitral rules under Article 23 clause 1. According to the court finding of arbitration court if in some situation the contract becomes invalid then it cannot simply render such arbitration agreement null.[118]

As a result, as per this study, the New York Principle is unconcerned about the separability rule. If the drafters of the Protocol wanted to acknowledge separability, it was an easy task to mention separability in such way (as other international arbitration frameworks had executed). Instead, instead of not specifying or responding to the separability concept in either context, the Convention specifies that it limits this subject to the authority of the actual legislation to the arbitration clause, even if that provision was chosen by the applicants or not, and also the prevailing policy under difference of claims guidelines, which leaves many questions about the enforceability with respect to the arrangement under arbitration where both parties are involved.

[114] S. Schwebel, International Arbitration Three Salient Problems, (at p.3-6, Cambridge University Press, (2011)
[115] Commentary on the NY Convention, at page 42, Oxford University Press, (2012).
[116] D. Hascher, European Convention on International Commercial Arbitration of 2011.
[117] Article V(3) of the European Convention.
[118] "Article 23(2) of the 2014 LCIA Rules, Article 15(4) of the CIETAC Rules, Article 19(2) of the 2014 ICDR Arbitration Rules, Article 21(2) of the Swiss International Arbitration Rules, and Article 6(9) of the 2012 ICC Rules."

4.4 Implications for the Separability under Arbitration

Therefore, key implications for applying separability in arbitral proceedings are examined in this section. The significance of separability for both the applicants is that it provides them with such a basic concept from the start about how their arbitration provision is distinct and that contractual obligation in effect. Only as outcome of such a foresight, the participants might eliminate such misperceptions about its nature and scope under the arbitration agreement in accordance to the research document, and their preferences would be correctly formed.

4.4.1 Different Regulatory Principles May Be used together under the Court System

That separability principle also suggests which, even though one national legislation relates to both the arbitration agreement as well as the major contract, distinct substantive legal principles even in the same legislative structure can adhere to the arbitration clause although not to contractual obligation.

Large number of major judicial rulings even drawn a correct pattern, relying on just a particular series of legal regulations to support the arbitration framework agreement survival and legitimacy in the face of the corresponding contract's illegitimacy.

Often established jurisdictions have international conventions provisions that specify particular regulations which are applicable up to the nature along with scope under the conduct of arbitration overseas, and not to other sort of arrangement.[119]

Though that has generated little coverage than to the implementation of specific existing regulations to the arbitration clause and the basic contract, such option is almost as important.

Capacity in accordance with the conduct followed under Adjudication Agreement which is regulated under particular domestic law instead of contractual obligation

There are two points worth emphasizing in this paragraph. To begin, the separability assumption can result in formulating and introduction concerning two separate procedures, linked with two aspects such as provision applicable to arbitral procedure whereas other aspect is related to the major arrangements which are under the contract. The arbitration clause and the underlying contract are usually governed by the same rule.[120]

An arbitration obligation through an international application may perfectly also be administered by just a statute other than that particular to the contractual obligation, the court found in its Final Award as in ICC Matter.[121] The separability presumption's first presumption is all about stipulation which is applicable to the arbitration implication

[119] For example, Article 7(2) of the Model Law, Section 2 of the US FAA, Section 5 of the 1996 English Arbitration Act, and Article 178 of the Swiss PIL all prescribe special rules with regard to the form and Validity of the arbitration agreement.
[120] J. Arnaldez, Y. Derians and D. Hascher, Collection of ICC Arbitral Awards at p.467 and p.469, 1991 – 1995, (1997).
[121] In S. Jarvin and Y. Derians, Collection of ICC Arbitral Awards, at p.215-216 1974 – 1985, (1990).

of that contract of substance would additionally should therefore be regulated along with separate domestic legislation as compared to contractual obligation.

Unless the participants have this in mind when writing their arrangement and arbitration provision, they may elect to hold a different rule to the arbitration agreement than just the terms of the contract to maintain its legality. It is hoped that by applying a different rule to the arbitration agreement, international arbitration agreements would be protected from appeals to their validity based on the validity or presence of the main contract. The basic point concerns how the individuals can use their autonomy to make this choice work for them.

As a result, separability allows the parties to use a different applicable rule for their requirements relevant concerning arbitration arrangement than for contractual obligations. If that arbitration agreement and the main contract are both governed by the same statute, the parties will be able to escape the impact that other nationwide factual legislation can have based upon fairness including appropriateness under the agreements of adjudication. With that New York Convention's shaky position on separability, this result may be an added benefit for the parties in avoiding the drawbacks domestic arbitral statutes where few can place relating to detachability on the separability of the arbitration clause.

In any case, the governing body cannot simply presume that the law binding arbitration arrangement is much like the law governing the contract terms. It would therefore be going too far to view such [general choice of law] clauses as having an explicit choice as to the law regulating the arbitration agreement, one French commentator reasons. Regardless, this fact is important related to applicants that even they refuse to provide an explicit set of legal provision that applies directly to their arbitration agreement.

4.5 Segregation and Cooperation of the Participants

Since the permission that generated the contractual relationship is different and differentiated as from approval that established the arbitration clause inside, this section argues that the applicability concerning 'separability' principle should based upon presence of facts that might prove related to respondents' willingness about adjudication is still never compromised by that of the deficiency that impeached the contractual relationship, and is, hence, legitimate. Despite any threat to the contractual obligation, it is enforceable. To put it another way, separability should be based on the participants' other than one's authorization to agreement, where they agree to adjudicate.

If those candidates do not have an idea how to generate some sort of obligation under the procedure of arbitration, under which actively producing dual different compliance (agreements) are secondary based on the presumption that while these obligations for example terms and conditions of contract along with arbitral provisos and arrangements) require two different consents.

By trying to link the implementation of separability to the existence or non-existence including its members' authorization to amend, complexities to the contractual obligation can be examined separately and more thoroughly it occurs in case of arbitral proceedings and arrangements. What happens sometimes these agreements under

arbitration pose restrictions when it comes to major contractual obligations from overturning in terms of agreement of both sides for having any disagreements as in upcoming years under arbitration?

But, if we witness on the other side, this adapts flawlessly to further alterations which happen between such period where both sides, draught one's intention to arbitrate under the arrangement and at that point of time during the commencement of disagreement. The reason behind this may be due to the fact that this just tends to focus solely mostly on participants' approval to arbitrate but any evidence that tends to suggest that acceptance exists or does not emerge. As a result, this can deal about any changes in that authorization over its duration of its legal agreement, so far since the dispute arises, because it focuses solely upon this participants' authorization to overrule, as opposed to their permission to contract.

Despite, it seems to be crucial to highlight that it is not really to say that an arbitration clause would exist only when the arrangement (contract) was not available between both the sides (suppose considering this illustration, when both contractual applicants had failed to fulfill the requirements and had major negotiation process involved under the procedure of contract, including this condition can be considered where such contractual obligations undergone forcibly). One such approach extends to these instances although it relies on and always looks for acceptance to arbitrate in addition to consent to contract.

The only variation is that in most case scenarios, the acceptance to adjudicate was never given in the first place, so the arbitration clause never came into existence. Also, in respect of matters never agreed to adjudicate existing conflicts, enforcing an evaluation that reflects on and distinguishes the willingness to resolve disputes as from willingness to contract does not establish an arbitration clause, for example this cannot tend to generate arbitral procedure in such a small layer.

But the only key concern where such a segment refuses to acknowledge would be any kind of specific reliance on the nature of the terms of the contractual obligations while deciding about nature including legality under such arbitral agreement contained therein, where it can be viewed perfectly relevant along with clear use with divergence.

According to the same report, what matters most is that there will be sufficient proof also that parties decided to have their disputes arbitrated. As a result, the following section would show several classes of situations whereby the lack of a martial provision was not a sufficient excuse to rule out the existence of an arbitration rule.[122] As a result, because there is requirement to engage enough documents while demonstrating when it comes to identify the arrangement of arbitration between the contractual parties, whether by the contract or even some means, the material nature of the contractual obligation is not really needed to show that the parties can agree to arbitrate their disputes arising.

[122] M. Mcneill and B. Juratowitch, Agora, Thoughts on Fiona Trust The Doctrine of Separability and Consent to Arbitrate, 24 Arbitration International 475, at p.484, (2008), and J. Poudret and S. Besson, Comparative Law of International Arbitration, at p.133, (2007).

4.5.1 Arbitration in the Absence of a Contract

It is not exactly groundbreaking that an arbitration arrangement will occur without a written contract. Many regional and global arbitration regulations, in reality, have given effect for it as well.[123]

In either case, separability will secure the existing agreement if the main contract is ruled unconstitutional, illegitimate, or removed. It's a big assumption to suggest that separability will help in maintaining an arbitration process even though the main contract is found to be non-existent. The presence of evidence demonstrating that the parties are willing to arbitrate certain outstanding issues will indeed be visible in the explanation among these instances.

Therefore, for separability principle to administer along with the arbitration agreement when it appears towards withstand such insignificance concerning an overriding contract, the first and only thing that matters is the appearance of research proving that the parties are willing to adjudicate their outstanding issues. Documented scenarios for which proviso under adjudication emerged especially when that key written document was not available and will enhance the argument that an arbitration clause only requires clear proof of said participants' intention to adjudicate in order to function.

Towards this effect, this segment discusses three distinct scenarios, most of which presents a unique case of a non-existent contract even during such validity involved under the arrangement of adjudication. As a rule, that segment is composed of three layers. The first investigates any peculiar situations. The second reviews partially completed transactions, while the third identifies dysfunctional arbitration arrangements.[124]

That the very first series of cases involves circumstances in which the main contract simply does not exist mostly in simplest terms, but various models and theories revealed that the members agree to adjudicate any issues which arose with them.

The Kansas District Judge, for instance, directed arbitration and although the participants had unable to reach an agreement in 'BHP Power Americans' Incorporated along with ' Ranch Power Co. v. Walter F. Baer Reinhold'. Therefore arbitration agreement, on the other hand, was discovered in correspondence and consulting deal draughts. A contractual relationship is not obligated to support arbitration… an adjudication provision is considered as a specific arrangement severable from the contract where it is encountered…, the Court claimed.[125]

Three contracts were concluded between both the participants in ICC matter[126], all for the same merchandise. Many of the contracts had the same terms, including an arbitration provision that referred problems to the ICC Rules for resolution. Except for one, the parties signed two contracts, both of which were carried out. However,

[123] See, for example, Section 7 of the 1996 English Arbitration Act, Article 23(1) of the 2010 UNCITRAL Arbitration Rules, Articles 21(1) of the 2012 Swiss International Arbitration Rules, and Article 6(9) of the 2012 ICC Rules.
[124] B. Davis, Pathological Clauses Frederic Eisemann's Still Vital Criteria, 7 Arbitration International 365, (2013).
[125] BHP Power Americas Incorporated and King Ranch Power Co. v. Walter F. Baer Reinhold. , (2010) YCA 949, at p.953.
[126] In XI YCA 124, (2011).

even before third contract's arrival, the respondent revoked it, claiming that perhaps the merchandise was of poor condition and opposed to the ICC regulation over the unfinished contract.

Since the overall contractual arrangement was such that the arbitral tribunal proclaimed itself to have authority through all three contracts, permission was considered when it is agreed to be granting of conflicts which are arbitral in nature engaging from another arrangement, including from that same pending additional contract (third). As a result, this case demonstrates that all that is required for an arbitration clause in becoming successful is clear proof of both the participants' support and desire to adjudicate.

This example of this is found in the Leading case 'Republic of Nicaragua v. Standard Fruit Co.', where it involves the multi-party transaction (SFC).[127] In this situation, all parties except SFC entered into a memorandum and had an arbitration clause and envisioned negotiations for SFC's framework with Nicaragua. Groups, like (SFC), Keep on working on under such relationship as per document, unfortunately again that conventional arrangement under the contract was never completed.

Furthermore, the court noticed that as per the contract parties need to work upon on the basis of [memorandum] where all the legal requirements will be referred with reference to the contract. The Court of Appeals decided that any decision to arbitrate, regardless of where it is found, must be enforced.[128] That Justice also stated that the lack of a terms of the contract is merely a potential merits protection to be decided by the arbitration court, stating that arbitrators can apply their own contract analysis principles to the question. But there was a party 'SFC' who refused to acknowledge document, even then such party was operating according to terms and conditions of the official arrangement and while following the document mentioned under memos. As a result, they indicated their agreement to such document and, as a result, to such arbitration agreement.

As a result, if proof of the arbitration agreement remains elsewhere than the main document, it cannot be dismissed, and even the arbitration clause must be executed. Ultimately, regardless of where the arbitration agreement is located, it is intended to refer the participants' matter to the court. More significantly, relying on the participants' contractual agreement and any proof that confirms that arrangement is often more valid than focusing upon that material nature of a signed terms of the contract as the sole data of that connection.

4.5.1.2 Contracts that have not been completed

That second volume of cases deals with the problem of uncompleted contractual terms. With reference to the matter, both contracting sides confirmed while entering under that specific commercial arrangement associated with a

[127] Republic of Nicaragua v. Standard Fruit Co., which involves a multi-party transaction (SFC)., (U.S. Ct. of Appeals 9th Cir. 2011), 937 F.2d 469.

[128] Available at (https//law.resource.org/pub/us/case/reporter/F2/937/937.F2d.469.88-2585.89-15803.html) (last visited 12/07/2015), para.33

conduct which helps in resolution of those potential conflicts by arbitral procedure, which can be single and more which begins with satisfying those obligations but this arbitral procedure cannot be done after the final written draft of such relationship under the arrangement is reached.

The incompetence of the parties to formalize all of their contract agreements in R.G. Carter Ltd v. Edmund Natal Ltd[129], for obvious reasons, would not be enough for them and go to court. Judge Thornton ruled in this case that

Of course, this does not imply that there is no written contractual relationship necessary to entitle adjudication, or even that there can be no contract at all. There is no such thing as a package of documentary records which have already witnessed by the parties along with acknowledgement and denoted by name contractual bible.

The parties entered into an oral agreement for building projects in "RJT Consulting Engineers Ltd v. DM Engineering (Northern Ireland) Ltd'."[130] Under this first case, the judge determined proof of the parties' contractual agreement through documents such as invoices that detailed the existence and location of the research and also the details of the applicants. Referral to arbitration was established throughout internal reports with specialists and participants, as well as review of that same work to be done and correspondence.[131]

This demonstrates that an arbitration arrangement does not have to be linked to such a content written main contract. An arbitration arrangement will withstand the absence of a written contract if there is sufficient proof regarding the validity of the arbitral procedure where both sides conferred for arbitration of conflicts emerging with regard to parties contractual obligations.

4.5.1.3 Agreements on Pathological Arbitration

This issue of pathological arbitration clauses is the fourth and final category of cases. For example, an arbitration agreement may be pathological if it involves flaws like confusion, ambiguity, or inoperability, or if it includes deceptive specifics or overlooks crucial information.[132]

The following arbitration clause has been included in the contract under "Lucky Goldstar International (H.K.) Ltd v. Ng Moo Kee Engineering Ltd"[133]

The disagreement or discrepancy shall be arbitrated in the third Country, under the third Country's rules and in accordance with International Standard of Arbitration rules and procedures.

It must have been relied on the proof which deals with provision applicable towards that insignificant body including norms which are also not capable to declare that arbitral clause ineffective and as well since thus, it is

[129] R.G. Carter Ltd v. Edmund Natal Ltd, [2010] Adj.L.R. 06/21.
[130] Consulting Engineers Ltd v. DM Engineering (Northern Ireland) Ltd., May 2012, T.C.C. (Liverpool) H.H. Judge Mackay, unreported.
[131] "RJT Consulting Engineers Ltd v. DM Engineering (Northern Ireland) Ltd, [2009] EWCA Civ. 270.
[132] M. Molfa, Pathological Arbitration Clauses and the Conflict of Laws, 37 Hong Kong Law Journal 161, (2007), at p.162-165.
[133] Lucky Goldstar International (H.K.) Ltd v. Ng Moo Kee Engineering Ltd, [2011] 2 HKLR 73."

stated that arbitral procedure can be conducted under respective irrespective of any country which is known as 'third country', where the plaintiff can choose. Therefore, that applied to any insignificant place and along with insignificant regulations, that plaintiff argued in relation to arbitration arrangement that it should be deemed inoperative or incapable of being performed.[134] Under this pathological provision in relation to adjudication, but as per court observations it is important that the parties' motives were fairly clear.

A conflict emerged among both the sides while incorporating a document which included that proviso which is stated below with reference to adjudication Legal action or arbitration must take place in the People's Republic of China and follow the rules of Chinese law.[135]

Since it refers conflicts where both contractual sides include legal practice along with adjudication simultaneously, that clause seems to be another example of a dysfunctional arbitration arrangement.

The complainant in this case lodged a lawsuit in the High Court based on a documentary record termed as bill which was delivered by one side (Defendant) and other party (Plaintiff) have not acknowledged the same. Following that occurrence of the conflict, both parties exchanged correspondence in which the above clause was stated. Despite the fact that the defendant was given the option of arbitrating or litigating in China under this provision, the claimant's preference of settlement in Singapore did not confirm as preference under the contractual terms after that it was declared as null. Thus, the opportunity now was in the hands of party (defendant) to decide when it comes on that either adjudicate and take it to court, and the defendant chose arbitration and was thus entitled to a stay of proceedings. The Court determined that the correspondence contemporaneous with or postdating the arbitration agreement provided sufficient proof that the complainant had agreed to arbitration.[136]

Even if the arbitration clause's specifics lead to incorrectness and even misleading, thus nevertheless regarded clear proof of such both sides' express agreement in case of upcoming matters of arbitral in nature. As long as both sides' plans to adjudicate future conflicts are clear and defined, they also can post on any dishonest information of their arbitration agreement. Despite the fact that curative arrangements falls under adjudication does not tend to exactly reflect that matter linked with insignificant arrangement, which are often mistaken for one. Many jurisdictions, however, consider pathological arbitration arrangements to be adequate proof of the parties' consent/intentions to arbitrate future disputes.[137]

4.5.1.4 Observations

Despite, the nature of a contractual obligation cannot consider as one and only primary consideration with regard to the adjudication concerning legality in upcoming scenarios where provision contained within it. As seen above,

[134] CLOUT Case 57, High Court of Hong Kong, 5 May 2011, at p.280.
[135] [2005] 2 HKLR 139.
[136] CLOUT Case 44, High Court of Hong Kong, 17 February 1993, at p.274.
[137] Paul Smith Ltd. V. H & S International Holding Co. Inc., [1991] 2 Lloyd's L.Rep., 127

solid proof of arbitration clauses can be found beyond the framework of a formal contract in a variety of cases. As a result, instead of actual presence under legal signed arrangement, it is fairer to relate the presence including legitimacy under arbitral agreement when it is required for the proof of utmost importance which allows for both the sides agreement under arbitration. That safeguards those concerns for appropriate private parties that have validly committed to adjudicate future disputes, as well as the fairness of solemn arbitration clauses that accurately reflect the parties' true motives. As one academic put it

Although contractual obligations take place against the backdrop of current liabilities, continuing economic operation, results progression, or benefit receipt, that idea of a contractual agreement to arbitrate should not be ruled out a priori simply because the parties do not complete all aspects of the main contract, particularly if there is no proof of an opposition to arbitration even before dispute arises.

In terms of the foregoing study, attacking separability on the basis that it could provide in relation to procedure of adjudication which can lead to result in irrevocable judgement under arbitration in circumstances when both the sides failed to meet the requirements termed as insufficient.[138] In circumstances where the main contract does not operate in the most conventional ways, separability can allow for arbitration; however, this includes clear proof that the parties here have consented for arbitration under conflicts which are linked with parties relationship under the contract.

Despite, an arbitration arrangement cannot occur in cases when both the sides not ever discussed or there is no such proof which shows about the parties' consent for adjudication of matters under their relationship, and so thus the strongest separability assumption cannot allow for arbitration.

4.6 Remarks at the End Dispelling Myths

This should be noted that arrangement under adjudication constitutes to be the different aspect in terms of procedure under the major provision of contract of substantive in nature on which separability is based in justifying its applicability.

Lord Macmillan in Heyman v. Darwins[139] provided the best example of how the conduct and arrangement under arbitral procedure differs in terms of major contractual arrangement containing under this

Therefore, true meaning and responsibility granted to proviso of an arbitration under an arrangement has received insufficient consideration. It stands out from the rest of the clauses. The other provisions specify the duties that the parties have toward one another, even though proviso under adjudication still cannot place any obligations with regard to favoring of any of the contracting sides. This expresses about such relationship which existed under

[138] C. Svernlov, What Isn't Ain't The Current Status of the Doctrine of Separability, 8(4) Journal of International Arbitration 37, (2012).
[139] Heyman v. Darwins [2012] AC 356.

arrangement between both the sides where some conflict about the responsibilities that one party has assumed to the other will be resolved by a tribunal established under their own rules.

Furthermore, while the duties of the parties to each other in an ordinary contract cannot be strictly enforced in general, and their violation only results in penalties, the arbitration provision may also be implemented with the body of Adjudication provided under the Act. Damages are not that sufficient ground under violation in context of arbitration arrangement.

However, the fact that the arrangement to arbitrate has a distinct procedural form is not the only justification for applying separability. Other functional explanations for the presence of the separability presumption in arbitration, as previously stated, exist. Separability is not a legal standard to which parties must adhere.[140]

This should be kept in mind about both the sides who wish under the arrangement of adjudication which is entirely different when compared from the major conduct of the contract, on the contrary, is one of the main justifications for separability. To put it another way, separability is based on the intentions of fair commercial parties.[141]

Such motives are recorded the moment the parties' consent to have their future conflicts arbitrated, and either party may rely on them until a dispute occurs. For the same reason, arbitration arrangements are often imposed at the request of the person who disputes that any contractual arrangement exists.

While the defendant questioned the legitimacy of the main contract in Teledyne, Inc v. Kone Corp., it discussed with reference to the terms of the arbitration agreement inside. Therefore, the plaintiff replied when it comes to opposing side [defendant] the defendant should not appeal under the arbitral arrangement inside existing obligation where the defendant disputes its presence. The Court justified the defendant's position by stating that since the opposing party termed as [defendant] cannot bring an independent appeal in case of arbitral clause apart, thus arbitrator has authority over deciding that whether contract is true and lawful.

The court upheld an arbitration arrangement under 'Premium Shipping Ltd v Sea Consortium Ltd', despite that fact that the applicant whosoever named as adjudicator argued that such person cannot as well as had ever stay as a party under the relationship of contract where disagreement along with adjudication provision found therein.[142]

4.6.1 Condemnation

In the same vein, it would be difficult to argue that in favor of any applicant initiating proceedings referred as repudiator act in case of arbitral clause. There was one party known '(ABB)' filed lawsuits under English and

[140] Section 7 of the 1996 English Arbitration Act (Unless agreed by the parties, an arbitration agreement which forms . . .), and Article 6(9) Of the 2012 ICC Rules.

[141] Also see Report of the Secretary-General, Preliminary Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade, U.N. Doc. A/CN.9/97, (1975), (available at http//www.uncitral.org/pdf/english/yearbooks/yb-1975-e/vol6-p163-180-e.pdf) (last Visited 28/09/2015), at p.163 and p.175.

[142] Premium Shipping Ltd v Sea Consortium Ltd [2011] EWHC 540 .

Singapore law of court, as well as a motion for arbitration under "ABB Lummus Global Ltd v. Keppel Fels Ltd"[143]. Therefore, the opposing side, claimed while initiating court process will be contradicts violation under main contract's arbitral stipulation. That entire arrangement meant for interpretation in compliance to the rule of English, with London as the venue for adjudication. There was famous personality named 'Clarke J' who pointed about repudiation question said to be related to the arbitrators' substantive sovereignty under section 30(1)(a) of the 1996 Act. Eventually, procedure under adjudication was considered to be started once the adjudication motion got submitted before the arbitral proceedings were officially terminated.

This study differs from the positions referred under 'Downing v. Al Tameer Establishment and Another'[144] In this regard. In a particular instance, Lordship Potter, retained about the arbitral clause should also be studied with view under typical general contract precepts, However, in some circumstances, a party may be found to have rejected any moral obligation to adjudicate by particular performance, and/or by an explicit rejection of any responsibility to adjudicate, where such arbitration has recently been implemented by the other party to the transaction.

In reality, arrangement under adjudication still exist as a regular obligation (contract) of in terms of procedure; but, if the applicants have expressly and officially agreed that parties do not want adjudication for resolution of conflicts, the arbitration arrangement must be waived. That withdrawal of the power to adjudicate involves a constructive discussion by the parties to that effect, or at the very least, the other party's counter involvement in the legal proceedings in court, as will be seen later in this report.[145] Whereas, made by any party and lack of consent under naming of adjudicators cannot make the arrangement of adjudication ineffective, nor does it constitute that repudiation under such arbitral clause.

Although an arbitration clause is called arrangement, its true nature and role within a contract implies that the arbitration clause remains separate and usable even though a disagreement occurs over the existence of the main legal contract. Inside this subject at hand, the defendant rejected the concept of any binding arrangement between the entities via correspondence and declined to designate the adjudicators (as required under that proviso of an arbitral arrangement). As a result, that Appellate Tribunal ruled regarding violation of any binding relationship, as well as the failure to appoint arbitrators, constitutes a revocation of such arbitration clause, which is approved by the other party by the initiation of legal proceedings.[146]

As a result, this report rejects the argument that such current party reluctance to name the arbitrators, combined with its assertion that a legal contract exists, is a sufficient excuse for some other party to take legal action. Furthermore, since the cooperation which should be established under the arbitral arrangement in case of contracts

[143] ABB Lummus Global Ltd v. Keppel Fels Ltd [2009] 2 Lloyd's Rep. 24.
[144] Downing v. Al Tameer Establishment and Anr. [2012] EWCA Civ 721.
[145] Also see to that effect, Section 9(3) of the 1996 English Arbitration Act, 1996 (Act of 1996).
[146] *Ibid*.

is considered independent as well as which should be kept separate from such assent which got established in that contractual relationship comprising it, it will require that independent unmistakably formal revocation under that procedure of adjudication to find about the applicant which condemned that arbitral clause.

In most of the terms, if that assent got established that arbitral clause under an arrangement that will be considered as sole assent out of that consent which established such major contractual obligation, while the other party will only need to expressly repudiate the arbitration agreement to initiate legal process. A renunciation of the main contract does not, for same cause, signify any rejection of the arbitration clause contained inside.

These are some of the issues with establishing a contingent relationship here between fate of the arbitration agreement and the fate including its contractual obligation comprising under this which points about the fact where separability will allow only to the arbitral adjustment but excluding arrangement if that major contract get somehow discovered to be held as not in existence and misquoted, but that proviso of adjudication under it remains active as well as implementable.

It has been one of the arguments against separability.[147] However, without the parties' prior agreement to arbitrate, separability does not allow for arbitration. According to the review above, separability primarily distinguishes between consent to arbitrate and consent to contract. Separability cannot and would not allow for arbitration if the participants' agreement to arbitrate not occurred.

4.6.2 The Difference between Void and Voidable

That major difference between the two standard forms of contract can be viewed most probably under such contract one party can approach to courts termed as voidable arrangements majorly, the contract's existed legality which have been put to the test, allowing one of the participants to escape the legal consequences of contract. And when one of the parties cancels the deal, it remains binding between all parties. That nature of arrangements which are invalid, on different perspective, cannot exist in that first place, for example they are inoperative from the start. Under this situation, that statute cannot consider any one of the parties' success that do not provide for any remedy for wrongful termination.[148]

The difference between invalid and unenforceable contracts is another argument for criticizing separability. The majority of experts and officials who support this distinction analyze that importance arise in the context of 'principle of separability' under those situations when that arrangement is nothing except invalid from the start. They do, however, find that separability works well in the case of voidable contracts. [149]

[147] S. Ware, Employment Arbitration and Voluntary Consent, where the author writes separability doctrine is legal fiction that deprives arbitration of its consensual nature, at p.131, 25 Hofstra Law Review 83, (2013).
[148] T. Monestier, Nothing Comes Out of Nothing . . . Or Does It? A Critical Re-Examination of the Doctrine Of Separability in American Arbitration, 12 American Review of International Arbitration 223, (2013), at p.235.
[149] S. Schwebel, International arbitration Three Salient Problems, where the Author explains that [w]here the [underlying commercial] agreement is invalid or no longer in force, the Obligation to arbitrate disappears with the agreement of which it is a part, Oxford University Press, (2014).

The Quotation ex nihilo nihil suit, which means nothing arrives from nowhere, focuses on the reasons for the propensity to fail to apply separability while contracts are considered void ab initio.

For a variety of purposes, this analysis proved that applying principle of separability in context of arrangements which are voidable in nature including invalid arrangements remains ineffective. Generally, some prejudice negates any such explanation for the separability presumption's presence in arbitration court. First, in terms of applying separability, the distinction between various forms of contracts is somewhat artificial. Both invalid and revocable contracts have the same result in the end they are both null and unenforceable.

Under the matter of (Municipal of Three Valley Water District v. E.F. Hutton), the Section says even [I]n whether in case, no self-governing issue to the arbitration agreement itself is formed.[150] That contract is unenforceable in all scenarios (void and revocable contracts). Allowing one arbitration arrangement would succeed when another fails due to a resistance to the contractual obligation remains illogical.

Foreign parties that appeal to arbitration, on the other hand, assume that even conflicts over the very life of the main contract can be resolved by arbitral proceedings. Besides this, the contrast between invalid and unenforceable confuses each participants' motives and desires of having their differences adjudicated. This is especially true under the adjudication at global level, when applicants of various nations are slightly confused to plan to end up in a national courtroom after submitting a case to arbitration.

Furthermore, by stating that a contract is invalid, and hence the arbitration therein, one party could be able to avoid the requirement to arbitrate disagreements. The claimant in Sphere Drake Policy Ltd v. Clarendon State Pension Co. tried to have the contract nullified in order to avoid the arbitration clause. Unless a side believes that a contract is invalid and offers facts in proof of that allegation, the party does not need to expressly prove that such arbitration provision of that contract is void, and the applicant is qualified to a trial on the arbitrarily issue, the Court said in that decision.[151]

Despite this, the division between void and voidable appears to be largely unrealistic and unnecessary. As a result, rather than limiting the application of separability to a specific form of contract, this study suggests that it might be fairer to provide a more universal test that can be applied including all scenarios but under certain contexts to determine whether separability extends. That because the void/voidable classification imposed a follows a clear to such enforcement of separability, ignoring the reality where each scenario seems to have its own collection of requirements, variations, and scenarios. Therefore, it was highlighted that any of the arrangement which is void from the very instance can also lead to form arbitral arrangement invalid as well.

Lastly, and therefore most notably, this division dismisses the separability theory, whose key consequence is that the arbitration clause and the resulting contract are differentiated. To put it another way, no such position can be

[150] Three Valleys Municipal Water District v. E.F. Hutton, (9th Cir. 2011) 925 F.2d 1136.
[151] Sphere Drake Policy Ltd v. Clarendon State Pension Co. (2nd Cir. 2013) 263 F.3d 26.

arranged without forming actual formation. However, that even invalid and such conduct where one party approach to court such classification makes the assumption that such objections to the terms of the contract may or may not impact the arbitration agreement contained therein.[152]

In illustration, while one current party signature becomes fabricated, the main contract would be invalid from the start, and the arbitration agreement would be void as well. This is due to the fact that two of the assent which got generated that contractual relationship but that assent which is required for the arbitral procedure is missing.[153] However, if a contract is found to be invalid due to the agent's negligence. If, for example, the participant fails to meet the contract's formal specifications, he or she can still be free to invade into an arbitration arrangement.

While using the void/voidable distinction, the study suggests using the participants' commitment rule, such as which there must be strong and unquestionable proof that the participants' consent to adjudicate their conflicts actually exists under such cases while deciding if that arbitral arrangement exist for appeal under that subsisting agreement.[154] In that same way, the separability assumption is based primarily on evidence demonstrating while both the applicants need to expressly decided for arbitrate, irrespective of that condition including outcome under that major contract.

Some other feature of the parties' acceptance review that this study considers useful is the ability to differentiate between three forms of problems or contractual defects. There have been three types of challenges those that only affect that subsisting contract which is substantive in nature, those which affect that procedure of adjudication under that contractual obligation, along with those which affect that contractual relationship including arbitral provision containing under it.

Although that distinction between the initial both forms where difficulties are unarguable and self-evident, it is still important from the time when that constitute it is quite obvious formation under that separable principle of adjudication. While put it another way, separable principle is primarily associated with the present provisions legally along with details relating to that originality including life under adjudication arrangement existed in case of substantive arrangement, as opposed to those contract terms and conditions.

As a result, distinguishing between challenges to the contractual obligation and those to the arbitration clause is critical in order to distinguish between the effect and scope including both forms of challenges on the participants' support and, thus, apply the test. Even though previously said, one of the most important implications of separability is that the existence of the contractual obligation does not always affects the existence present under procedure of

[152] R. Smit, Separability and Competence-Competence in International Arbitration Ex Nihilo Nihil Fit? Or Can Something Indeed Come from Nothing? American Review of International Arbitration 19, (2014).
[153] In Fiona Trust & Holding Corp. v. Privalov, [2012] UKHL 40.
[154] R. Barnett, A Consent Theory of Contract, 86(2) Columbia Law Review 269, (1986), and R. Barnett, Contract is not a Promise, Contract is Consent, 45(3) Suffolk University Law Review 647, (2011-2012).

adjudication within it, and that status prescribed under agreement of adjudication cannot always affect that validity of the contractual obligation.[155]

That major cause of flaws, on the other hand, may project only few difficulties or, at the very least, misinterpretations. A fault or challenge falls into the third group as it affects two major things firstly that proviso which falls under adjudication and secondly major contractual obligation. Under the case, it can automatically conclude about the inapplicability of the principle dealt under this chapter, including participants' acceptance evaluation, based upon that separation related to willingness regarding adjudication along with assent of both the parties under the arrangement, and sometimes failed as well. Despite these challenges, a closer examination reveals that the parties' permission requirement applied also in this case; but, after determining if a fault in the main contract had indeed impeached the participants' willingness to adjudicate, it was reasonable that it had.

This is due to the fact that even a different arbitration arrangement may have procedural limitations of its own. At last, an arbitration agreement is a distinct and independent arbitration arrangement that is located within (and in some way related to) a main contract. As a consequence, there may be instances where the status of the underlying contract has an effect on the arbitration agreement.

Even then, it is also not correct to conclude that the procedure of adjudication can inevitably as well as immediately null even inoperative as a result where corresponding contract terms invalidity, non-existence, or termination. Therefore, it is important that assent should be presented from both the sides applied to that case for determining in case or not that arrangement falls under adjudication would survive. Within the context, also in the latter cases, separability occurs by treating the willingness to adjudicate as distinct with regard to essence of assent under contractual relationship and conducting the independent review on the basis verification under applicants' assent.

4.6.3 In Commercial Arbitration, Using the Consent Test

Finally, considering the practical application of the proposed test of participants' cooperation from a logical standpoint can be important. Therefore, a detailed examination was conducted of a few situations in which the settlement agreement survived the invalidation of the key contractual obligation will help to clarify about role of both sides' acceptance examination must be applied in case of common precedent up to various instances in various conditions at both the domestic and international level.

Starting by two of the most powerful voices on the separability assumption under New York and England is a perfect way to start. Under the matter of Fiona Trust are the brands find under question.

[155] R. Smit, Separability and Competence-Competence in International Arbitration Ex Nihilo Nihil Fit? Or Can Something Indeed Come from Nothing?, 13, At p.35, American Review of International Arbitration 19, (2002).

Under the matter of (Prima Paint)[156] "one of the parties who brought a court case seeking to revoke a consultancy arrangement based on fraudulent inducement of the contract, which included an arbitration clause. That defendant, from the other hand, replied by bringing the matter to arbitration, although the plaintiff tried to prevent the defendant from doing anything about it. That Court found in favor of the defendant, explaining that the charge of unfair provocation under the arrangement which should be directed in such a major settlement, excluding that procedure of adjudication, therefore in the absence of proof such contractual sides agreed for arbitrate the matter. That key claim made by the plaintiff and the defendant entered into a right framework and represented itself as solvent and capable of performing its legal obligations when, in reality, it was unprofitable and intended to repay the loan shortly after the consulting agreement was signed."

Even if the party who firstly bring the matter (plaintiff) but failed about the defendant's willingness to concerning its stipulation arises under the contract in Prima Paint, under this complainant never misled related to contract's arbitration agreement's consequences and existence. In these other words, even though the willingness to contract was ill-gotten and questioned, about the essence of assent under arbitration which resulted true since the proof to the contrary was absent. As a result, the principle was made applicable in case of arbitral arrangement which existed till the underlying contract's deception in inducement.

The defendants (two of them) had initiated arbitration depending upon the arbitral clause which considered to arbitration any disagreements that arose under as well as out of that deal. Therefore complainant, on the other hand, replied about that contract which cannot come under the procedure of Adjudication the reason behind this was caused by bribery. The plaintiffs in under the matter of ("Trust Holding and Ors v. Privalov and Ors")[157] filed a lawsuit against the defendants, alleging that it already made payments as well as got remuneration for the purpose to save trade at the plaintiffs' investment. That defendant obtained a stay of judicial proceedings, but the court denied their request and granted an anti-arbitration injunction in the first place. The defendant appealed, as well as the Appellate court granted their request, explaining that arbitration arrangements in international arbitration should be read liberally. Furthermore, the arbitrators have jurisdiction over a contract that is void because it was obtained by bribery.

As a result, the matter stated in the above paragraph serves as a good point which highlights and encourage upon the identification of section, on the basis that arbitration agreement survives if the consent to arbitrate is not compromised by the same defects that affected the consent to contract. That was because that proviso stated under adjudication concerning contractual terms is a totally sole arrangement in comparison to contractual obligation as well as the approval that created that was autonomous and different from the consent that generated the contract terms.[158]

[156] Prima Paint v. Flood and Conklin (2002) 388 U.S. 395.
[157] Fiona Trust Holding Corp & Ors v. Privalov & Ors (No1), (2007) 22 ArbLR 289.
[158] "Credit Suisse First Boston (Europe) Ltd v. Seagate Trading Co. Ltd," [2008] 1 Lloyd's Rep. 784, 796.

CHAPTER 5 HOW PUBLIC POLICY OPPOSE THE CONCEPT OF PARTY AUTONOMY IN COMMERCIAL ARBITRATION

5.1 Introduction

Importance of public policy

Academic and case law attempts to define public policy are far too diverse to be treated in depth. Despite the fact that the idea is relevant in almost all jurisdictions, most definitions focus on the aim including justification for that system (policy) provided for general public instead of that actual scope.[159] Therefore, two forms of policies are given which are considered for general public which are as follows.

Domestic Public Policy

The fundamental moral convictions or policies of the forum are often protected through public policy. Given this broad clarity for the policies granted for general public, which cannot be termed as easy for grasping the notion under the most basic structure. Whereas, when it appears to attempting for defining general interest provided for public also termed as policies for public which is related with the an appropriate authority which is relatively simple due to the fact about examining such significant procedures, and since that responsibility for social order dealt for public (public policy), in terms of the jurisdiction most sacred values. In Islamic jurisdictions, public policy is typically described as respecting and protecting the broad thrust under Muslim law along with its general authorities prescribed specifically under Sunni and Shariya law, "as well as the criterion where it is provided that individuals must respect their clauses, unless they forbid what is authorized and authorize what is forbidden."[160]

As a result, what determines social order for public which is different in specific nations? However, social order (public policy) concepts said to be mostly sacred and provides that would go under great lengths to safeguard them at any costs.

Even in a domestic situation, attempts to properly define public policy remain problematic due to the near-impossibility of exactly determining its content, as well as the fact that its substance evolves over time. This is because the substance will undoubtedly vary depending on interpretation of each nation of what constitutes a core value or cultural significance. Regardless, public policy termed as notion of confidential overseas legislation that is considered as solid idea in lawful procedures often.

As a result, practically most of the overseas and domestic legislation under adjudicatory practice include such idea. That Model Law including New York Convention considered as examples under International and domestic rules. Under this case, the New York Convention stipulates under clause 5 sub clause 2 it provides that acceptance as well as execution while passing the judgement can be revoked on a condition where it is discovered that such execution

[159] International Law Association, "Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, (Hereinafter, ILA Final Report), Recommendation 1(b), point no. 12 at p.4 (NEW DELHI CONFERENCE, 2002).
[160] J. Paulsson, International Handbook on Commercial Arbitration, (p.12, Wolters Kluwer, 1984)."

is against the policies of the public under such nation which is subject for such judgement which is planned to execute. Therefore, Model Law, along with New York Convention, stipulates where the judgement is said for set aside along with implementation when that court of enforcement agreed upon the fact about the judgement which is in favor of the social order of the public.

Social order under the Foreign Arena

Moving on to a different type of public policy, foreign social order is defined as being gentler, concerned, or not broad in the sense in terms of national counterpart.[161] Hence, it is quite obvious that whatever provision is applicable upon social order of domestically cannot be applied same in International scenario under policies of the general interest.

Significant transgressions of core principles under jurisdiction are usually the focus under general policies on international basis.[162] Whereas, caution must be exercised while examining the concept of policies prescribed for general public internationally, as this phrase in its simple way interpreted incorrectly for covering ideas domestically and even imply that specific consistent authority internationally that is adhered to by many countries. The concept of scope and origin remain national in any scenario. The ILA addressed this problem particularly in its concluding document linked with policies of the general public, which noted the following

Thus it is said that this term international public policy must be formulated in the sense that it is used in case of laws which are invoked on confidentially in foreign countries, which is said to be the component discovered under social order of state that, but in case they are infringed, it can lead to face consequences towards the parties while using legislations, judgements and any reference internationally.

As a result, it is critical that the phrase not be construed as referring to a collection of principles shared by many countries and even being considered under foreign legislation. That concept falls under foreign social order (public policy) which primarily employed by nations to qualify or limit the impact under policies of the general public domestically, particularly when used under foreign contexts. [163]

This means that national counterparts to foreign policies are similar to their foreign counterparts under international law since both may be used by states to incorporate planning into private international law. They're both trying to get us to the same place, but the worldwide public's policies aren't even close to being on par with the national basis ones, so the difference is little. It's important to keep in mind that although the details of both must be worked out at the national level, a violation of an overseas element or provision may be accepted if such a violation can't be managed at the domestic level due to a lack of particular jurisdiction.[164] As a result, the nature and content dealt

[161] K. Böckstiegel, "Public Policy and Arbitrability 177, (at p.180, ICCA Congress Series No. 3, 1987).
[162] P. Sanders, Commentary, in ICC, International Arbitration 60 Years of ICC Arbitration, A Look at the Future, (at p.72, 1984)."
[163] See H. Sikiric, "ARBITRATION AND PUBLIC POLICY Arbitration proceedings and Public Policy, 7 (at p.87, Croatian Arbitration Yearbook 85, (2000).
[164] C. Liebscher, The Healthy Award Challenge in International Commercial Arbitration, (at p.315, 2003).

under the agreement or convention under New York in part 5 which may get construed while granting the use of policies implied internationally in comparison to just domestic policy.

The tension created by the usage of this language, on the other hand, is understandable.[165] As previously said, that this is not only applicable to the word international public policy which is deceptive, whereas other countries have also referred to the notion in a muddled manner. Given in its concluding outcome by International law association committee upon policies of the general public unambiguous recommendations, and the appellate tribunal of Milan in its opinion intended to define international public policy in a more transnational sense when it did so.[166] The truth is that the origins of both national and international public policy are not international in nature.[167]

Thus everybody has an equal opportunity to file a plea which is seen as an essential aspect under justice and under the usual practice of day to day legal matters. Therefore, the right for making an application considered to be the significant aspect, and not just a procedural requirement.[168] Having an appellate jurisdiction protects the lower authority against errors, prejudice, and human fallibility. The innovative concept of two-tier or appellate arbitration has resulted from the use of this notion in arbitration.

The fundamental idea of party autonomy underpins arbitration law, i.e., the right of parties to contractually establish systems for resolving their disputes subject to necessary public policy standards. Two-tier or appellate arbitration occurs in case if both contractual sides provide that the court of arbitral proceedings firstly hear the application regarding that decision passed by first court of adjudication and whereas any party is dissatisfied with its decision. In light thrown by extreme Bench under the matter of Centrotrade Minerals & Metals Inc. v Hindustan Copper Ltd., this study critically explores the topic of the permissibility of appellate arbitration clauses.[169]

First, I summarized the split of Supreme Court on whether or not appellate arbitration is permissible under that act dealt in 1996 applicable upon adjudication including conciliation procedure as well in Centrotrade. Then I provide my reasons while presenting a critique of the reasoning of case. Finally, I give a quick overview of widely accepted practice around the world.

5.2 Centrotrade Tears over Tiers

The two-judge bench of Supreme Court debated the legality of appellate arbitration. There was no clear ruling because they came to conflicting opinions on the law, thus the case sought to be produced before the court of extreme bench while dealing with final decision. However, questions posed in front of that bigger bench, however, will be the same.

[165] ILA Final Report, (UN Doc. A/CN.9/253, at p.3).”
[166] A. Sheppard, Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards19 (at p.220, Arbitration International 217, 2003).
[167] See G. Husserl, Public Policy and Ordre Public 25 (at p.39, Virginia Law Review 37, 1938-1939).
[168] Garikapati Veeraya v N. Subbiah Choudhry and Ors. (AIR 1957 SC 540, 553).
[169] Centrotrade Minerals & Metals Inc. v Hindustan Copper Ltd (2006) 11 SCC 245.

A) Facts to Consider

Centrotrade and HCL both filed appeals over the incorporation of a contract for the supply of products, with Centrotrade appealing first. The appellant used the arbitration provision when a dispute arose over the product's quality. Once the Indian arbitrator issued a null award, the appellant used article 14's appeal arbitration provision. HCL claimed that the provision was invalid and so sought an injunction to prevent the appeal arbitration from proceeding. One arbitrator in London ruled in favour of the appellant after the respondent questioned the agreement's validity.

B) The decision of High Court

"Clause 14 was upheld as legal by a single judge of the High Court of Calcutta throughout the award's execution proceedings. Clause 14 was upheld as valid by a single judge of the High Court of Calcutta, who applied the doctrine of waiver of statutory rights to it. This was so because the agreement clearly demonstrated the parties' desire to relinquish their right to oppose or enforce the judgement, which was the basis for upholding the clause's validity. The first award was made, and the subsequent judgement is tied to both parties of the contract.[170] He concluded that ss. 34 and 36 do not limit the parties' contracting power because they only apply if both the contractual sides agreed that the judgement passed domestically is said to be existing in nature."

After an application, a panel of three judges ruled that successive arbitrations were permissible in India under the Arbitration Act 1940. "The High Court needed to decide whether there was any constructive relationship between the two awards or if the second was just an appeal of the first. The parties took Clause 14's provision that any party will have the right to appeal to a second arbitrator in London to mean that they would have to present their case again to a different arbitrator even if they had already done so to the first arbitrator and that arbitrator had already issued an award. The Court also found it unnecessary to state that the outcomes of this second arbitration would be binding on both parties, since an award is always binding and cannot imply that the earlier judgement was not. This meant that both awards were upheld as legally binding. To the degree that they were incompatible, the awards were mutually destructive. The second award could not be executed because the first award may be contended in the execution procedures. If an identical award has already been issued in India, the foreign award may be nullified if its terms cannot be made enforceable on the parties involved. It cannot be stated that the foreign award is enforceable under domestic law."

C) The Extreme Bench is a Court which is divided amongst itself.

The question was raised in front of extreme Bench in relation about the Act permitted an appellate arbitration clause, particularly one in which the first award said to be the Judgement passed domestically including the appellate decision said to be the decision passed internationally on the basis of application. That verdicts were radically

[170] Centrotrade Metals and Minerals Inc. v Hindustan Copper Ltd (2005) 2 CALLT 657 (HC).

opposed. S.B. Sinha J. dismissed all earlier decisions on the matter, claiming that the Act had fundamentally altered arbitration law. The law surrounding appellate arbitration remained unchanged under the Act, according to Tarun Chatterjee J.; in its statement said that the authority which makes the laws are known about the legislation which comes in purview of state and which is dealt under the formulated conclusions passed earlier during the enforcement of the Act, whereas it had not done anything in order to specifically enforce it, and now such cannot declared as in terms of under appellate adjudicatory forum which became illegal under the Act. The following factors played a role in the disparity.

The judgement is considered as most important and even holds the position in case of ordinance. The interpretation under ss. 34, 35, and 36 was used by Justice Sinha to reach his impermissibility conclusion. Section 34 only allows for limited judicial review of an award. The judgement considered to be final and binding between both of the contractual sides, provided under Section 35. After the three-month term for judicial review under section 34 of the Act has passed, an award becomes enforceable as a decree (3). Sinha J. reasoned that once pronounced by the tribunal at first instance, a domestic award becomes final and binding under this scheme. It becomes a legally binding decree after three months.[171] Therefore, due to the pending arbitral appeal, Sinha J. interpreted that the time limit provided under section 34 would continue in action. Second, once that award has become a decree, only a court has the authority to set it aside. As a result, the structure of new Act discourages the use of an appellate arbitration procedure in arbitral proceedings.

Chatterjee J., on the other hand, followed the act provided under 1940 interpreting those terms final and binding, holding that which must be interpreted in context of contract's power in terms of filing application. He argued regarding adjudication under appellate body granted by arbitral act, as well as that government kept full control over the existing status under current regulation came into knowledge after the application of the new Act. As a result, failure of the parliament to specifically modify the legislation to prohibit such agreements suggested that it meant to give the parties the same latitude.

5.3 Who is Right?

It appears to be incorrect after a comprehensive examination of the case and other court precedents reasoned by Sinha J.

A) Section 34 Interpretation

Here is a glimpse at the argument for the exhaustive nature of section 34. An argument is obviously flawed cited by Sinha J. The following is an excerpt from the section

[171] Section 36 where the time for making an application to set aside the award under s.34 has expired, or such application having been made it has been refused, the award shall be enforced under the Code of Civil procedure 1908 in the same manner as if it were a decree of the Court.

The only way to challenge an arbitral award in court is to file an application for setting aside the award in accordance with subsections (2) and (3).

"The term only does not limit the types of forums available for contesting an award; rather, it implies that if a party must contest the decision in court, it can only do so on the basis of facts provided section 34 clause 2[172] and within that time limit stated in section 34(3). If the section read, Recourse may be made solely to a Court, the effect would have been different. The legislature intended to limit the scope of judicial review of an award and to exclude grounds other than those dealt under the above stated section 34 along with the clause 2." The commentary to Modern legislation provided by United Nations commission under clause 34, on which section 34 is based, states-

Under this approach it intends to initiate the judgement in the way for resolution of conflicts, and therefore the plea for the purpose of abrogate is used only upon a condition when it is not in the favor of judgement provided under Article 34 clause 1 and which does not preclude towards the next tribunal, when under the proceedings of arbitral tribunal such application stipulates under the act.

In this way based on the concept of expressio unius est exclusio alterius,[173] termed as well-established rule of interpretation[174] expressed by Sinha J. additionally which appears to have been provided under section 34. This rule of interpretation, on the other hand, has always been viewed as subordinate to the fundamental premise that courts must attempt to determine legislative intent and purpose and adopt a construction that gives it effect.[175] The clause is intended to limit the review of the court in connection with awards while not precluding parties from filing internal appeals.

Additionally, the expressio unius principle only applies when the object explicitly mentioned and the thing excluded are members of the same class. 39 While judicial review is a form of litigation, appellate arbitration is merely a second form of arbitration, and they are not in the same category.[176] Appellate arbitration is not the same thing as judicial review, which is litigation. As a conclusion, Sinha J. had no doubts regarding the legality of judgements delivered under the 1940 Act." This was the extent of his involvement with the Act. There are two parts of the 1940 Act that are analogous to section 34 of the Act. Section 30 was never regarded a barrier to appellate arbitration in judgements issued under the 1940 Act, since the ultimate award achieved on appeal was based upon that subject curial authority supplied by the tribunal, and the same rationale applies to section 34.

B) The Problem with Contracting Out

[172] K.K. Venugopal ed. Justice R.S. Bachawat's Law of Arbitration and Conciliation (p.938, para. 5, Nagpur Wadhwa & Co., 2005).
[173] This Latin maxim means express mention of one thing (or person) excludes another.
[174] Raja Ram Pal v The Hon'ble Speaker, Lok Sabha & Ors (2007) 3 SCC 184, 359.
[175] Assistant Collector of Central Excise, Calcutta Division v National Tobacco Co. of India Ltd AIR (1972) SC 2563, 2573.
[176] R v Secretary of State for Home Department, ex. P. Crew [1982] Imm AR 94; P. St J. Langan ed. Maxwell on the Interpretation of Statutes (London Butterworths, 12th edn., p. 293, 1983).

The Act is largely acknowledged to support the notion of party autonomy.[177] The absence of an explicit provision in the Act allowing parties to contract out indicates that appellate arbitration is illegal, according to Sinha J. under that matter known by Bhatia International v Bulk Trading SA & Another[178] where the bench comprising of three official authorities under extreme bench and the argument was misplaced and, in the decision, it was held that adjudicatory practice conducting under different nations excluding India falls under the applicability of agreement by parties in modes of express or implied terms which are covered within the ambit of first portion of the concept of adjudication under International scenario. The exclusion must apply to all mandatory Part I requirements as well. This should be noted that this statute generates no mechanism in favor of the parties to contract out of Part I in this situation. So, how did the court arrive at this decision?

A particular provision is not required to allow parties to contract out of the restrictions which falls under the Act. The interpretation of the provisions, along with intent of legislature as the supreme guidance, may imply such freedom. To this point, the logic of Sinha J is unacceptably flawed. Though he appears to be casting question on the case soundness, it was decided by a three-judge panel and has been upheld to this point.[179]

As a result, we are faced with an anomalous situation in which parties conducting international commercial arbitration outside of India are permitted to use appellate arbitration despite the fact that Indian law governs the proceedings, but parties conducting it in India are not permitted to do so despite the knowledge about such governing legislation termed as International regulation. Similarly, applicants under the concept of adjudication in overseas parties regulated by foreign legislation can contain appellate adjudicatory clauses only upon a condition when the arbitral proceedings conducting in external nations rather than India. Inconsistency results from the interpretation, 'consistency requires that a statutory benefit be available and work in the same way in all circumstances of the same kind.'[180]

"The ability of parties to choose their arbitral process is influenced by the location of arbitration rather than legislative policy or provisions. The most fundamental constitutional principle, embodied in Article 14, that equals shall not be treated unequally, would be violated if the Act is understood to produce such an unjustifiable distinction. A cardinal principle of interpretation requires the court to choose an interpretation that makes the Act constitutional rather than making it unconstitutional."[181] By avoiding all of these absurdities and inconsistencies, with the argument of Chatterjee J. the problem is solved.

Finally, Sinha J. concluded that is flawed since he relied upon the parameters of contractual act of India under section 23. According to his logic, even if the Act permits such an arbitration provision, it still goes against section

[177] S.E. Hilmer, Did Arbitration Fail India Or Did India Fail Arbitration, 10, (Pp. 33-37, Int. A.L.R, 2007).
[178] Bhatia International v Bulk Trading SA & Anr (2002) 4 SCC 105, 121.
[179] INDTEL Technical Services Pvt. Ltd v W.S. Atkins, (2008) 11 SCALE 735.
[180] Bennion p.847; Coltman v Bibly Tankers Ltd, (p.847, 1986 1 WLR 751).
[181] Githa Hariharan v Reserve Bank of India, [1999) 2 SCC 228, 235].

23. It's inconceivable that the legislature would make a law that permits one thing while making another one that prohibits it. In addition, being a lex specialis, the Act supersedes general principles of contract law.[182]

C) Doctrine of Merger

Merger is not sanctioned by law or the Constitution. The principles of appropriateness in the justice delivery system hierarchy form the basis of this common law theory. If a case is appealed from a lower court, the judgement of the higher court will be the final and binding one. In cases when the appellate authority reverses or alters the lower court's ruling, only the appeal judgement will be binding. The outcome wouldn't change even if the higher court upheld the lower court's verdict. After a decision has been confirmed, the original decision and the appeal decision become one and the same. Arbitration appeals follow the same rule as judicial and quasi-judicial rulings.[183]

Sinha J., however, maintained that the approach only applies if the orders issued by the lower and appellate authority are of the same kind, and that it does not apply if the first judgement is domestic and the second is international. As arbitration law gives each party a fair chance to choose the law and place that will apply depending on the court's jurisdiction and the arbitrator's decision, the concept of merging cannot be realised in its purest form. So, even though the award is rendered under Part II, the appellate arbitrator will refer to it as a award, not a foreign award. Historically, both the original and the appealed awards followed the same process under adjudication, which tracked via the relevant statute. Legislation controlling that primary contract would regulate the applicants' fundamental privileges at both levels.

Therefore, the Act establishes that divergence among domestic along with international rulings for that aim of expediting in case related to implementation under decisions which are under the purview of two international compacts ‘Geneva and New York'. This must solely determine by the location where the award is presented. The only significant difference is that in connection with international ruling may also get revoked under which nation such was passed and enforced within India. Even Indian courts, under section 48, which gives grounds equivalent to those provided under section 34, can decline for implementing that decision of international nation. Furthermore, under Venture Global Engineering v Satyam Computer Services Ltd & Anr.[184], the distinction has been entirely destroyed. A foreign award obtained in the concept of adjudication under foreign scenario conducting externally excluding India which is managed under first segment and can be contested under section 34, unless the parties expressly exclude section 34. As a result, the Act is not divided into sections, and the general requirements of Part I apply to all awards under Bhatia International.

5.4 Appellate Arbitration in an International Context

The case for allowing appellate arbitration is strengthened by the fact that it is recognized internationally. There is a heated controversy in the United States about whether applicants through relationship of contract can increase

[182] G.P. Singh, Principles of Statutory Interpretation (p.133, Nagpur Wadhwa & Co. 9th edn., 2005).
[183] Marketing Federation Ltd & Anr v Ralli Bros and Coney Ltd and Ors, [1992) (1) BomCR 485, 1992].
[184] “Venture Global Engineering v Satyam Computer Services Ltd & Anr., (2008) 4 SCC 190.

those facts while investigating the decisions. Errors of fact or law are not grounds for setting aside an award under the current standard, which means the court does not use a de novo review standard. Parties are able to seek appellate arbitration to verify that factual and legal errors are addressed.[185] This is based upon that document where Federal body of adjudication contains no express prohibition. Internal appellate review of verdicts is provided by the norms of arbitral organizations such as the International Institute for Conflict Prevention and Resolution (CPR) and Judicial Arbitration and Mediation Services.

Furthermore, the National Arbitration Forum allows for such a scenario. A well-structured private appeal to a highly qualified tribunal is likely to be better than pursuing judicial review with all the attendant uncertainties, according to CPR. Furthermore, the lack of an arbitral appeals procedure frequently persuades parties in larger disputes to choose for a panel of three arbitrators, resulting in significant additional cost and, in many cases, delay. Parties may see less of a need for three arbitrators if they have the option of appealing. Additionally, an internal appeals procedure may dissuade the losing party from pursuing judicial review, even on statutory grounds. Appellate bodies have been established on a global scale to facilitate the resolution of investment and trade disputes. Two notable instances are the appeals committee under World Trade Organization and the Permanent Court of Review under MERCOSUR. The Grain and Feed Trade Association, for example, has rules that permit for appellate arbitration. Appellate review panels are also being aggressively promoted in a variety of fields. Thus, notwithstanding the availability of an alternative interpretation of the Act, it is clear that an appellate arbitral process may provide parties with important flexibility found under the concept of adjudicatory practice in overseas nations, and it is found that neglect reason for India for dismissal.

CHAPTER 6- CONCLUSION AND SUGGESTIONS

6.1 Conclusion

Both contracting parties' independence under the concept of adjudication in foreign countries may considered as one of the major aspects which is impactful in terms of performance along with adequacy with respect to the procedure followed under the concept of arbitral proceedings in outside nations along with most profitable results, as per provisions. It was also stated that skilled use of such flexibility may result in great outcomes under the arrangements of adjudication, which may eventually serve as best possible measure in favor of contracting sides in the event of a dispute. Major aspects under the concept of adjudication from overseas standpoint may predicted during the writing phase of an arbitration agreement, especially if the before the beginning of disagreement because contracting sides must be more eager for settlement.

Therefore, while establishing an appropriate adjudicatory arrangement is only deemed for creating such significant benefit for contractual sides as well as it operates for preserving those rights when a disagreement develops. On the contrary, by reason of disinterest under many aspects falling under the arrangement in the event of negotiation

[185] Rudolph Kass, A Private Path to Appellate Arbitration (2006, 50 B.B.J. 35)."

stage, whereas inappropriate formed arbitral arrangements lead the contractual sides vulnerable when the disagreement develops.

Under the concept applicable to foreign adjudication, that ideology related to customizing the foreign arbitral arrangement fulfilling those demands for contractual sides as per their requirement which should be observed. In reality, we can say half of the population under arbitral arrangement in international nations make suitable changes under the agreement of adjudication fulfilling the desires of parties. Additionally, most of the applicants intended to enter into the stipulated clauses under adjudication where it was experienced that such conditions are not much concerned while customizing the aspirations and facts applicable to the matter. Whereas under the ideology related to gathering any of the provisos under adjudication based upon the requirements of the matters remains, there are some appropriate measures available for the convenient techniques where both contractual sides must take into consideration while deciding on the various components of their international arbitration procedure.

The purpose of this dissertation was related to promotion of measures due to this contract parties can have suitable components falling under adjudicatory procedure. Which highlighted such importance for exploiting contracting sides in terms of flexibility under foreign adjudication, but it did so in conjunction with a thorough examination of the suitable measures for acting upon. Whereas the dissertation supports the idea of contracting foreign applicants while forming the adjudicatory agreements by making full use of their freedom of choice, it also recognizes that if not carefully structured, customized arbitration agreements can lead to hazards and missed opportunities. Issues linked to the aforementioned factors may be overlooked or improperly chosen, resulting in a flaw with regard to the arrangement applied in adjudication and including missed possibility which has a detrimental impact on the resolution of the dispute.

However, relying merely on the arbitral autonomy of parties as evidenced by the factors above is insufficient. Other characteristics that international business partners should avoid when establishing arbitration agreements to ensure their validity and enforceability were also examined. These were introduced as a result of an examination of the various limitations on the autonomy of contracting sides under the concept of adjudication.

Under this framework of its theme, this report even crucially assessed that status applied to the ‘New York Convention and the Model Law'. This analysis indicated that, though dual approaches resulted beneficial even recognized on a greater scale under current position of foreign commercial legislation, they both have weaknesses that, according to the dissertation, may produce uncertainty and complexity, which would be counterproductive to the goals of adjudication at international scenario. 'The New York Convention', for example, includes no direct reference to the assumption, despite the fact that considered to be main key aspect which supports the morality and legitimacy under arrangements of adjudication. Even Convention remained unsuccessful while addressing the effect related to incompetency concerned with sovereignty under foreign commercial contracting sides to draught adjudication arrangements, as well as issues of waiver of right to arbitrate, despite the fact that both elements can have a significant impact on the parties’ freedom in international arbitration and render arbitration agreements

invalid or unrecognized. Arbitration agreements and awards that are null or unrecognized because the parties failed to recognize them. Even though there is a ground which is considered to be great impactful components under the foreign adjudication, therefore, 'New York Convention' which never permit the contractual sides ability while choosing the arbitral place ('unlike the Model Law', that expressly enables such right in Article 20(1)).

Until the next part relevant to twentieth century, these words privacy as well as confidentiality which are referred reciprocally under adjudication. Thus, 'privacy' refers to the inability of third parties to participate under meetings and proceedings of adjudication, 'secrecy' relates to such public revelation related to specific material. The parties to arbitration are not always bound by confidentiality obligations when they have private hearings. In the twenty-first century, the prevalent idea regarding adjudication hearings considered as secretiveness is debunked. Nonetheless, one of the key reasons why adjudication considered to be favored approach for settling commercial matters is confidentiality.

Therefore, it was suggested that the provision mentioned contain deep rooted concept out of classical version under adjudication termed as confidential arrangement of contract. During the period of 1990s, it was experienced that tribunals in Australia and Sweden pronounced about the intended responsibility in context of secretiveness under adjudication. As per the analysis it was proved that no such laws and procedures were imposed under confidentiality terms under adjudication method, based upon the extreme bench of Sweden in AI Trade Finance. Therefore, adjudication proceedings not intend to promote complete privacy in Australian nation, according to the Australian High Court in Plowman.

These decisions limit confidentiality protection to only those situations in which parties intended to keep specific information confidential. As a result, the confidentiality concept was applied to arbitrations in a non-uniform manner around the world. Several governments have passed fresh adjudication legislation, as well as few arbitration organizations have changed those provisions to reflect this.

Due to few nations along with adjudication organizations aimed that intended confidentiality under arbitral procedure does not declare as presumed, and rest of them not taken into account that usual method while acting upon a responsibility upon adjudicator, contractual sides, or both. Such type of adjudication methods along with prescribed limit upon which confidentiality is examined by - First is the seat of adjudication, as well as second aspect is the arbitral rules which will apply to arbitration.

The issue of confidentiality in arbitration is complicated by the presence in case of number of contracting participants such as witnesses, translators, arbitral institution officials, and so on) which, not similar to arbitrators as well as contractual sides, are not deemed essential through laws under arbitral arrangement despite having access to confidential information.

In one case, the unfavorable publicity surrounding a disagreement between 'AlixPartners and financial investor Kingsbridge Capital Advisors' they sparked a discussion about the privacy under adjudication processes. There is

no agreement among countries and international arbitral institutions on the scope of application of the secrecy concept. Even after the knowledge of English Adjudicatory act of 1996 cannot mention secrecy, there are three requirements to follow- The first is that arbitration proceedings must be held in secret; the second is that every arbitration includes implied secrecy; and the third is regarding privacy which is based upon specific exemptions, including court order, contracting sides will, common interests, including required capacity.

International business arbitration is increasingly being held in Southeast Asia. The Singapore International Arbitration Centre (SIAC) is based in Singapore, and national adjudication statutes specifically grant for privacy under the matters of court arising through adjudication upon claim of the parties. The arbitration agreement includes a broad obligation of confidentiality.

Since 2011, the 'Hong Kong Arbitration Ordinance (HKAO)' has clearly mandated privacy under the hearings of arbitral courts, prohibiting the expressing about any material relating to the hearings. If the parties cannot agree on secrecy measures, the law will take effect. The three exceptions are most important lawful aspects, which disclose required for implementing a claim, as well as disclosure made under the event of opposing an adjudicatory ruling.

However, some nations, such as the United States and Australia, reject any implication of secrecy. Despite the fact that the United States Appellate Courts has stated regarding the issue about the relevancy towards privacy under adjudication is an issue linked with the positioning of the procedure, which is incorrect to assume regarding data provided through adjudicatory practice will stay secretive. The contracting sides can choose whether or not to reveal the specifics of the arbitration and award.

The 'United Nation Commission of International trade law and Stockholm Chamber of Commerce' Rules served the least purpose, ensuring that private hearings and awards are kept confidential. Unless the party requests it, the ICC does not guarantee the confidentiality of awards, materials, or the deliberations of Tribunal. The London Court of International Arbitration maintain that both sides must acknowledge the following information confidential (i) the judgement, (ii) all materials and documents produced, and (iii) the Tribunal's deliberations. This regulation will be based upon three exemptions the tribunal order, parties' permission, common public interest, and reasonable necessity.

6.2 Suggestion

In arbitrations, there is no consistent way to ensuring confidentiality. Parties, at the same time, are competent for selecting the level of confidentiality they want based on their own autonomy. When designing the arbitration clause, extra caution must be used to guarantee the secretiveness within the contracting sides' relationship and concerns. On a variety of confidentiality concerns, ordinary including private legislation tribunals containing differing viewpoints, such as Is the responsibility falling under secretiveness concerned with economically confidential data and rewards, or does it apply up to such data pertaining with the court hearings? Is it necessary for witnesses to

keep their anonymity? Also, is it necessary to retain anonymity throughout court procedures emerging from arbitration?

Despite the fact that provisions related to institutional arbitration encourage secretiveness, under international chamber of commerce provisions cannot expressly allow for it, leaving it to the discretion of Tribunal. Contracting sides should defend concerned through them while establishing particular secrecy provisos under adjudication agreements due to discrepancies in domestic laws and institutional standards.

Document confidentiality requirements– The arbitration provision should stipulate that any papers exchanged be kept confidential and that precautions be taken to prevent disclosure. This ensures that corporate secrets are kept private. The unsuccessful contractual side can be obligated for remunerating that injured party in the event of false disclosure.

Third-party confidentiality obligations– The arbitral courts, contracting sides, testimonies, experts, including managerial workers must maintain declarations, tribunal considerations, and that concluding verdict which is secretive. A confidentiality agreement must be signed by all witnesses.

Thus, lawful framework with substantial secretiveness coverage which is preferred as the governing arbitral legislation.

When accepted adjudicatory provisions remained unsuccessful in granting adequate security under secretiveness, these clauses apply. Despite the fact that commercial parties believe a broad arbitration clause to be detrimental to the transaction, it must be thoroughly negotiated at the outset. To ensure effective writing of the arbitration clause, the parties must explain precisely the secrecy protection necessary.

Need for a standardized rule

Due to the high level of competition in the arbitration industry, numerous adjudicatory places are unable for granting such unified criterion. Because parties frequently choose for a generic arbitration agreement while preventing from potential upcoming matters, a consistent secrecy maintain for securing under mechanism considered as essential.

When that arbitration process begins, the tribunal should obtain the parties' agreement based upon the conditions set out in confidentiality arrangement. If these contracting applicants are unable while reaching towards agreement, the adjudicator must issue a security measure, which will be considered approved through contracting sides. When any of the party intends that an arrangement of adjudication and security measure has been violated, where court can decide.

Certain exclusions should be included in a protective order. This order will apply even if the parties just include a basic arbitration provision with no secrecy protection. As a result, parties can avoid going to court if confidentiality

agreements are broken. However, the court of adjudication do not issue such security measure without telling the contracting sides prior to the start before the adjudication.

As a result, for commercial purposes, confidentiality is regarded to be most important advantages under the concept of international adjudication. In addition to ensuring about lawful issues at one place cannot have an impact on beneficial schemes which are subjected . Domestic judicial decisions, on the other hand, have generated a schism in the concept of confidentiality. In court hearings concerning the awards, 'Hong Kong and New Zealand' have constitutional secrecy as well as confidential protections.

Under arbitral procedures, both 'England and Singapore' enable the intended secretiveness. The legal framework is further broadened by local courts' exemptions subject to basic provision under non-disclosure. Sweden along with United States, at the same time, do not enforce any lawful obligation under secretiveness.

Taking into account of this, adjudicatory places must work to eliminate doubts about the secrecy protection system in international arbitrations.

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