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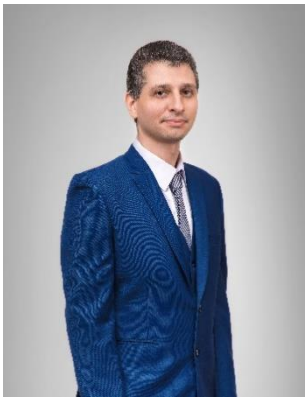
Book Review: Transnational commercial disputes in an age of anti-globalism and pandemic.

By: Djamel EL AKRA



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Mr. EL AKRA's international law background extends to France, Italy, China, Japan, and Cambodia. He has contributed to governmental institutions, such as the International Institute for the Unification of Private Law, and has provided technical assistance for the UNIDROIT-FAO legal guide on contract farming.

Dedicated to academia, Mr. EL AKRA has been lecturing law courses for 12 years at the Royal University of Law and Economics, collaborating with international programs affiliated with Paris II and Lyon 2 Universities.

I. Introduction

1. This book is a compilation of articles and presentations delivered for a meeting between judges and academics in 2021 (3rd. Judicial Roundtable). It is therefore natural that these articles reflect the context of

a global society whose main concern was the COVID-19 pandemic. As Judge Helen Winkelmann also reminds us in the foreword to the book, the pandemic may have occurred in a general context of questioning globalization.

2. It should be noted that most of the authors are sitting judges or former judges, although some authors are legal practitioners or law professors. The first of these is Mr. Sundaresh Menon, Chief Justice of Singapore. They are also authors who practice common law, although some authors are also trained in continental law, such as Mr. Anselmo Reyes. The audience of the initial contributions are judges of a judicial order, which is reflected in the conclusions of the contributions, which are favourable to the emergence of international commercial courts.

3. It is precisely this dual context that is crystallized in the title, the subject of which deals with transnational commercial disputes in a context considered to be anti-globalization and pandemic (in an age of Anti-Globalism and Pandemic), the latter term being in the singular. According to the Preface, the contributions of this book should be read as a response to such crisis of globalization, as it "*considers how judges, arbitrators, lawyers, policy-makers, and other stakeholders can and should respond to the current wave of discontent over the way in which international commercial dispute resolution is carried out*" (p.vii, Preface). It is clear here that this is not simply a discussion aimed at mapping practices, but it aims to make recommendations on how its actors can respond to the dissatisfaction caused by the practice of international trade dispute settlement. In other words, it could be said that it is a question of mobilizing the actors of dispute settlement at the bedside of globalization. This is reflected in the Preface, through a three-step analysis: *(A) how each element has so far supported and complemented globalism; (B) what problems have arisen as a result; and (C) how those problems might be addressed by way of a response to the anti-globalist critique and the upheaval wrought by COVID-19*. The purpose of the book is therefore to respond to the criticisms made against globalization, which may have been reinforced for several reasons since the COVID-19 epidemic.

4. The formatting of the book adopts an approach that is intended to be pedagogical, since the sequence of chapters in each of the parts follows

an order allowing readers to address either the state of a subject (odd chapters) or to directly address the observation and the proposed solutions (even chapters).

II. Review of the Content

5. **The introduction attempts to present a framework of thought of a "*justice in a globalised age*"** (Menon S., Introduction: Justice in a Globalised Age, pp.1-25) as its title suggests, or more broadly a "*transnational system of justice*". The author emphasizes the interaction between the phenomenon of globalization and the development of law in this field. The law is conceived as an instrument to regulate this phenomenon, while contributing to its intensity, which would require rethinking the future of globalization to consider the very future of transnational commercial law.

6. Different analogies are taken up by the author to highlight the instrumental nature of law in globalization, taking up the analogy of Lord Bingham making law a "*handmaid*" of international trade, or by resorting to another analogy making law the regulator of the highways of globalization. The author's brief historical review serves to demonstrate the global interactions at work, whether it be the attacks of September 11, 2001, the financial crises (in Asia in 1997 or in the United States that of 2008 following the bankruptcy of an American bank), climate change perceived as a threat to all humanity, threats to public health at the international level, of which COVID-19 has made us aware. As the author reminds us, it is the succession of crises of an existential nature that has reinforced the idea of excessive interdependence and a loss of control. Even if the author acknowledges that some warning signs already presage a reaction against globalization, such as Brexit, the election of Donald Trump or a slowdown in international economic exchanges between 2008 and 2017.

7. The author sees three reasons for the decline of globalization, which he also describes as being an "*ideology.*" The first reason is the lack of consensus on its main objectives and goals, as well as its limitations. The second reason is the lack of reorientation of globalization to address the global challenges facing humanity. A third reason is the role played by the

law itself, which contributes to this decline, resulting in the weakening of the right of access to justice for populations furthest from judicial institutions, in both developed and developing countries. However, the author also sees hope in these challenges, since according to him, it is this same interconnection that will make it possible to better respond to these challenges. To abandon the framework of globalization would be to relinquish all control over the future, not to take back power.

8. To reshape globalization, the author identifies three potential remedies in which law can have a role to play: sustainability, the development of an appropriate narrative, and the search for legitimacy. Sustainability is considered in two dimensions, in the sustainable use of natural resources, but also in its social dimension by considering inequalities, both in distribution and opportunities. Law can have a role to play, the typical example would be the inclusion of sustainable development clauses in free trade agreements (FTAs) or investment protection agreements, such as those concluded by the EU. As far as the expression of a narrative is concerned, the author suggests the creation of a space for debate within the different communities allowing a consensus on the issues of globalization, while debating the quid pro quo acceptable to this same group. This dialogue should serve to go beyond the idea of a narrative that makes globalization a natural phenomenon that should be accepted without reservation. However, this space for dialogue should not be unlimited, in fact the author gives the example of the *Protection from Online Falsehoods and Manipulation Act* (POFMA) to combat disinformation related to globalization, which may be debatable since this type of law can induce a debate even on the limits of freedom of expression which vary according to legal systems. Finally, the acceptability of globalization must be found in the legitimacy of its institutions, understood by the author as: "the *willingness of people to respect the institutions, principles and practices associated with globalisation, and the decisions and outcomes that are derived by those actors and from those norms, even if individually, they may not agree with any particular instantiation of the globalist philosophy.*" (p. 18)

9. Of these three aspects, it is this last aspect that is the most developed by the author, as it is considered fundamental for the construction of a sustainable model of globalization. The author notes that three axes

emerged during the round table that could accompany the process of judicial reform. First, the importance of the procedure in ensuring access to justice. Many examples are cited, but one of the examples is indicative of the concepts of accessibility of justice and the adequacy of a mechanism for its intended objectives, and that is ISDS. The dissonance between public and private interests at stake in this type of mechanism is summarized by the author: "*there is a growing sense that much of the criticism levied at the ISDS process stems from the dissonance between its public nature and goals and the private procedure by which they are to be achieved.*" (p.19) Secondly, the awareness of actors that any dispute settlement mechanism is part of a broader system of transnational justice. It is the awareness that the different mechanisms are not in competition, but are complementary, this is the case of the judicial or arbitral remedy, one could add amicable in the current context (i.e., mediation). Jurisdictions should not see themselves as competing or consider standardization but should integrate the need for "*interoperability.*" (p.24) Thirdly, to rethink the role of legal professionals in contributing to the process of legitimizing globalization through their networking.

10. **The first part attempts to define the expression of 'international commercial dispute'. The first chapter identifies traditional instruments for defining an international commercial dispute on the basis of the UNCITRAL Model Law on International Commercial Arbitration** (Pak H. L., 'A Bird's Eye View of International Commercial Dispute Resolution', pp. 29-41). It is the idea of convergence that emerges from this first chapter, a convergence of principles, both of substantive and procedural law, since harmonization should not lead to an identical approach in legal systems, not denying the rights of States to compete to attract foreign investment by promoting certain characteristics that are absent in other States. This harmonization is achieved through international instruments, both binding and non-binding, with some sectoral organizations already playing this role. One of the approaches of this chapter is to question the benefits of international arbitration and to rediscover the advantages of judicial remedy, or rather to question the ease of enforcement of arbitral awards compared to foreign court decisions. The author recalls certain studies that call into question the superiority of arbitral awards in this field, identifying the ease granted by courts in common law legal systems to the enforcement of foreign court

decisions (the purpose of which relates to the payment of a sum of money), under certain conditions, which would also benefit from such a facility in continental legal systems, through the principle of reciprocity. This thesis takes up an approach already developed by one of the contributors in another article (See for instance, Reyes A, 'ASEAN and The Hague Conventions' (2014) 22 Asia Pacific Law Review 25).

11. **The Chapter 2 envisions international commercial dispute settlement as a decentralized, but interconnected system** (Allsop J., Warpole S., 'International Commercial Dispute Resolution as a System', pp. 43-87). Without hesitation, the authors state categorically that the goal must be to further develop the system of globalisation. The necessity stems from the fact that the authors consider globalisation, as a system, as being a component of the rules-based international order (p.44). The content of Chapter 2 may seem repetitive compared to Chapter 1 in attempting to define what an international commercial dispute is, which is understandable to the extent that the contributions were produced independently. However, the authors add some examples from English law or Australian jurisprudence. Moreover, in attempting to delineate the types of disputes that are part of international commercial dispute settlement, the authors distinguish between investment and trade dispute settlements, even though the former may be part of this dispute settlement system at the international level. The authors offer a historical summary of the lex mercatoria, focusing on the development of English law. Drawing an analogy with the monument of Gaudi's Sagrada Familia, an unfinished historical monument, the author describes an international dispute settlement system that remains heterogeneous and constantly evolving. A typology of foundations, institutions, applicable rules and the human factor is made by the authors. The foundations of this system are the UNCITRAL instruments and the various Hague Conventions. As far as the institutions are concerned, they are the international arbitration centres, but also the commercial courts. The authors go against certain extreme positions according to which only the courts are legitimate to decide disputes, if these two institutions are in competition, they are also complementary: "*Arbitrators, and commercial parties, should be able to rely upon a sympathetic, competent and interested commercial court that will act with a light touch generally whilst also intervening with proper despatch when the circumstances of the case and the protection of the system as a whole*

demand it." (p.56) The authors acknowledge the role of the arbitrators, who are part of this system, because the stakeholders of this system recognize their competence, which can be summed up by the author: "Arbitrators can, and do, make law." (p.59)

12. In addition to these considerations of identifying the elements of the system, the authors emphasize the balance of interests at stake. The authors argue that "*just as there is a need to promote party autonomy, there is a need to promote the national and transnational public interests that attend such disputes, so that the system retains the support of the international community of nations upon which it depends.*" (p. 63) This statement reflects the fact that the international community is already placing limits on private interests and the principle of party autonomy. This is the case with the scope of arbitrability of a dispute, the authors are of the opinion that even if the scope of arbitrability expands, certain types of disputes will always remain within the scope of national courts, even if this scope of arbitrability is not uniform, but it may vary from one legal system to another (e.g. Disputes relating to competition law, intellectual property rights, etc.). The authors also review a second element, which is the question of overriding mandatory rules, which oblige the arbitral tribunal to consider the balance between public and private interests. Public policy is also concerned, as it is specifically targeted as a cause for annulment of an arbitral award to prevent it from becoming part of the legal order of a legal system. The Australian and English case law shows that it is a fundamental breach of the concept of public policy that is primarily targeted.

13. The elements of convergence reside, for the author, in the development of a modern *lex mercatoria*, the establishment and development of international commercial tribunals, as well as the elaboration of a specific culture for the settlement of international trade disputes. In the author's view, the *lex mercatoria* should not be limited to a choice between two extremes opposing the international legal order to the national order, but rather it should bring together internationally accepted instruments and practices, as well as interpretations at the national level when they are compatible with the international context. The most important thing for the author is consistency in the interpretation of the principles considered by the various institutions of international trade dispute settlement. Not

surprisingly, the author asserts without hesitation that this modality of legal formation is the common law, which will obviously certainly take the jurist of continental law by surprise (who would certainly call it uniform law?). Anticipating criticism of the lack of transparency of arbitral awards, the vast majority of which are not published, the author argues for the publication of awards, allowing this common law to flourish under the pen of the best international arbitrators. Here we see a certain form of elitism in the making and a risk of seeing the drafting of arbitral awards wax lyrical. As a judge, the author emphasizes the importance of international commercial courts, particularly the Singapore International Commercial Court (SICC), which has the particularity of offering a selection of international judges, unlike the London court. Increasing cooperation between these institutions could make it possible to harmonize practices, as well as their networking (this is also the purpose of the Standing International Forum of Commercial Courts – SIFOCC - network, one of the authors of which has a role in the Steering Committee). As far as the cultural factor is concerned, the example of a pro-arbitration approach set out in Australian case law in 2010 is an example, recalling the instruments applicable at the international level in arbitration, recalling the supervisory role of national courts, to be exercised only when intervention is appropriate.

14. **The competition and complementarity of international commercial arbitration and international commercial courts is the subject of Part 2 of the book. The purpose of Chapter 3 is to establish an identity sheet of existing commercial courts by presenting their advantages and disadvantages about international commercial arbitration** (Shi J., 'The Landscape of International Commercial Courts', pp. 91-113). The section dedicated to the history of ICC provides a brief overview of some of the ICC that are members of the SIFOCC network. As the author notes, the reasons for the establishment of ICC vary according to legal systems, but two main reasons can be identified: either a need for specialization requested by the business community, or based on geopolitical considerations, with the ambition of establishing a regional centre for the settlement of international trade disputes (this is the case in Dubai or Singapore, for example). The case of the China International Commercial Court (CICC) is original, since one of the reasons justifying its creation is based on the geopolitical and economic project of the Belt and Road Initiative (BRI).

15. With regard to the disadvantages identified by the author: - the recognition and enforcement of foreign judgments, with the New York Convention retaining a presumed advantage, even if some other authors of the book do not necessarily see this as a problem, particularly in the common law sphere (see Chapter 8); - even if the courts envisage the settlement of international trade disputes by adapting certain rules, the applicable procedural law often remains the civil procedure law of the forum; - an advantage that can also be presented as a disadvantage is the right to appeal decisions, unlike arbitral awards, which may conflict with the expressed need for expeditiousness of the procedure, but which retains a fundamental nature in the legal systems envisaged. The CICC still appears to be an exception, as the decisions of the CICC are final and not subject to appeal; – not all ICC offer the possibility for foreign judges and representation by a foreign lawyer, or a lawyer not registered with the local bar.

16. This presentation therefore relativizes the importance given to CCI, their functioning depends on the national legal order in which they are part of, reiterating the diversity of judicial practices and procedures, keeping differences with the functioning of international arbitration.

17. **The competition between the judiciary and the arbitration mechanisms is presented under the analogy of a *'swinging pendulum'* in Chapter 4** (Ader B., 'The Driving Forces behind the Swinging Pendulum', pp. 115-134), whose author's profile as judge and arbitrator may be seen as representative of this 'pendulum' movement, but also of the versatility that actors can play, who can be called upon both as judge, arbitrator, mediator, adviser or expert. Beyond the succinct description of the influence of so-called Asian values (which may be needed to be further defined elsewhere, we can rather refer to specifically dedicated works), the added value of this Chapter is to recall the debate in English law on the alleged risk of impact on the development of the common law and its role in the interpretation of commercial law. The reminder of this debate, which is internal to the common law tradition because of the particularity of its sources, echoes previous contributions in which the right to appeal or the confidentiality of arbitral awards are considered as both advantages and disadvantages about judicial recourse and the development of ICC.

Outside of English law, the question of common law development could be a discussion in other legal systems in the common law tradition, such as Singapore. However, the author recalls the work on this question, showing that it remains open due to a lack of sufficient objective data, or that even if this were the case, there is no obligation pending on any litigant to contribute to the development of case law, recalling the words of Lord Saville of Newdigate (pp. 123-124). The author emphasizes that the question of appeal on the merits, which could contribute to the development of the common law, remains open in Singapore, and that Hong Kong law takes a similar approach as English law, but unlike English law the right of appeal is based on an opt-in.

18. The Chapter 4 echoes the Chapter 3 on identifying advantages and disadvantages of both mechanisms. The author highlights other disadvantages, whether in terms of collecting evidence in a State other than the one in which the ICC is located, or in terms of the modalities of recognition and enforcement of a judicial decision of an ICC, even if cooperation among ICCs of systems of common law tradition seems to be developing in parallel with the new competences posed by instruments of international law such as the Hague Conventions (as already considered by other chapters in the book). The Chapter 4 raises the role of mediation in the light of this analogy of the pendulum between the two other types of mechanism. This could be the subject of further developments in the current context where the Singapore Convention is meeting with some success.

19. **Part 3 deals with ISDS as a clash between a David and a Goliath. Chapter 5 summarizes the criticisms levelled at the ISDS system, including criticism of arbitrators themselves** (Ye J., 'An Introduction to Investor–State Dispute Settlement', pp. 137-158). The criticism of the lack of diversity of the arbitrator profiles is indicative of the lack of diversity in general among the economic elites. The author points out that diversity is not limited to gender, but also to nationality or legal system. Using previous studies on this topic, the author notes that a few numbers of women monopolize female appointments in the ISDS system. We believe that the term diversity needs to be better defined, otherwise it can lead to misunderstandings, since other types of differences, for example social diversity, tend to be left aside in favour of parity.

20. The author identifies the main criticisms being formulated in favour of reform of the ISDS system, which are the lack of diversity and the lack of independence.

21. **Chapter 6 focuses on the concept of proportionality between the legitimate objectives of a State and the legitimate expectations of an investor, or, as its title suggests, the needs of a State and the demands of investors**(Reyes A., 'The Way Forward in Investor–State Dispute Settlement How Do We Balance the Needs of States with the Demands of Investors?', pp. 159-179)**.** The discussion revolves around four parts, the conclusion of which supports an overhaul of the dispute settlement mechanism through the establishment of a multilateral investment court, a proposal supported by the EU and integrated into the new generation of FTAs, notably with certain ASEAN states, including Singapore and Viet Nam.

22. First, an analysis is made on the four types of clauses: fair and equitable treatment; protections in the event of expropriation; national treatment; the most-favoured-nation clause. The author points out that, regardless of the nature of the protection invoked, an arbitral tribunal is faced with the search for a balance between public and private interests. However, what a court is confronted with, for the author, is the search for discriminatory treatment of an investor or an investment as a basis for the breach of its obligations and the responsibility of the State in question. In addition to the principle of balancing competing interests, the second proposition is centred on the proportionality of measures adopted by a State to achieve a certain objective. The author moves quickly to the third part of his articulation, which aims to affirm the lack of legitimacy of an arbitral tribunal made up of ordinary legal practitioners as soon as the principle of balance of interests and the principle of legitimacy of the measure would be established by a court. For the author, the justification does not require further elaboration, because unlike international trade arbitration, international investment arbitration would also involve the public interests of the citizens of the State in question, and therefore the lack of legitimacy of arbitrators whose mandate would be illegitimate.

23. The fourth part materializes the conclusion of the three previous postulates to arrive at a proposal in favour of the establishment of a network of Multilateral Investment Courts (MIC), as proposed by the European Union in its new generation of FTAs and IPAs, envisaged by the European Commission as an appropriate response to replace the current ISDS system. The EU-Singapore FTA and IPA provides an example, as the author points out, of the organisation and functioning of this MIC. The MIC is organized into two orders, first instance and appeal, composed of full-time judges paid by the two states, they are appointed jointly by them. The author attempts to respond to three criticisms made against a multilateral system: the biases of judges appointed by States, the negotiation of the qualifications of the persons who can be appointed, and the difficulty of negotiating the conditions of operation of this system in a multilateral manner. As far as instruments are concerned, the author leaves open the possibility of negotiating binding instruments, but he makes a proposal by proposing the use of a "*universal civil procedure*" (p. 177), of which the SICC procedure could serve as a model. Contrary to optimism about the benefits of mediation, the author adds his observation that mediation will provide little help in the field of ISDS, because it entails risks for the public authorities, both politically and legally. One may consider whether the lack of diversity could be exacerbated by the establishment of such a single system further restricting the profile of persons who could be appointed as judges of an MIC, restricting access to these functions to the establishment close to public decision-makers or those who have already attained the highest judicial functions in a State, on the model of the International Court of Justice. However, opportunity of appointment of arbitrators in the ISDS system may already be seen as being limited to a restricted pool of practitioners.

24. Although Part III alludes to David and Goliath, it is difficult to see which of the states or investors fall into either of these categories.

25. Part IV focuses on the concepts of finality and certainty in the settlement of international disputes.

26. **The linear reading of the book gives us the feeling that the concept of certainty is a common thread in the authors' contributions, even if it can be considered by some authors in distinct aspects, such as the**

formation of jurisprudence. These concepts are defined in Chapter 7 (Lui W., 'The Need for Finality and Certainty in International Commercial Dispute Resolution', pp. 183-207).

27. **Chapter 8 provides a comparative perspective between the interpretations made by different judicial systems of the principles of finality and certainty, while also articulating them with other principles such as reciprocity or comity, sovereignty, party autonomy (**Nallini Pathmanathan, Joanne Tan Xin Ying, Towards the Just Resolution of Disputes How Do We Balance Commercial Certainty and Achieving the Right Result? pp. 209-242). The authors explore the foundations of the principles underlying the prevention of parallel proceedings, which may differ in common law systems or in continental law systems, through the principle of *lis pendans*, *forum non conveniens*, or the submission of an anti-suit injunction. The authors are of opinion that the latter principle is more accepted by systems of continental law when its purpose is to give effect to an arbitration clause. The authors underline the importance of the Hague Conventions of 2005 and 2019, as they may facilitate the recognition and enforcement of foreign judgments, even though the risk of fragmentation of interpretations between the different courts of the different legal systems is not excluded. The authors recall Gary Born's criticisms of these conventions, and they take the view that those criticism are unfounded because conventions can play the same role with the same degree of protection as that granted by the New York Convention for arbitral awards.

28. Another interesting development in this Chapter is the question of the consequence of the popularity of the use of mediation in the settlement of international trade disputes, focusing on whether this can be done to the detriment of the development of the *lex mercatoria*, as the other contributions considered the question of whether arbitration may ultimately result in the impoverishment of the development of the common law. Echoing the Chapter 1 of the book, the same question can be asked, according to the author, also for arbitration, as far as arbitration is confidential and not conducive to contributing to the development of the *lex mercatoria*. The authors' position is that the courts are in a better position to contribute to the development of the *lex mercatoria*, through the publication of judgments, even if the alternative dispute resolution

institutions also contribute to the production of transnational norms, particularly in the field of procedures. This Chapter reaches the same conclusion as the Chapter 1. We can ask ourselves the question of legal systems in which there is still a lack of transparency in the procedure and the judgments rendered.

29. **Part V is devoted to the definition and content of the lex mercatoria.** Its two chapters remind us of the difficulty of conceiving the lex mercatoria as having a universally accepted content. A proposal is made by an author to conceive of the lex mercatoria as a network: "*it is submitted that it would be more appropriate to regard the lex mercatoria as a network of interlocking principles, rules and guidelines which deal with different aspects of transnational commerce. Diversity and divergence within that network is to be expected, and can even be advantageous where rules diverge not out of ignorance, but due to a genuine need to accommodate special interests or cater for unique situations."* (p. 276)

30. **The last two chapters of Part VI discuss the effects of COVID-19 on dispute settlement.** These two final contributions reflect the context of the pandemic, they include positions in favour of a change in practices in the conduct of hearings, both arbitral and judicial, even though the authors suggest that the adoption of new practices is faster for arbitration, than for judicial hearings. The authors agree on the possibility of conducting a procedure in a diachronic manner, known as "asynchronous dispute resolution" (With regard to the debate in arbitration, one could refer to *Does a right to a physical hearing exist in international arbitration?* The ICCA Reports No. 10).

III. Conclusion

31. The solutions proposed in the contributions are not entirely new, but they do represent an amplification of a paradigm shift in favour of professional judges and judicial settlement by permanent international commercial tribunals and a mechanism of bilateral or multilateral investment tribunals. It is not so much arbitration that is the subject of a formal accusation, but above all the investor-state dispute settlement mechanism that is

considered by the authors to be no longer adequate. Arbitration in international trade retains its place in a transnational system of justice.

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Investment Treaty Arbitration is a *'Pacta Sunt Servanda*[1]*- An Analysis*

By: DR.R.J.R.Kasibhatla[2]

Born in the year 1966 at Kotha Peta, E.G. district, Andhra Pradesh. Graduated in science (BSc) from Andhra University in the year 1986 in First Division with Zoology as main subject and Botany and chemistry as ancillary subjects. Obtained Bachelor of Laws Degree from Nagarjuna University in the year 1990 with Taxation and Insurance as specialization. Pursued Masters Degree in Law (LL.M.) from Bangalore University in the year 1992 with comparative settlement of Disputes and service law as specialization. Obtained P.G. Diploma in Industrial Relations and Personnel Management (PGDPIR) with Distinction from A.P. Productivity council in the year 1987. Cleared UGC-NET in the year 1996. Awarded Ph.D. for the thesis submitted on "Legal Analysis of Biological Diversity and Ecological Order in India in the year 2006.

Presently working as Additional Legal Adviser in the Ministry of Law & Justice, D/o Legal Affairs, Government of India, New Delhi and part of the International law and Cooperation Division. While serving in the Department of Legal Affairs Participated in the BIPA/BIT (Bilateral Investment Promotion and Protection Agreement) negotiations with several Countries like UK, Australia, UAE, Russian Federation, Seychelles, Saudi Arabia, Guyana, Canada, Greece, USA, Lithuania , Cuba and Iran and Check republic, etc. Participated in negotiations regarding Mutual Law Assistance Treaty in Civil and Commercial matters between India and Ukraine and Free Trade Agreement/Comprehensive Economic Cooperation Agreement negotiations with Australia, Japan, South Korea and European Union. Assisted in several Investor State Disputes raised under BIT like Vodafone, Cairn, Tenoch, Nissan Motors, RAKIA, KOWEPO, GPIX, and participated in the evidentiary hearing and part of part of ongoing ISDS cases.

Nominated as an Inter-Governmental Expert to Review of the Status of implementation of the provisions of United Nations Convention Against Corruption (UNCAC). As a peer review committee member reviewed implementation of UNCAC by South Korea. Participated in India-USA contact group Meeting held at Vienna and London during the year 2014 for finalization of the agreements to set up nuclear power plants in India by US Companies. Attended 6th Member States Conference at Austria,

[1] Treaties that are in force bind the parties must be executed by them in good faith.

[2] Presently working as Additional Legal Adviser in the Ministry of Law and Justice, Department of Legal Affairs, Government of India and views expressed are purely personal.

Vienna to review the implementation of UNCAC in the month of June, 2015. Participated in the 3rd G20 ACWG meeting held in Paris form 15-17 October, 2015. Attended UNCAC Members state conference regarding Implementation of UNCAC held at St. Petersburg during 2-4 November, 2015. Member of RCEP WGI group and participated several rounds of negotiations.

As a Legal Adviser to Government of India tendered advices on various important legal, constitutional, Taxation (including GST) and international issues. Also involved in the process of making of several important legislations like IBC, GST and the subsequent amendments. Before joining Law Ministry practiced as an Advocate before the District Courts in and around Kakinada and also as an attorney for Patents and Trade-Marks. Also served as Asst. Professor at W.B. National Law University of Juridical Sciences. As a Law Teacher, Advocate and as a Legal Adviser to Government of India so far put up more than 30 years of experience in the field of law. His articles on diversified legal issues are published on various national and international law Journals.

Abstract

Dispute settlement is arguably the most important provision in any Bilateral Investment Protection and Promotion Agreement ("BIPA") or Bilateral Investment Treaty ('BIT'). It provides recourse to foreign investors for ensuring that the obligations of the contracting parties under the BIPA investment treaty are effectively implemented and enforced. "[Having ISDS provisions] increases the level of certainty regarding the business environment in which investors operate in the host country. In addition, this mechanism ensures that the dispute is decided on legal grounds, thus separating legal from political considerations."[3] Another important preliminary point to note about ISDS provisions in a BIPA is that most of them adopt Alternative Dispute Resolution ("**ADR**") methods for settlement of disputes between the investor and the state. This practice is in consonance with the requirements of international business which requires the adoption of the most speedy, informal, amicable, and inexpensive method available. The increasing interaction of BIT provisions and private rights in the light of legitimate expectations lead to the increase of the ISDS[4] cases. The tribunal also invokes their jurisdiction in such cases and decides the matters. However, the most relevant and important issue to be considered while considering an ISDS is as to whether such claim is in accordance with the

[3] UNCTAD, Bilateral Investment Treaties 1995-2206: Trends in Investment Rule Making, New York and Geneva 2007.

[4] Investor State Dispute Settlement

provisions of the BIT or not. The Tribunals while deciding the issue on merits in the first instance has to ensure that *prima-facie* there is a breach of substantive obligations of the BIT by the Contracting state where the investments are made infringing the right of the Investor/Claimant's right. The present paper is analysis of the issue as to whether the arbitral tribunal can invoke jurisdiction even if the claim raised is not explicitly or implicitly in breach of the substantive obligations or covered under the BIT.

Introductory:

Investment arbitration arises out of a relationship between the State and an investor and is governed by Public International Law, which is quite different from a commercial set up[5]. Unlike typical commercial arbitrations on several grounds firstly one party to an investment treaty arbitration, usually the respondent, is a State or State entity. Second, investment treaty arbitrations regularly involve questions not of private, but of public law that is, disputes about the limits of the State's or State entities administrative, legislative, or judicial powers. Thirdly Investment treaty arbitrations do not primarily involve questions of contractual liability under domestic law, but of State responsibility under international law, that is, whether the host State's conduct was in accordance with the principles contained in an international investment treaty. Fourth, the parties to an investment dispute are not equals: instead, investors and host States stand in a relationship of super-and-subordination with the State being able to impose binding decisions on a foreign investor. Fifth, investment treaty arbitration is "arbitration without privity"[6]

[5] Judicial Approach in Applying the Arbitration and Conciliation Act, 1996 to Investment Disputes, 2 IALR (2020) 255 at page 257

[6] See Jan Paulsson, "Arbitration Without Privity" (1995) 10 ICSID Rev.-FILJ 232; Bernardo Cremades, "Arbitration in Investment Treaties: Public Offer of Arbitration in Investment-Protection Treaties", in Robert Briner, L. Yves Fortier, Klaus Peter Berger and Jens Bredow (Eds.), LAW OF INTERNATIONAL BUSINESS AND DISPUTE SETTLEMENT IN THE 21ST CENTURY (2001) 149; Andrea K. Bjorklund, "Contract Without Privity: Sovereign Offer and Investor Acceptance" (2001) 2 Chicago JIL 183.] — The host State's consent is not based on contract, but on a unilateral offer in an investment treaty in generalised and prospective form, which any investor covered by the treaty's provisions can accept simply by initiating arbitration. [See Barton Legum, "Investment Treaty Arbitration's Contribution to International Commercial Arbitration" (2005) 60(3) Dispute Resolution Journal 71, 73.] Deference in Investment Treaty Arbitration: Towards a Public Law Understanding of the Relationship Between Investment Treaty Tribunals and Host States, (2014) JDPR 81 at page 88by

Dispute settlement is arguably the most important provision in any Bilateral Investment Treaty ("**BIT**"). It provides recourse to foreign investors for ensuring that the obligations of the contracting parties under the BIPA investment treaty are effectively implemented and enforced. "[Having ISDS provisions] increases the level of certainty regarding the business environment in which investors operate in the host country. In addition, this mechanism ensures that the dispute is decided on legal grounds, thus separating legal from political considerations."[7] Another important preliminary point to note about ISDS provisions in a BIPA is that most of them adopt Alternative Dispute Resolution ("**ADR**") methods for settlement of disputes between the investor and the state. This practice is in consonance with the requirements of international business which requires the adoption of the most speedy, informal, amicable and inexpensive method available. The increasing interaction of BIT provisions and private rights in the light of legitimate expectations lead to the increase of the ISDS[8] cases. The tribunal also invoked their jurisdiction in such cases and decided the matters. However, the most relevant and important issue to be considered while considering an ISDS is as to whether such claim is in accordance with the provisions of the BIT or not. The Tribunals while deciding the issue on merits in the first instance has to ensure that prima facie there is a breach of substantive obligations of the BIT by the Contracting state where the investments are made infringing the right of the Investor/Claimant's right.

Investment Arbitration:

An investment treaty normally provides treatment provisions with respect to several matters. Various treatment standards in an investment treaty may be categorized as 'general' or 'specific', the former applies to all forms of investment activities in the host state while latter only concerns particular matter relating to an investment. General standards of treatments include host state's commitments to grant investors and their investments 'fair and equitable treatment', 'full protection and security', 'treatment in accordance with the international minimum standard', 'national treatment', and 'most-favored-nation treatment'. Specific treatment standards include 'monetary transfer provision', 'expropriation, and investor rights in times of war, revolution, or civil disturbance[9].

[7] UNCTAD, Bilateral Investment Treaties 1995-2206: Trends in Investment Rulemaking, New York and Geneva 2007.
[8] Investor State Dispute Settlement
[9] Santhosh Kumar, Full Protection and Security Standard in International Investment Law and

The remedy under a BIT Agreement is a remedy which is provided to investors from foreign countries. Presuming an investor to be a genuine investor, if the investor's investment in India has been prejudiced, the investor can invoke remedies available under the BIT. The availability of such remedies promotes the investor-friendly ecosystem of any country. Under the BIT, the State holds out an assurance to protect the investments of investors from the Contracting State. An assurance given under any BIT signed by the Republic of India constitutes a solemn promise by the country for being a destination for safe foreign investment. The BIT provides for obligations and remedies which are not dependent on any other statutes or laws. The BIT is self-contained and is primarily governed by principles of public international law. It would not be wrong to say that BITs are '*sui generis'* in nature and do not depend on the applicability, interpretation, and adjudication under domestic laws. Interference with the BIT dispute resolution mechanism in the case of a genuine investor dispute could lead to erosion of investor confidence and also dislodge the fundamental precincts on which BITs are based[10].

PRE-REQUISITES FOR ACTIVATING THE ISDS PROVISIONS:

In general majority of the BITs requires that prior to invoking the ISDS procedure under Article 9, several conditions must be fulfilled. The pre-requisites for invoking the ISDS procedure are the following: -

a. Negotiations

As a first step, that disputes must, as far as possible, be settled amicably through negotiations between the parties to the dispute[11].

b. Exhaustion of local remedies

Historically, most BIT's have required that parties must exhaust local remedies before invoking ISDS procedures[12].

Practice : an Indian Perspective, 2 SML L Rev 177 (2019) at page 178)

[10] Union of India v Khaitan Holdings (Mauritius) Limited and Others CS (OS) 46/2019, I.As. 1235/2019 & 1238/2019 Decided on January 29, 2019 in the High Court of Delhi. 2019 SCC online Delhi 6755

[11] Article 9 (1) of the Indian Model BIT text

[12] Article 9 (2) (a) of the India Model BIPA requires that any dispute which has not been amicably

c. Conciliation

The second alternative to settle the dispute if negotiations have failed is to submit the dispute to international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law ("**UNCITRAL**")[13]. An additional requirement for submission to conciliation is that the Parties may refer a dispute to conciliation only if they have failed to amicably settle the dispute by negotiations within six months.

d. Consent

Another important feature is that at every place consent of the parties is necessary to invoke the dispute settlement procedure.

THE ARBITRATION FORUM

ISDS provisions in most BIPA's refer to various existing international arbitration conventions to prescribe the rules governing the arbitration. The forums are: -

a. International Convention for the Settlement of Investment Disputes ("**ICSID**"), 1965, if both Contracting parties (the Contracting party of the investor and the host state) are parties to ICSID and the investor consents in writing to submit the dispute to ICSID; or

b. The ICSID Additional Facility for the Administration of Conciliation, Arbitration, and Fact-Finding proceedings, if both parties agree[14]; or

settled between the parties through negotiations may be submitted for resolution to a competent judicial, arbitral or administrative body, in accordance with the law of the host country.

[13] Article 9 (2) (b) of the Indian Model BIT Text.

[14] Since India is not a state party to ICSID, any investment dispute involving India or Indian investors cannot be initiated under ICSID. Thus, option (a) is automatically rules out for Indian investors or where India is a state party to a dispute. As a consequence, any dispute involving India/Indian investors will be referred to the option mentioned under Article 9 (3) (b) & (c) (of Model BIT Text) : - the ICSID Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding proceedings or an ad-hoc arbitral tribunal in accordance with the Arbitration Rules of the UNCITRAL, 1976.

c. To an ad-hoc arbitral tribunal in accordance with the Arbitration Rules of the UNCITRAL, 1976.

INTERPRETATION OF BITS:

Interpretation of Bilateral Investment Treaties (BITs) is governed by Public International Law but it does not exclude Domestic Law from consideration by Investment Treaty Tribunals. The main role of Domestic Law is in defining the scope of investment protected. When the Tribunals themselves have attempted to establish canons of construction for interpreting BITs, the principles that have established are contradictory.

COMPETENCE TO INTERPRET:

As per the settled principles of International law obviously, the parties to the Treaty have competence to interpret a treaty, but this is subject to the operation of other legal rules. The Treaty itself may confer competence on an ad hoc Tribunal or the International Court. The UN Charter is interpreted by its organs, which may seek advisory opinions from the Court[15].

THE RULES OF INTERPRETATION:

Various rules for interpreting treaties have been put forward over the years[16]. These include the textual approach, the restrictive approach, the teleological approach[17], and the effectiveness principle. Of these, only the textual approach is recognised in VCLT: Article 31 emphasises the intention of the parties and expressed in the text, as the best guide to their common intention[18]. The jurisprudence of the International Court likewise supports the textual

[15] Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), ICJ Reports 1962 P 151, 163. Also: Navigational and Related Rights (Costa Rica v Nicaragua), ICJ Reports 2009 P 213, 237.

[16] For interpretation in the World Court pre-VCLT: Fitzmaurice (1951) 28 BY 1.

[17] The teleological approach is also called “consequentialism”. It determines the moral worth of any action by the consequences or outcomes of that action. An action is good if its consequences are good; an action is wrong if its consequences are bad.

[18](a) On interpretation of treaties authenticated in two or more languages: Art 33; James Buchanan and Co Ltd V Babco (UK) Ltd (1977) AC 141; Young Loan (1980) 59 IL 494; Nicaragua, Jurisdiction and Admissibility, ICJ Reports 1984 P 392, 522-3 (Judge Ago), 537-9(Judge Jennings), 575-6(judge Schwebel, diss); La Grand (Germany V US), ICJ Reports 2001 P 466,502.

(b) Also see James Crawford, SC, FBA, “Brownlie’s Principles of Public International Law” Eighth Edition, P379, Oxford University Press.

approach[19].

THE GENERAL RULE: VCLT[20] ARTICLE 31:

Article 31 (1) of the VCLT provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. As per Clause (2) of this Article the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

> (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Under Clause (3) there shall be taken into account, together with the context:

> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) Any relevant rules of international law applicable in the relations between the parties.

Clause (4) provides that a special meaning shall be given to a term if it is established that the parties so intended. The first principle stated in Article 31 of the VCLT is that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty'. In Polish Postal service in Danzig the Permanent Court observed that postal service which Poland was entitled to establish in Danzig by treaty was not confined to working inside the postal building: 'postal service' must be interpreted in its ordinary sense so as to

[19] As the International Court put in 1950, 'if the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter': Competence of the General assembly for the Admission of a state to the United Nations, ICJ Reports 1950 P 4, 8. Also: Territorial Dispute (Libya/Chad),ICJ Reports 1994 P 6-21; Qatar V Bahrain, Jurisdiction and Admissibility, ICJ Reports 1995 P 6,18; Pulau Ligitan/Sipadan, ICJ Reports 2002 P 625, 645: Genocide (Bosnia and Herzegovina V Serbia and Montenegro),ICJ Reports 2007 P 43, 109-10. Further: Fitzmaurice (1951) 28 BY 1, 1-28: Fitzmaurice (1957) 33 BY 203, 203-38, Thirlway (1991) 62 BY 1, 18-37; Gardiner (2008) 13-17.

[20] Vienna Convention of Law of Treaties, 1969.

include the normal functions of a postal service'[21]. Since then the principle of ordinary meaning has become well established as fundamental guide to interpreting treaties.

MEANING MUST EMERGE IN THE CONTEXT OF THE TREATY:

A corollary of the principle of ordinary meaning is the principle of integration: the meaning must emerge in the context of the treaty as a whole (including the text, its preamble and annexes, and any agreement or instrument related to the treaty and drawn up in connection with its conclusion)[22] and in the light of its object and purpose[23]. Another corollary is the principle of contemporaneity[24]: the language of the treaty must be interpreted in the light of the rules of general international law in force at the time of its conclusion, and also in the light of the of the contemporaneous meaning of terms[25]. The doctrine of ordinary meaning involves only a presumption: a meaning other than the ordinary meaning may be established, but the proponent of the special meaning has a burden of proof[26]. In complex cases the tribunal will be prepared to make a careful inquiry into the precise object and purpose of a treaty[27]. Treaties cannot be interpreted in isolation of the wider context, but at the same time, tribunals should be cautious about using article 31 (3) (c) as a guide for impropriating extraneous rules in a

[21] (1925) PCIJ Ser B No 11, 37

[22] VCLT, Art 31 (2); further: Competence of ILO to Regulate the Conditions of the Labor of Persons Employed in agriculture (1922) PCIJ Ser B Nos 2 and 3; Free Zones of Upper Savoy and the District of Gex (1932) Ser A/B No 46, 140; South West Africa, Preliminary Objections, ICJ Reports 1962 P 319, 335; Young Loan (1980) 59 ILR 494, 534-40, 556-8; Arbitral Award of 31 July 1989, ICJ Reports 1991 P 53. Also: Bernhardt (1967) 27 ZaoRV 491, 498; Gardiner (2008) 165-6.

[23] Rights of Nationals of the United States of America in Morocco (France V US), ICJ Reports 1952 P176, 183-4, 197-8; Pulau Ligitan/Sipadan, ICJ Reports 2002 P 625, 645-6, 651-3. See also Sur, L 'Interpretation en droit International public (1974) 227-31; Reuter, in Dinstein & Tabory (eds), International Law at a Time of Perplexity (1989) 623, 628; Jennings, in Bejaoui (ed), International achievements and Prospects (1991) 135, 145; Buffard & Zemanek (1998) 3 Austrian RIEL 311, 319; Linderfalk (2007) 205.

[24] As promulgated by Sir Gerald Fitzmaurice in 1957, the principle of contemporaneity — or principle of contemporaneous (treaty) interpretation — requires that "[t]he terms of a treaty [are] interpreted according to the meaning which they possessed […] in the light of current linguistic usage, at the time when the treaty was originally concluded".

[25] US Nationals in Morocco, ICJ Reports 1952 P 176, 189.

[26] For critical comment on the concept of natural or plain meaning: Lauterpacht, Development (1958) 52-60.

[27] Gabcikovo-Nagymaros Project (Hungary/Slovakia), ICJ Reports 1997 P7, 35-46.

manner that oversteps the boundaries of the judicial function[28].

'PACTA SUNT SERVANDA' IS SUPREME IN INTERNATIONAL LAW:

The VCLT entails a certain presumption as to the validity and continuance in force of a treaty[29]. This may be based upon *'Pacta Sunt Servenda'* as a general principle of International law: a treaty in force is binding upon the parties and must be performed by them in good faith[30]. The observance of '*pacta sunt servanda'*[31] is supreme in International Law and the override of treaty can result from deliberate acts or even in adopting legislations inconsistent with the tax treaties. The tax treaties essentially limit the jurisdiction of states to tax and thus ensure orderly application of domestic laws[32].

A State is placed in an extremely sensitive and critical position where its actions of enforcing domestic regulations and implementing larger governance policies can result in a breach/frustration of a contract, which can further lead to potential award against it under investment arbitration treaty. The customary international law codified in the Vienna Convention on Law of Treaties ("VCLT") entails an obligation of '*Pacta-sunt-servanda*' on a signatory state, which is to consider every bilateral or multilateral treaty signed into as binding[33] and a good faith obligation[34]. to respect that. Failure to respect this obligation by violating a BIT would result into dwindling of economic and potentially diplomatic ties between India and other states signatory to various BITs[35].

Before the Vienna Convention was adopted, the question as to what is

[28] French (2006) 55 ICLQ 281
[29] VCLT, Article 42. Also see Draft articles, II, ILC Ybk 1963/II, 189-90 (Art 30); ILC Final Report and draft Articles, ILC Ybk 1966/II, 236-7 (Art 39).
[30] VCLT Article 26; ILC Final Report and Drft Articles, ILC Ybk 19666/II, 210-II (Art 23); Villiger Commentary (2009) 361-8; Corten & Klein (2011) 659-87.
[31] Vienna Convention on Law of Treaties, 1155 UNTS 33 (1969), Article 26:"Every treaty in force is binding upon the parties to it and must be performed by them in good faith.".
[32] OECD, Model Tax Convention on Income and on Capital 2010, R (8) para 1
[33] Vienna Convention on the Law of Treaties 1969, Art. 26
[34] See Vienna Convention on the Law of Treaties 1969, Art. 26; Vienna Convention on the Law of Treaties 1969, Preamble
[35] Significance of International Investment Arbitration in India's Efforts Toward Instituting a Robust Regulatory Regime, 11 Ind J Int Ec L [82] 2019 at page 98

the basis of validity of a treaty, or to say, what is the binding force of a treaty was much disputed. The opinion of the jurists on the above question was different. According to some writers, the binding force is the law of nature. To others, it is religious and moral principles that bind a State. To some other writers, it is the will of the parties which gives binding force to their treaties. According to Oppenheim 'treaties are legally binding, because there exists a customary rule of International Law that treaties are binding[36]. The binding effect of that rule rests in the last resort on the fundamental assumption, which is expressed in the form of the principle *pacta sunt servanda* which means that States are bound to fulfil in good faith the obligations assumed by them under treaties. To carry obligations in good faith arising from treaties is one of the duties of the States. The Draft Declaration on Rights and Duties of the States prepared by the International Law Commission has expressly laid down under Article 13 that every State has the duty to carry out in good faith its obligations arising from treaties. McNair lays down that no Government would decline to accept the principle *pacta sunt servanda*[37]. It is one of the elementary and universally agreed principles for which it is impossible to find a specific authority. The principle of '*pacta sunt servanda'* has also been incorporated in the Vienna Convention. The Preamble appended to the Convention stipulated that the principles of free consent and of good faith and the '*pacta sunt servanda'* rule are universally recognized. Under Article 26, the Convention expressly laid down this principle by stating that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'. Article 2 Paragraph 2 of the Charter of the United Nations also lays down that 'All members in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.' It is to be noted that the good faith principle has also been recognized by the International Court of Justice in Nuclear Tests Case (Australia v. France) by stating that the principle of good faith is "one of the basic principles governing the creation and performance of legal obligations.[38]"

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[36] Oppenheim, op. cit., p1206 as referred by H.O. Agarwal, "International & Human Rights" Central Law Publications P361.

[37] Oppenheim P.493

[38] ICJ Reports (1974) P 268. Also see case Concerning Rights of Nationals of the United States of America in Morocco. ICJ Reports (1952) P. 212. Earlier Permanent Court of International Justice had also recognized the principle in a few cases. See Minority Schools in Albania, PCIJ Ser.A/B No 64, (1935) PP 19-10; Treatment of Polish Nationals and other Persons of Polish Origin, PCIJ Ser.A/B, No. 44 (1932) P28.

WHAT IS MEANT BY GOOD FAITH?

A question arises as what is meant by good faith. In the strict legal sense it has no meaning. However, parties to a treaty are required to interpret and perform the provisions of the treaty in good faith that is in accordance with the ordinary meaning to be given to its term in the context of the treaty and in the light of its object and purpose[39]. If a treaty is open to two interpretations, one of which does and other does not enable the treaty is open to two interpretations, one of which does and other does not enable the treaty to have appropriate effects, good faith, and the object and purpose of the treaty demand that the former interpretations should be adopted. In the case concerning Gabcikovo-Nagymaros Project (Hungry and Slovakia) International Court of Justice stated that the element of good faith implies that the purpose of the treaty and the intentions of the parties in concluding the treaties should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realised[40].

The principle of the '*pacta sunt servanda'* is regarded as the basis of validity of a treaty. It serves two essential functions as both as a source of International Law of ever increasing importance and an effective instrument of international co-operation. The contracting parties are required to carry out their obligations arising from a treaty in good faith. If they fail to observe this very principle, treaties which are regarded as the most important source of International Law would become questionable[41]. In the context of the law of treaties, however, the principle of good faith is not called upon to be "a source of obligation where none would otherwise exist". A party to a treaty is under a specific obligation to perform its obligations under the treaty, derived from the principle '*pacta sunt servanda'*, which can reasonably be described as one of the cornerstones of international law. Good faith is pertinent to the manner in which that obligation is to be performed; it is not put forward as a free-standing obligation[42].

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[39] See Dharam Pratap, "Interpretation of Treaties" in S.K. Agarwala, Essays on the 'Law of Treaties". (Edited) P.66

[40] Judgment was delivered by the Court on September 25, 1997.

[41] H.O. Agarwal, "International & Human Rights" Central Law Publications, P.363

[42] Article 26 of the Vienna Convention on the Law of Treaties, 1969. Mobil Investments Canada

INTEGRATION BETWEEN COMMERCIAL CONTRACTS AND BITS:

The increasing interaction of BIT provisions and private rights in the light of legitimate expectations lead to the increase of the ISDS[43] cases. The tribunal also invoked their jurisdiction in such cases and decided the matters. In SGS vs Pakistan the Tribunal came to the conclusion that it did not have jurisdiction over contractual claims 'which do not also constitute or amount to breaches of the substantive standards of the BIT'[44]. In SGS vs The Philippines, where contractual claims were more easily distinguishable from treaty claims the Tribunal referred certain aspects of contractual claims to local jurisdiction while retaining treaty-based jurisdiction[45]. "Umbrella Clauses[46]" might potentially transform a contractual obligation of a State into a treaty obligation thus erasing the distinction between one and the other.

TRIBUNALS SHOULD NOT REWRITE TREATY OBLIGATIONS:

Investment treaty tribunals, unlike international commercial tribunals, quite often make reference to the notion of deference: yet, they attribute different meanings to it. First, it can refer to the idea that international courts and tribunals have to respect the treaty-making power of States, and that tribunals should not rewrite treaty obligations they disagree with for policy reasons[47] or disregard authoritative interpretations by the Contracting

INC. Claimant and Government of Canada Respondent (ICSID Case No. ARB/15/6 Award dated 13th July 2018)

[43] Investor State Dispute Settlement

[44] SGS Societe Generale De surveillance S.A. vs Islamic Republic of Pakistan (ICISD Caen O. ARB/01/13), decision on Objections to Jurisdiction of 6 August 2003; 18 ICSID Rev.-FILJ 302 (2003), Para 162.

[45] SGS vs Philippines, (ICSID Case No. ARB/02/6), Decision on Objections to Jurisdiction of 29 January 2004, Para 163.

[46] Having 'Umbrella Clauses' in BITs is a mechanism of integration between Contracts and Treaties. Umbrella Clauses might potentially transform, a contractual obligation of the State into a treaty obligations, thus erasing the distinction between one and the other. To this extent contracts may be considered as treaties from the point of view of their legal effect.

[47] See Siag and Vecchi v. Republic of Egypt (ICSID Case No. ARB/05/15), Decision on Jurisdiction, April 11, 2007, para. 127 ("On the matter of interpretation of the international instruments involved in this case it was submitted that the Tribunal should give deference to the negotiated language of the treaty, including how Egypt and Italy chose to define 'natural person' and 'protected investment'. The Tribunal should not rewrite the BIT to achieve policy ends. If it did so, the Tribunal would be replacing its judgment for that of the Contracting States.").]

Parties[48]. This meaning of deference concerns the limits to the power of a court or tribunal to interpret the governing law vis-à-vis States as the authors of the treaty in question.

DOCTRINE OF COMPETENCE-COMPETENCE:

The doctrine of kompetenz-kompetenz (also known as competence-competence), as originally developed in Germany, was traditionally understood to imply that arbitrators are empowered to make a final ruling on their own jurisdiction, with no subsequent judicial review of the decision by any Court[49]. However, many jurisdictions allow an arbitral tribunal to render a decision on its jurisdiction, subject to substantive judicial review[50]. It is a well-recognized principle of public international law that a legal authority possessing adjudicatory powers has the right to decide its own jurisdiction. Similarly, it is a general rule of international arbitration law that an arbitral tribunal has the power to determine its own jurisdiction. The ability of an arbitral tribunal to determine its own jurisdiction is an important facet of arbitration jurisprudence because it gives effect to the separability presumption. The separability presumption insulates the arbitration agreement from the defects of the underlying contract, and thereby ensures the sustenance of the tribunal's jurisdiction over the substantive rights and obligations of the parties under the underlying contract even after such a contract is put to an end. The doctrine of competence-competence allows the tribunal to decide on all substantive issues arising out of the underlying contract, including the existence and validity of the arbitration agreement. The doctrine of competence-competence is now a part of all major jurisdictions[51].

[48] Consider how various tribunals, some deferential, others not, have dealt with the FTC Note of Interpretation on fair and equitable treatment under Article 1105(1) NAFTA. See Schill, at 268-275

[49] Fouchard, Gaillard, Goldman on International Commercial arbitration (edited by Emmanuel Gaillard and John Savage, 1999) 396.

[50] (a) Gary Born (n 62).

(b) For further details refer In Re: Interplay between Arbitration Agreements under A&C Act and stamp Act AIR 2023 SC 1 (at Para 115-116)

[51] In Re: Interplay between Arbitration Agreement under A& C Act and stamp Act, AIR 2024 SC 1 (Para 116)

TRIBUNAL TO DECIDE JURISDICTION:

The Tribunals while examining a claim made by the Investor or Claimant invoking the provisions of the BIT must consider the provisions of the BIT and see what is agreed and what is not agreed. The substantive standards of the BIT need to be considered in the way they are agreed by the Contracting Parties or states and not as interpreted by the Claimants or investors. A Contractual breach cannot be assumed or presumed as breach of Treaty unless the same has been specifically agreed in the form an Umbrella Clause. Similarly a dispute on tax measures cannot be considered unless the tax matters are covered under the BIT. Tribunals must ensure that the principle of the 'pacta sunt servanda' is regarded as the basis of validity of a treaty.

In Muhammet Çap & Sehil v. Turkmenistan[52] the dispute relates to the purported destruction, impairment, and unlawful expropriation of Claimants' construction projects in Turkmenistan, through acts and omissions of Respondent that allegedly violate the protections the latter afforded to Claimants under the BIT. After careful consideration of the Parties' written submissions and oral presentations, the Decision rules on Respondent's objection to jurisdiction and request for dismissal of Claimants' claims pursuant to ICSID Convention Articles 25 and 41, and Rule 41 of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), on the ground that Claimants failed to submit their dispute to Turkmenistan's national courts prior to initiating ICSID arbitration proceedings in accordance with Article VII(2) of the Turkey Turkmenistan BIT. In this case, the Tribunal has concluded that Article VII (2) provides for an option allowing an investor of one Contracting State to bring proceedings in one of three arbitration venues or in the local courts. If claims are brought in a local court then arbitration proceedings cannot be brought until one year has elapsed and no decision has been issued by that court[53].

[52] Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6

[53] The Tribunal expresses no view as to whether an investor can bring international arbitration proceedings if it is dissatisfied with a decision rendered by the local court in less than a year. Cf, however, Kiliç Award (Exh. RLA-98), § 6.5.4., and Kiliç Separate Opinion (Exh. RLA-98), § 22.

In Tulip Real Estate v. Turkey [54] the dispute was brought under the Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey dated 27 March 1986 (the "BIT") [55]. Respondent requested the bifurcation of its preliminary objections to jurisdiction and admissibility from the merits of the case. Respondent argued that Claimant has failed to respect the mandatory negotiation period set out in Article 8 of the BIT, depriving the Tribunal of jurisdiction to hear this case. It is argued that this objection could result in the dismissal of the whole case and therefore should be dealt with in an initial phase of the proceeding before the merits are addressed. The Tribunal held that it is not for the Tribunal to determine whether the requirements of Article 8(2)[56] of the BIT have been complied with; merely, whether this objection should be dealt with as a preliminary question or joined to the merits. Article 8(2) of the BIT clearly provides for a period during which the parties shall seek to resolve the dispute by consultations and negotiations in good faith. Respondent asserts that this is a mandatory negotiation period that has not been complied with.

CONCLUSION AND COMMENTS:

In the light of the above analysis it can be inferred that Investment Treaty Arbitration is a '*Pacta –sunt servanda'* and the Tribunals must adhere to the said principle and strictly look into the provisions of the Treaty to determine the issue as to whether there is any breach of substantive standards of the Treaty and thereby they can invoke jurisdiction or not. As a legal authority possessing adjudicatory powers the Tribunal has the right to

[54] Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28.

[55] In this case it is claimed that actions taken by Respondent deprived Claimant of the entire value of its real estate development projects throughout Turkey and constitute breaches of the BIT and applicable international law

[56] Article 8 (2) provides that in the event of an investment dispute between a Contracting Party and an investor of the other Contracting Party, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations in good faith.... If the dispute cannot be resolved through the foregoing procedures the investor concerned may choose to submit the dispute to the International Centre for the Settlement of Investment Disputes ("Centre") for settlement by arbitration, at any time after one year from the date upon which the dispute arose provided that in case the investor concerned has brought the dispute before the courts of justice of the Contracting Country that is a party to the dispute, and there has not been rendered a final award.

decide its own jurisdiction, the Tribunals mandatorily must look whether there is any umbrella clause to consider contractual claim or whether there is any Joint Interpretative Statement (JIS)[57] to realise the real intent and object of the provisions of the Treaty in good faith to reach the right conclusion regarding its jurisdiction. Any contrary interpretation or conclusion by the Tribunal in guise of 'legitimate expectation' may tantamount to expanding the scope of the Treaty or rewriting the same not permissible under public International law as the same is the exclusive domain of the Parties to the Treaty.

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[57] The Joint Interpretative Statement –records the understanding of both Parties as to how the BIT should be interpreted by international tribunals, including the Tribunal in on-going or even concluded Arbitration. The possibility of issuing JIS emanates from Article 31 (3) (a) & (b) of the VCLT. Vienna Convention on the Law of Treaties dated 23 May 1969, 1155 UNTS 331 (1969).

Case Study: Reliance Infrastructure LTD v. Shanghai Electric

By: ***Ms. Shreeya Dharmatti***[1]

Guidance: ***Mr. Sagar Kulkarni, FCIArb | FAIADR.***

I am Shreeya Dharmatti, an LLM graduate from the National University of Singapore, specializing in International Arbitration and Dispute Resolution. My passion lies in exploring effective methods for resolving cross-border disputes, with a particular fascination for the nuances of international law. Moreover, I harbor a profound enthusiasm for international investment and commercial arbitration, recognizing its pivotal role in ensuring equitable resolutions within the global commercial landscape. With a dedicated commitment to these disciplines, I am poised to apply my legal acumen and scholarly insights to contribute substantially to the field, advancing the cause of justice and harmony in our increasingly interconnected legal milieu.

In this dispute over the outstanding payments related to the Sasan Project in India, the Claimant, Reliance Infrastructure, and the Defendant, Shanghai Electric Group, clashed over the legitimacy of a Guarantee Letter purportedly signed by the signatory on the behalf of the Claimant. The crux of this setting-aside application in the Singapore International Commercial Court revolved around the jurisdictional challenges and the alleged forgery of the Guarantee Letter put forth by the claimant.

The Claimant contested the jurisdiction of the arbitration tribunal, arguing that the arbitration agreement lacked merit, thus rendering the arbitral award void. They maintained that their failure to object during the arbitration proceedings did not essentially waive their right to challenge the jurisdiction, especially since they were unaware of the forgery allegations until after the

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tribunal's ruling. To substantiate these forgery allegations, the Claimant presented forensic and handwriting analysis of the signature and testimony disputing the authenticity of the Guarantee Letter. They also asserted that the signatory lacked the authority to bind the Claimant, emphasizing their subordinate role and limited involvement in negotiations. The Defendant further countered by asserting that jurisdictional objections were waived due to the Claimant's failure to raise them promptly during the arbitration. They argued that the Guarantee Letter's legitimacy was supported by external evidence and that the signatory had authority based on prior actions within the Claimant's organization.

In its decision, the court focused on the principles of waiver, estoppel, and severability concerning the jurisdictional objections. The court further ruled that the Claimant's failure to raise objections until the filing of the Statement of Defence, precluded them from contesting the jurisdiction afterward. Additionally, the court considered the validity of the Guarantee Letter based on the legal concept of agency, determining whether the signatory had the apparent authority to bind the Claimant. Despite conflicting expert opinions, the court concluded that the signatory's actions appeared to fall within the scope of their authority, thus upholding the arbitration award.

Analysis:

This decision brings to light a myriad of consequential issues that demand attention. First and foremost is the concept of waiver and its implications. This decision underscores the importance of timely and strategic maneuvering in raising jurisdictional objections, highlighting how a party's silence during arbitration can potentially foreclose avenues for challenging jurisdiction down the line. Additionally, the decision prompts a closer examination of the doctrine of agency and the intricacies surrounding the authority of individuals to bind their organizations in contractual agreements. Some of these issues that come to surface have been discussed as follows:

1. **Waiver:**

The judgment's discussion on waiver underscores the critical importance of *conscious relinquishment* of known rights. The element of waiver necessitates knowledge of the rights in question and one cannot waive a right they are

unaware of.[2] This principle assumes significance in the Claimant's argument, where their failure to raise objections during the arbitration procedure led to the forfeiture of their ability to contest the Guarantee Letter's legitimacy in their setting aside application. Furthermore, the court's characterization of a jurisdictional challenge as akin to a guerrilla tactic illuminated the strategic nature of such objections, indicating the tactical considerations that parties ought to navigate during their submissions. The judgment's interpretation of waiver delved into the foundational principles of procedural fairness and party autonomy in arbitration. By emphasizing the requirement of awareness in relinquishing rights, the court underscored the importance of informed decision-making in arbitration proceedings. The recent decision by the Seoul Central District Court sheds light on the issue of waiver in arbitration proceedings in Korea.[3] The case involved a challenge to an arbitration award issued pursuant to the Korean Commercial Arbitration Board's (KCAB) rules. The dispute arose from a Joint Guarantee Agreement between two Korean companies (the Claimants) and a Russian national (the Respondent). The crux of the matter was the appointment of the arbitral tribunal, governed by the KCAB's Domestic Arbitration Rules 2011. However, the Respondent argued that the arbitration should have been subject to the KCAB International Arbitration Rules 2011. The tribunal found that the Respondent had waived its right to object to the tribunal's composition, as it failed to raise the objection promptly.[4] The Respondent sought to set aside the award, invoking Article 36(2)(1)(d) of the Korean Arbitration Act. The Seoul Central District Court considered Article 5 of the Arbitration Act, which states that a party forfeits its right to object if it is prudently aware breach but proceeds with the arbitration without promptly objecting to it.[5] The Court ruled that the Respondent had not been aware of the breach when it returned the list of arbitrator candidates to the KCAB. Therefore, it set aside the award on the grounds of improper tribunal composition. This decision may have significant implications for future arbitration proceedings in Korea, particularly concerning the standard for determining waiver and the balance between procedural stability and the inherent rights of the parties. It highlights the importance of timely objection and the need to prevent parties from adopting a wait-and-see approach during arbitration. On the contrary, Reliance Infrastructure's failure to raise objections during arbitration proceedings is analyzed in light of its implications for procedural efficiency and

[2] Paragraph 69 of Reliance Infrastructure Limited v. Shanghai Electric Group Co Ltd [2024] SGHC(I) 3
[3] Hongjoong (Paul) Kim and Umaer Khalil , 'When Is It Too Late to Object: The Seoul Central District Court's Judgment Regarding the Waiver of the Right to Object' (*Kluwer Arbitration Blog* 20 July 2017) <https://arbitrationblog.kluwerarbitration.com/2017/07/20/bkl/> accessed 16 March 2024.
[4] *Ibid*
[5] *ibid*

the finality of arbitral awards. This analysis reflected the court's commitment to upholding the integrity of arbitration agreements while balancing the rights of the parties involved.

2. Estoppel:

This decision further delves into the nuances of estoppel, distinguishing between active and passive remedies. It examines whether the failure to exercise an active remedy precludes a party from subsequently invoking a passive remedy. In the Astro v. Lippo case[6], the Singapore Court of Appeal clarified the availability of active and passive remedies in challenging international arbitration awards rendered in Singapore, known as "domestic international awards."[7] Upholding party autonomy, the Court affirmed that parties have the option to actively challenge awards or await enforcement proceedings, aligning with the UNICTRAL Model Law. It extended the grounds for resisting enforcement under Article 36(1) of the Model Law to parties contesting enforcement of domestic international awards under Section 19 of the IAA, ensuring procedural fairness.[8] Moreover, the Court ruled that failure to challenge the Tribunal's jurisdictional ruling under Article 16(3) of the Model Law does not preclude the passive remedy, preserving parties' rights. This decision emphasizes strategic options based on cost, efficiency, and timing considerations, maintaining Singapore's arbitration practice consistent with international standards while upholding the importance of the "choice of remedies" principle in international arbitration.[9] In this case, the assertion that Reliance cannot resurrect previously raised defenses as jurisdictional objections during setting aside proceedings underscores the principle of estoppel and its implications for procedural fairness.[10] By distinguishing between active and passive remedies, this judgment navigated the complexities of estoppel doctrines in the context of arbitration proceedings. Reliance's inability to resurrect previously raised defenses during setting aside proceedings underscored the principle of estoppel and its impact on preserving the integrity of arbitral awards. This analysis further highlighted the court's

[6] Astro Nusantara International BV and others *v* PT Ayunda Prima Mitra and others [2012] SGHC 212

[7] Ben Jolley, 'Astro v. Lippo: Singapore Court of Appeal Confirms Passive Remedies to Enforcement Available for Domestic International Awards' (*Kluwer Arbitration Blog* 29 November 2013) <https://arbitrationblog.kluwerarbitration.com/2013/11/29/astro-v-lippo-singapore-court-of-appeal-confirms-passive-remedies-to-enforcement-available-for-domestic-international-awards/> accessed 16 March 2024.

[8] *Ibid*

[9] *ibid*

[10] Paragraph 95 of Reliance Infrastructure Limited v. Shanghai Electric Group Co Ltd [2024] SGHC(I) 3

commitment to promoting fairness and consistency in dispute resolution.

3. Forgery and Arbitrability:

Paragraphs 24 and 44 of the judgment scrutinize Reliance's contentions regarding forgery in detail. Reliance presented various external factors, such as the respondent's non-compliance with internal company procedures and Indian regulatory requirements, to bolster their forgery claims. Additionally, the absence of contemporaneous documentation and the removal of a parent company guarantee clause from the supply contract have been cited as supporting evidence. The tribunal's decision to apply English law as the governing law, despite Reliance's preference for Indian law, added another layer of complexity to the forgery issue, highlighting the interplay of this decision's analysis of forgery allegations and arbitrability issues further demonstrating a meticulous consideration of the evidentiary standards. The question of whether forgery and fraud disputes are inherently arbitrable remains a hotly contested issue. Reliance Industries' adoption of this stance may stem from its status as an Indian company, influenced by the Supreme Court of India's pro-arbitration decision. Additionally, the court's emphasis on *compelling public interest*[11] in this judgment aligns with Reliance's strategic defense approach. In the landmark Avitel Post Studioz Limited & Ors v HSBC PI Holdings (Mauritius) Limited[12] case, the Supreme Court of India clarified that only "*serious allegations of fraud*" would render a dispute non-arbitrable, upholding the contractual bargain of parties and preventing a respondent from thwarting an arbitration agreement by merely raising fraud as an issue.[13] This decision, amidst prior uncertainty, elucidated the construct of "serious allegation of fraud," affirming that the allegations must meet specific criteria to fall outside the ambit of arbitration. The court distinguished between fraud affecting the formation of a contract and fraud in its performance, underscoring that while damages are available for the latter, the innocent party cannot rescind the contract. Importantly, this case also emphasized that allegations must have a "public flavor" or necessitate adjudication by a writ court to be deemed non-arbitrable, safeguarding the sanctity of arbitration clauses[14]. This legal clarity benefits international parties by instilling confidence in the

[11] Paragraph 36 of Reliance Infrastructure Limited v. Shanghai Electric Group Co Ltd [2024] SGHC(I) 3

[12] Avitel Post Studioz Limited & Ors. v. HSBC PI Holdings (Mauritius) Limited**, Civil Appeal Nos. 5145 and 5158 of 2016,** 2020 SCC OnLine SC 656

[13] Akshay Kishore, 'Allegation of Fraud Cannot Be Used to Defraud an Arbitration Agreement – Indian Supreme Court's Ruling on Arbitrability' (*www.twobirds.com*23 August 2020) <https://www.twobirds.com/en/insights/2020/singapore/allegation-of-fraud-cannot-be-used-to-defraud-an-arbitration-agreement-indian-supreme-courts-ruling> accessed 16 March 2024.

[14] *Ibid*

enforcement of foreign awards in India, thereby promoting a pro-arbitration approach and limiting challenges based on arbitrability and public policy grounds.[15] However, in this present Reliance Industries vs. Shanghai Electric case, the Singapore International Commercial Court (SICC) highlighted that the assertion of an award being against the public policy of the *lex fori*, which in this case is Singapore, hinges on demonstrating that the award was obtained through fraud, thus contravening Singaporean public policy.[16]

4. Effect of Apparent Authority:

The judgment comprehensively explored the doctrine of apparent authority and its application in the present case. While the tribunal found that the signatory possessed apparent authority, Reliance Infrastructure argued that there exists a distinction between negotiating on behalf of the principal and committing the principal to binding legal obligations. The court further referenced the doctrine of the law of agency and analyzed the interpretation of authority under English law, particularly elucidating the concept of "holding out" in the context of apparent authority. Apparent authority, distinct from express or implied authority, enables an agent to bind a principal even sans actual authorization.[17] This concept, which is crucial in commercial transactions for ensuring efficiency and certainty, arises when the principal's conduct creates a reasonable belief in the agent's authority. The law of agency, recognizing the need for flexibility in modern commerce, upholds transactions where a third party reasonably relies on the agent's apparent authority, typically through the principal's representations. Notably, apparent authority extends to cases where an agent exceeds or misinterprets their authority, leading the third party to believe in the agent's capacity to act on behalf of the principal.[18] However, it is paramount to note that the appearance of authority must stem directly from the principal's actions, not the agent's assertions. In exceptional instances, the apparent authority may signify the principal's approval of a transaction, as illustrated in *Kelly v Fraser*[19]. Moreover, companies can convey apparent authority through authorized officers or corporate organs like the board of directors. While the apparent authority enables third parties to sue the principal, the latter cannot invoke it to sue the third party;

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[15] *ibid*

[16] Paragraph 61 of Reliance Infrastructure Limited v. Shanghai Electric Group Co Ltd [2024] SGHC(I) 3

[17] Tan Cheng Han , 'Ch. 15 Law of Agency' (*www.singaporelawwatch.sg* 9 July 2019) <https://www.singaporelawwatch.sg/About-Singapore-Law/Commercial-Law/ch-15-law-of-agency>.

[18] *ibid*

[19] *Ibid*

instead, the principal must ratify the agent's actions for recourse.[20] This doctrine, safeguarding commercial convenience and market efficiency, plays a pivotal role in agency relationships, navigating complex scenarios where actual authority may be lacking.[21] Thus, it is the representation made by the principal, in this case, Reliance Industries, to the contractor that forms the basis of their liability. For the principal to be held accountable, the evidence must be sufficient to support this assertion. In the Viet Hai Petroleum Corp v. Ng Jun Quan case, the High Court acknowledged that a business card displaying the alleged agent's designation as "Chief Operating Officer" was genuine, representing the employer-principal's appointment of the agent to that role.[22] Therefore, the authenticity of the business card is paramount, as it validates the representation originating from the principal. The court cited Martin v. Britannia Life Ltd, a decision of the English High Court, and Hepru Pty Ltd v. Morgan Brooks Pty Ltd in New South Wales, to support this view.[23] Notably, in both cases, the business card featured the principal's logo, and address, as well as the agent's designation, telephone numbers, and fax numbers, as is customary.[24]

5. The doctrine of Separability:

This principle ensures that the validity of the arbitration agreement remains distinct from the validity of the contract itself, allowing for arbitration even if the contract is deemed invalid.

Interestingly, the court's ruling in this case diverged from Reliance Infrastructure's interpretation of separability. They argued that the principle of separability does not guarantee the survival of the arbitration clause under all circumstances[25]. According to them, when a challenge to the validity of the underlying contract is raised, it becomes crucial to determine if this also constitutes an attack on the arbitration agreement. This determination which the Claimant has contended, is a fact-sensitive exercise, with much depending on the nature of the challenge against the underlying contract. For instance, if the

[20] *ibid*
[21] *ibid*
[22] Pearlie Koh and Stephen Bull, '76 SAL Annual Review (2016) 17 SAL Ann Rev 3. Agency and Partnership Law' <https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Annual-Review-of-Singapore-Cases/e-Archive/ctl/eFirstSALPDFJournalView/mid/512/ArticleId/1200/Citation/JournalsOnlinePDF> accessed 16 March 2024.
[23] *ibid*
[24] *ibid*
[25] Paragraph 90 of Reliance Infrastructure Limited v. Shanghai Electric Group Co Ltd [2024] SGHC(I) 3

allegation is that the entire contract was entered into without any authority, this might constitute an attack on both the underlying contract and the arbitration agreement, as it implies that every clause in the contract, including the arbitration agreement, was entered into without authority. However, if the challenge revolves around the underlying contract being void or voidable due to misrepresentation, Reliance posited that the arbitration agreement may survive, as the parties' intention to arbitrate might remain unaffected by the misrepresentation. Reliance Infrastructure's argument highlighted the complexities surrounding the doctrine of separability in arbitration agreements. While the principle generally aims to uphold the autonomy of arbitration clauses, its application can vary depending on the circumstances of each case. Reliance's distinction between challenges to the underlying contract and their impact on the arbitration agreement underscored the nuanced nature of separability. The court's departure from this interpretation suggested a more conservative approach, emphasizing the need for careful and objective scrutiny in determining the survival of arbitration clauses amidst challenges to the validity of the underlying contracts. This further underscored the importance of clarity and precision in drafting arbitration agreements to mitigate potential disputes regarding issues of separability.

6. Strategic Employment of Guerrilla Tactics

The ruling by the SICC serves as a deterrent to parties that are tempted to hold back jurisdictional objections for a strategic advantage.[26] It underscores the importance of promptly raising such objections in arbitration, regardless of the stage of proceedings, to avoid waiving the right to challenge jurisdiction in later court proceedings.[27] Parties must carefully assess their arbitration and litigation strategies in light of this decision, ensuring they don't inadvertently waive their rights. It's prudent for parties to conduct thorough investigations early on to determine if they have grounds for jurisdictional objections and to act accordingly.[28] Furthermore, the court reaffirmed the separability doctrine, clarifying that challenges to the main contract do not automatically extend to the arbitration agreement. According to the separability doctrine, the arbitration agreement is treated as a separate entity from the main contract.[29] This means

[26] Drew and Napier. "The Singapore International Commercial Court Throws out a Challenge to a US$146m SIAC Award." 15 Feb. 2024.
[27] *ibid*
[28] *ibid*
[29] Chua Kang Le. "Determining the Law Governing the Arbitration Agreement: Anupam Mittal v Westbridge." *The Singapore Law Review*, 21 Mar. 2023, www.singaporelawreview.com/juris-illuminae-entries/2023/determining-the-law-governing-the-arbitration-agreement-anupam-mittal-v-westbridge. Accessed 20 Feb. 2024.

that the rules governing the arbitration agreement may differ from those governing the main contract. Therefore, the validity of the arbitration agreement depends on the laws governing it.[30] If the laws relevant to the arbitration agreement don't allow for the formation of such agreements, then the arbitration agreement would be considered invalid.[31] This distinction highlights the necessity for a comprehensive grasp of legal principles and their application in arbitration disputes, emphasizing how crucial it is to properly distinguish between objections pertaining to the arbitration agreement and those to the underlying contract. Singapore holds a strong stance in favor of arbitration, prioritizing it over other legal considerations. This stance indicates that courts should generally uphold arbitration agreements unless there are compelling reasons not to do so.[32] Therefore, the genuine intentions of the parties, as expressed in the arbitration clause, should prevail over any issues related to the choice of law, even if the parties were unaware of the potential legal implications. While some may argue that parties should face the consequences of their agreements, requiring awareness creates uncertainty.[33] Eliminating this requirement would enhance the clarity of arbitration clauses and align with Singapore's commitment to enforcing arbitration agreements under the New York Convention. Moreover, since arbitration aims to provide a neutral forum and avoid national court jurisdiction, preserving an arbitration agreement, even with amended terms, better reflects the parties' intentions than resorting to litigation.[34] For example, in cases involving problematic clauses, Singapore courts have adjusted the interpretation to ensure the viability of arbitration. Similarly, the focus should be on upholding the primary intention to arbitrate, rather than strict adherence to procedural rules.[35] Thus, the need for awareness of potential invalidating effects should be disregarded. The mere presence of such effects should suffice to recognize that the law governing the main agreement may not necessarily apply to the arbitration agreement, ensuring the primary intention to arbitrate is respected.[36] The court based its decision on a strong legal foundation that it had established via previous decisions by courts and domestic and international legal precedents, such as the Model Law. The necessity of conducting in-depth legal study and precedent analysis to bolster legal claims and persuasively present one's case in arbitration procedures is highlighted by this dependence on

[30] *Ibid*
[31] *Ibid*
[32] *Ibid*
[33] *ibid*
[34] *ibid*
[35] *ibid*
[36] *ibid*

precedent.

Conclusion

In hindsight, this decision established a standard for jurisdictional objections in arbitration proceedings pursuant to timeliness and strategic intent. Notwithstanding the fact that challenges to the arbitration agreement are different from challenges to the original contract, parties entering into arbitration should be well aware of the significance of addressing jurisdictional issues as soon as possible. This decision serves as a cautionary tale about the ramifications of making calculated strategies during court procedures, highlighting the necessity for parties to conduct themselves in a way that complies with legal and ethical requirements while taking the larger scheme of things into account.

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