

CERTAIN FACTORS WHICH DECREASE THE EFFICACY OF ARBITRATION AND MEDIATION IN SETTLING INTERNATIONAL COMMERCIAL DISPUTES

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Introduction

Recent years have seen a dramatic increase in the size and complexity of international commercial transactions. Parties to these transactions try to avoid disputes, but differences inevitably arise, needing speedy and inexpensive resolution. Unfortunately, international commercial litigation suffers with maladies like uncertainty, protractedness and costliness, all of which are anathematic to trade and business. Various ADR processes like arbitration, mediation and a combination of the two provide some refreshing and a reasonably quicker and inexpensive alternatives to resolve such disputes, but certain self imposed restrictions and other problems come in the way of their more effective use. There is a need to liberate these processes from un-necessary restrictions and also to make arbitration bias-free.

This paper briefly deals with four problematic issues connected with the use of arbitration and mediation in the settlement of international commercial disputes. These are: (i) problem created by localization of international arbitral proceedings; (ii) the problem of ethnic bias in international arbitration; (iii) reluctance to utilize equity and *amiable composition*; and (iv) reluctance to combine mediation and arbitration in the settlement of international commercial disputes.

The Problem of Localization of International Arbitration Proceedings

Today, a major problem confronting international commercial arbitration is the localization or varying power of intervention in arbitral proceedings given to national courts under the local laws of different countries. Article 5 of the UNCITRAL Model Law¹ has tried to set a uniform standard of judicial intervention, but many a government show reluctance in faithfully following the letter and spirit of this provision. Only 28 countries in the world have fashioned their arbitration laws on the lines of Model Law.² Consequently in more than 100 countries, the national courts are empowered to intervene in

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1 Article 5 of Model Law says: "In matters governed by this law, no court shall intervene except so provided in this law".

2 These countries are: Australia, Bahrain, Bermuda, Bulgaria, Canada, Cyprus, Egypt, Germany, Guatemala, Hong Kong Special Administrative Region, Hungary, India, Iran, Ireland, Kenya, Lithuania, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, Russian Federation, Singapore Sri Lanka, Tunisia,

domestic as well as international arbitrations, creating lot of problems especially for the latter type of arbitration.

International arbitral proceedings must be exempted from the reckless use of *lex loci arbitri*. Jurisdiction of the local courts may be allowed when enforcement of the award is sought, or to facilitate arbitral proceedings. It is to be accepted that international commercial arbitration is sufficiently regulated by Conventions and its own rules, either adopted by the parties themselves or drawn up by the arbitral tribunal. The extent of judicial regulation and control exercised by the national courts allowed under the Model law should be regarded as adequate.³ But very often this is not followed in practice.

One country that opted in favour of a substantial or rather excessive degree of delocalization is Malaysia. Section 34, inserted in the (Malaysian) Arbitration Act, 1952 through an amendment in 1980, provides as follows:

“34. (1) Notwithstanding anything to the contrary in this Act or in any other written law but subject to sub-section (2) in so far as it relates to the enforcement of an award, the provisions of this Act or other written law shall not apply to any arbitration held under the convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur.

(2) Where an award made in an arbitration held in conformity with the Convention or the Rules specified in subsection(1) is sought to be enforced in Malaysia, the enforcement proceedings in respect thereof shall be taken in accordance with the provisions of the Convention specified in sub-section(1) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, as may be appropriate.

(3) The competent court for the purpose of such enforcement shall be the High Court.”

Section 34 has come under judicial scrutiny in four cases.⁴ In all of

Ukraine and Zimbabwe. In addition, in part of U.K. (Scotland); USA (California, Connecticut, Oregon and Texas). Source: www.un.or.at/uncitral

3 See, Redfern, Alan and Hunter, Martin, *Law and Practice of International Commercial Arbitration*, 3rd ed., p.90 (Sweet & Maxwell London, 1999).

4 See, *Klockner Industries – Anlagen GmbH V. Kien Tat Sdn. Bhd.* [1990] 3 MLJ 183 (K.L. High Court, per Dr. Zakaria Yatim J., as he then was); *Soilchem Sdn. Bhd. v. Standard - Elektrik Lorenz AG* [1993] 3 MLJ 68 (K.h.High Court, per Abu Mansor J.); *Sarawak Shell Bhd. v. PPES Oil & Gas Sdn. Bhd.* [1998] 2 MLJ 20 (Court of Appeal, per Mahadev Shankar, Abdul Malek Ahmad and Mokhtar Sidin

these cases the courts held in effect what Zakaria Yatim J held in *Klockner*:⁵

“... the words in S.34 are ‘plain, clear and precise’. Reading the clear language of the section I am of the view that the section excludes the court from exercising its supervisory function under the Arbitration Act 1952 or under any other written law, including the Companies Act 1965, in respect of arbitrations held under the Rules of the Arbitration Centre. The words “written law” has been defined in S.3 of the Interpretation Act 1967 to mean Acts of Parliament and subsidiary legislation made thereunder; ordinances and enactments and subsidiary legislation made thereunder; and any other legislative enactments, or legislative instruments. ‘Written law’, therefore, includes the Companies Act 1965.

Therefore, the question for capacity or locus standi of a party to the arbitration the question of security for costs, or the issue of pleadings before the arbitral tribunal, cannot be determined by the court by virtue of S.34. These are issues which the arbitral tribunal has to decide and the court cannot and will not interfere with the proceedings of the tribunal. The function of the court is confined only to the enforcement of the arbitral award if the award is sought to be enforced in Malaysia”.

Such a complete exclusion of the supervisory jurisdiction of the court could sometime become a worrisome matter. In *Jati Erat*,⁶ for example, the High Court ruled out the possibility of issuing a *Mareva* injunction due to reason that section 34 applied to the arbitration. The court fully agreed with the need of issuing the *Mareva* because of the imminent danger of the flight of assets, that is, the subject-matter of arbitration. This case sharply focused public attention on the negative aspect of section 34 and the possible adverse effects of total delocalization.

Justice Mahadev Shankar of the Court of Appeal in his judgment in *Sarawak Shell's Case*,⁷ cited with approval Lord Diplock's following remarks in *Bremer Vulkan's Case*,⁸ where the extent and scope of judicial intervention in arbitration is defined:

“For the moment, I confine myself to rejecting the notion that the High Court has a general (inherent) supervisory power over the conduct of arbitrations more extensive than those that are conferred

JJCA); *Syarikat Yean Tat (M) Sdn Bhd v. Ahli Bina Pamong Sari Sdn Bhd* [1996] 5 MLJ 469 (Shah Alam High Court, per Abdul Wahab Patail, PK.)

5 *Klockner Industris – Anlagen Gmb H v. Kien Tat Sdn Bhd & Ors.* [1990] 3 MLJ 183 at 185.

6 *Jati Erat Sdn. Bhd. v. City Land Sdn. Bhd.*, [2002] 1 CLJ 346 per Low Hop Bing J.

7 *Sarawak Shell Bhd v. PPES Oil & Gas Sdn Bhd* [1998] 2 MLJ 20 at 27

8 *Bremer Vulkan v. South India Shipping Corp.* [1981] 1 All ER 289 at 296

on it by the Arbitration Acts; nor do I suppose that the assertion of such an open ended power of intervention in the conduct of consensual private arbitration would be likely to encourage resort to London arbitration under contracts between foreigners which have no other connection with this country (England) than the arbitration clause itself.”

What has been said above in the context of England and approved by Mahadev Shankar JCA and two of his colleagues in *Sarawak Shell* with reference to Malaysia, is indeed true for the whole of the world.

Provisions similar to S.34 of the (Malaysian) Arbitration Act, 1952 but stated in a more balanced manner so as not to exclude the helpful judicial intervention may be inserted in the arbitration law of any country which has the political will to liberate the arbitral proceedings, particularly international arbitral proceedings, from the shackles of mandatory court intervention at every stage. Countries which do not like to deprive the national courts of the ‘supervisory’ jurisdiction over arbitral proceedings in international disputes may thus opt for a legal regime on the lines of Art. 5 of the Model Law and should clearly identify the number of occasions on which intervention shall be allowed. They should also resist the strong temptation to breach the limit set in Article 5.

Delocalization as allowed under Model Law or under Malaysian law has now become a fact of law and does not represent the vague idea of anational, floating arbitral process that was the target of ire of traditionalists.⁹ This concept is now being supported by many.¹⁰ The time has come to see a change in the views of those few who hold that even international arbitrations should be subject to the law of the place of arbitration (*lex loci arbitri*).¹¹ The correct view seems to be that international arbitration should not be completely regulated by the mandatory procedural law of the forum.¹² Minimal assisting role of courts, coupled with review power given to them at the time of

9 For instance, Park, William W., “The *Lex Loci Arbitri* and International Commercial Arbitration, 32 I.C.L.Q. 2(1983); Mann, F.A., “England Rejects ‘Delocalised’ Contract and Arbitration”, 33 I.C.L.Q., 193 (1984)

10 For example, Shindler, A., “*Arbitration Sill Bound*”, 102 L.Q. Rev. 500(1986), Paulsson, Jan “*Delocalisation of International Commercial Arbitration; When & Why It Matters*”, 32 I.C.L.Q. 53-61(1983) Read, Pippa, “*Delocalization of International Commercial Arbitration: Its Relevance In the New Millenium*,” 10 *Am. Rev. International Arb.* 177(1999)

11 For example. Mann, F.A., “*Lex facit Arbitrum*”, in Sanders Pieter (ed.), *International Arbitration: Liber Amicorum For Martin Domke*, (1967), p.159; Mann, F.A., “*England Reject ‘Delocalised’ Contracts and Arbitration*”, 33 I.C.L.Q. 193 (1984); Park, W.W., “*The Lex Loci Arbitri and International Commercial Arbitration*”, 32 I.C.L.Q.2(1983)

12 Paulsson, Jan, *Arbitration Unbound: An Award Detached from the Law of the Country of Origin*, 30 I.C.L.Q. 358(1981); Paulsson, Jan, “*Delocalisation of International Commercial Arbitration: When and Why It Matters*”, 32 I.C.L.Q. 53 (1983); Avenessian, A.B., “*The New York Convention and Denationalised Arbitral*

enforcement are enough as suggested in Article 5 of the New York Convention, which allows denial of enforcement if the award negates procedural fairness, or public policy of the State or where the dispute deals with a matter which is unfit for arbitration.

The Problem of Ethnic Bias in International Arbitration

International arbitration culture means that universal notion of arbitral neutrality, lack of bias and absence of any notion of superiority complex in either the arbitrator or the parties which is recognized everywhere but sometimes not followed faithfully. A few who do not follow the above norms bring bad name to arbitration. In some cases, such a conduct creates very negative sentiments against international arbitration as such. Many of the arbitrations in the Third World countries are held under pre-drafted arbitration clauses contained in contracts signed by countries which cannot afford to refuse the terms of the contract. For instance, the release of some assistance fund is dependant on the signing of the contract that contains the arbitration clause, specifying some very inconvenient clauses. Such a party remains very uneasy and reluctant to settle its dispute through arbitration, for example, at a place not of his liking and choice. Such reluctance is not confined to the parties alone. There is also a general reluctance on the part of multi-national corporations to accept arbitration in which the venue is in the Third World countries. A fact which is hard to deny is that the AAA International Centre for Dispute Resolution in New York, and all the other most popular international arbitration centres are either in Geneva, or The Hague, London, Paris, Stockholm or Vienna. The establishment of arbitration centers in other parts of the world has not much affected the pre-eminence of the European venues. The establishment of Euro-Arab Chambers of Commerce to facilitate international commercial arbitration between the Arab and the ten European countries¹³ also failed to erode the importance of the above-mentioned European venues. This monopolisation of venues inevitably brought in the monopoly of European arbitrators, some of whom show distinct signs of haughtiness and a sense of ethnic superiority.

International commercial arbitration venues must be distributed equitably all over the world. Arbitral institutions must consciously make efforts to convince the parties to accept Third World venues, because the climate in many countries of this World is fast becoming more conducive for holding arbitral proceedings. It is necessary to do so because according to Redfern and Hunter,

Awards (with Emphasis on the Iran-United States Claims Tribunal), 8(1) J. Int'l. Arb. 5(1991); Read, Pippa, "Delocalization of International Commercial Arbitration: Its Relevance in the New Millenium", 10 American Review of International Arbitration, 177 (1999).

13 The countries are: Austria, Belgium, France, Germany, Greece, Ireland, Italy, Portugal, Switzerland and U.K

many less-developed nations in Africa and Asia “fear that arbitral tribunals, established under the auspices of arbitral institutions based in the world’s major trading nations, will have an in-built cultural and social bias against them... the problem is a real one; and one of which the international arbitral institution have become increasingly aware”.¹⁴ It is therefore not surprising to find Judge Mbaye of Nigeria, who was Judge of the International Court of Justice, saying that many Africans, Asians and Latin Americans-

“... see arbitration as a foreign judicial institution which is imposed upon them. In Africa ... everybody knows, in fact arbitration is seldom freely agreed to by developing countries. It is often agreed to in contracts of adhesion the signature of which is essential to the survival of these countries.”¹⁵

Prof. Ahmad Mahiou, Dean of Law, Alger University, expressed his lack of faith in arbitrators coming from the First World, because -

“They have a tendency to consider that the arguments of the Third World client are devoid of any legal basis, and to hold them ineffective once they fail to correspond with their own conception of the Law”.^{15a}

For reasons more serious than this, the Arab nations once lost confidence in international commercial arbitration. The self-righteous, contemptuous and haughty behaviour of certain Western arbitrators had been responsible for this calamity. They ridiculed the *Shari'ah* (Islamic law) as a legal system, un-mindful of the fact that *ta'âkîm* (arbitration) has been a well developed component of *Shari'ah* (Islamic law) and its roots go back into its 1400 years old history. Yet, Lord Asquith, the sole arbitrator in a dispute between the Sheikh of Abu Dhabi (where *Shari'ah* is the law of the land) and the Petroleum Development Co. had the arrogance to make the following remarks in his award:

“If there exists a national law to be applied, it is that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran, and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.”¹⁶

14 Redfern, and Hunter, *Supra*, n.3 at 207

15 Mbaye, Judge of ICJ, in *60 years of ICC Arbitration – A Look at the Future*, ICC Publication no. 412 at p. 295(1984)

15a Cited in Redfern and Hunter, 3rd ed. *Supra* n.3 at 207, citing *60 years of ICC Arbitration – A Look at the Future*, ICC Publication No.412, pp. 235, 242, 243.

16 Ann. Dig. (1951) p.149; also Ahmad Abdel Hamid Achuch, *Le Regime Jwridique des Accords Pe'troliers dans les Pays Arabes* (1975), p.663, cited in El-Ahdab, Abdul Hamid, “General Introduction On Arbitration in Arab Countries”, in *Intl. Handbook on Commercial Arbitration, Supplement 27*, December 1998, p.1 at 14.

Similar were the remarks made by Sir Alfred Bucknill in the arbitration between the Governor of Qatar and the International Marine Oil Co. Ltd. (1953), betraying his ignorance of and contempt for *Shari'ah*:

“I need not set out the evidence before me about the origin, history and development of Islamic law as applied in Qatar or as to the legal procedure in this country. I have no reason to suppose that Islamic law is not administered there strictly, but I am convinced that this law does not contain any principles which would be sufficient to interpret these particular contracts”.¹⁷

A very hostile arbitral award given against the Government of Saudi Arabia in a dispute between the Government and ARAMCO prompted the Saudi Council of Ministers to issue the famous Decree 58 of 1963 prohibiting arbitration of disputes involving the Saudi Government, or any Ministry, Department or any of its agencies. Soon afterwards Libya followed the example of Saudi Arabia.¹⁸ In the words of the leading authority on the law of arbitration in the Arab countries, Abdul Hamid El-Ahdab:

“Many Arab countries now refuse the insertion of arbitration clause in their contracts with foreign countries. Also, in many of the Arab countries that acceded to the New York Convention, the courts refuse or delay granting a leave to enforce international arbitral awards, putting forward apparently legal reasons but the truth is different.”¹⁹

The above sad episodes and equally sad reactions in the history of arbitration in the Arab countries betray an utter disregard, on the part of arbitrators, for the principles of equal treatment of parties and ethnic neutrality. Such violations may play havoc with the emerging culture of international arbitration in the Third World countries. Russell reports ICC's practice to appoint as chairman a national of a different country from the countries of both the parties and the party-appointed arbitrators. “Some would go further, and insist that the Chairman does not come from the same kind of country as well. This might, we suppose, produce the following result: in an arbitration between, for instance, an African party and a United States party, the chairman of the tribunal could not be a national of any African country or of the United States: on the basis of this doctrine the United Kingdom, and possibly other countries in Europe, might also be excluded; the choice might be of a national of one of the

17 See, El-Ahdab, Abdul Hamid, *General Introduction on Arbitration in Arab Countries*, Int'l Handbook on Commercial Arbitration, supp. 27 (December, 1998), pp. 14 –15.

18 *Id* at 15

19 El-Ahdab, Abdul Hamid, *Arbitration With the Arab Countries*, 2nd ed., p.1(Kluwer Law International, The Hague, 1999)

Pacific Rim Countries”²⁰. However, it is rare to find rules like ICC rules and such a concern for neutrality as shown by a few.

The above stated facts bring us face to face with certain truths which must be confronted by every successful international arbitration: that the arbitrators must consciously remind themselves of and accept the equity of the cultural differences of the parties; that they must be competent to undertake a comparative analysis of the differences existing between major legal systems; that they must be culturally open minded, un-biased and thoroughly professional; that they never allow their personal background and training to dominate their approach to the issues under dispute.²¹ Any disregard of these principles may seriously compromise the future of international arbitration. Prof. Bernini, the Honorary President of the International Council for Commercial Arbitration, is full of misgivings about the prospects of the emergence of an international arbitration culture so long there is cultural and legal bias and continued emphasis, conscious or unconscious, on nationalistic supremacy. To quote his words:

“Building an international arbitration culture is the pre-requisite to the internationalization of international arbitration. This is not an utterance of facetious semantics: it is a warning.

At the present time, one may really doubt whether international arbitration is always international: national influences often remain paramount. This is true for a number of major systems where arbitration, inspite of the tendency to go international, still bears the stigma of strong domestic philosophies.”²²

Reluctance to Employ Equity and ‘Amiable Composition’ in International Arbitration:

Lord Mustill, the former Lord Justice and author of the famous book on arbitration, now turned into a very active international arbitrator, shows his extreme displeasure with the excessive amount of technicalities now forming part of international commercial arbitration. In his view, arbitration is now suffering from excessive flatulence of procedural rules and legal technicalities. He then makes the following amusing but correct remark:

“Nobody has yet discovered why the dinosaurs become extinct, but it is a reasonable surmise that their bulk was a significant

20 *Russell on Arbitration*, 21st ed. by Sutton, Kendale and Gill, (Sweet and Maxwell, London, 1997), p.123.

21 See, Lalive, “Enforcing Awards”, *60 years of ICC Arbitration A Look at the Future*, ICC Publication No. 412, p. 317.

22 Quoted in, Bernini, Giorgio, “Is there a Growing International Arbitration Culture?”, in Berg, Albert Jan Van(ed.), *International Dispute Resolution: Towards An International Arbitration Culture*, (International Council of Commercial Arbitration, The Hague, 1998), p. 44

factor. It would be pity if arbitration went the same way.... a course of slimming might be in order.”²³

It is indeed true that arbitral proceedings are fast becoming a carbon copy of litigation. But whereas in litigation the judge possesses the power to apply equity wherever he feels that the law is creating hardship and injustice; an arbitrator has no such power and is legally bound to strictly apply the applicable law, even though it may appear to cause hardship or injustice. His personal sense of equity and fair play are regarded irrelevant. The attitude of English courts on this point is clearly reflected in the following remarks made by Megaw J in *Orion Cia's Case*:

“... it is the policy of the law in the country that, in the conduct of arbitrations, arbitrators must in general apply a fixed and recognizable system of law, ... and that they cannot be allowed to apply.... equitable principles”²⁴

Notwithstanding the fact that the English courts have upheld the validity of ‘equity clauses’ in arbitral agreements in some rare cases,²⁵ the overall stand of the English judiciary and law continues to be against the application of equity in matters of arbitration. This attitude is naturally reflected in all the Common law countries.

The complexity of contemporary international disputes calls for a variety of ways to tackle them. One such way could possibly be to allow the use of equity by the arbitrators in situations where he finds no definite guidance in the existing law, or the application of existing non-statutory principle is found to give rise to injustice. His authority to rely on equity in such circumstances should be there irrespective of the fact whether or not he is allowed by the parties to do so. It is so because equity is an inherent part of law, and its function is to interpret law in the context of facts so as to give it vitality. Equity’s function is “not to destroy law but to fulfill it.” Equity is not abstract justice, but justice according to law. Thus, such criticisms of equity that it is too subjective, intuitive and abstract that it can be measured by the length of the Chancellor’s foot, may

23 Mustill, Michael John. “*Arbitration: History and Background*”, *Journal of International Arbitration*, Vol. 6 (1989), p. 43 at 56.

24 Per Megaw J in *Orion Cia Espana de Seguros v. Belfort Maats* [1962] 2 Lloyd’s Rep 257 at 264; see also, *Czarnikow v. Ruth, Schmidt & Co* [1922] 2 Kb 478. A slight relaxation of the rule was done by Lord Denning MR in *Eagle Insurance Co. Ltd. v. Yuval Insurance Co. Ltd.* [1978] 1 Lloyd’s Rep 357. But the judgment merely ousted ‘technicalities and strict construction.’

25 See, for example, *Home and Overseas Insurance v. Mentor Insurance Co. (UK) Ltd.* [1989] 1 Lloyd’s Rep. 433 (CA); *Deutsche Schatbau-und-Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co* (‘*DST v. Takoil*’), [1987] 2 All ER 769;

not be taken seriously.²⁶

It would be unwise to disregard such suggestions as made by Grotius, that law “includes everything, which it is more proper to do than to omit, even beyond what is required by the express rules of justice.”²⁷ What equity had succeed to do in the past and continues to accomplish in the present, justifies the remark made by Lord Denning M.R. that “equity is not past the age of child bearing.”²⁸ It is an undeniable fact that principles of equity have constantly developed and found new fields of application. This equally applies to the law of arbitration, which also has its strengths and weaknesses as any other law. To say that equity has no role to play in the realm of arbitration would not be realistic and correct.

The arbitrators should, therefore, be entitled in their own right, to have recourse to equitable principles of construction as well as power to apply notions of equity and justice wherever it appears necessary in adjudicating a dispute. To do so should not be interpreted as empowering an arbitrator to select and apply any rule in accordance with his whims. On the contrary it will simply allow him the discretion to refrain from applying strictly principles of law if doing so may create hardship to the parties in a particular case.²⁹ The occasions to do so may indeed be rare, but an arbitrator’s capability to do so would certainly add a new meaning to the arbitral process.

Acceptance of ‘amiable composition’ and ‘ex aequo et bono’ should facilitate the acceptance of ‘equity’:

Amiable composition and *ex aequo et bono* are identical concepts.³⁰ It confers an authority on the arbitrator to depart from the strict application of rules, and to decide according to broader notions of justice and fair play. However, in doing so he cannot leave behind rules of natural law, terms of contract between the parties and usages of the trade applicable to the parties.³¹

26 See, Judge Manfred Lacks, “Equity in Arbitration and in Judicial Settlement of Disputes”, in Muller, Sam (ed.in chief) and Mijs Wim (ed.), *The Flame Rekindled: New Hopes for International Arbitration*, p.127 (Martinus Nijhoff, Dordrecht, 1994); Molniss, Art “The Arbitration Bill and Equity Arbitration in England”, in Odams, A Martin, Higgins, Jodna, *Commercial Dispute Resolution*, pp.109-134.

27 Grotius, H., *De Jure Belli ac Pacis*, III, Cap.xx at 47 (New York ed.1901) cited in *supra* n.25 at 131

28 Lord Denning, MR in *Eves v. Eves* [1975] 1 WLR 1338

29 See, Jarvin, S., “The Sources and Limits of the Arbitrator’s Powers”, in Lew, JDM.,(ed.) *Contemporary Problems in International Arbitration*, p.50 at 70 (1986)

30 According to Redfern and Hunter, an arbitral agreement drafted by an ordinary lawyer will say that the arbitrator is to act as “*amiable compositeur*”, but “if the agreement has been drafted by public international lawyers or scholars”, then *ex aequo et bono* is used. Redfern & Hunter, *supra* n.3 at 43

31 See, Jarvin, “The Sources and Limits of the Arbitrator’s Powers”, in Lew (ed.) *Contemporary Problems in International Arbitration*, 1986, p.50 at 70, cited in Yu, Hong-Lin, “*Amiable Composition – A Learning Curve*,” *Journal of International Arbitration*, vol.17, No.1(2000), p.79 at 80

This concept is nearly identical to the concept of equity, but with the difference that application of amiable composition is possible only where parties have empowered the arbitrator to it. That is, he is not empowered to do so in his own right. If we remind ourselves of the history of equity, it is very clearly evident that equity would never have developed if the Chancellor or the Courts were subjected to similar requirement of obtaining King's permission to apply a principle of equity and justice. Why the same should not be applicable to arbitrators. His position is equally precarious as that of the Chancellor in England of the past or a court of today. Arbitration today is dying under its own dead weight of rules, lengthy procedures and technicalities. Equity may help the law of arbitration to liberate itself from this cob-web of rigid technicalities. Lord Mustill complains of this flatulence in and bulkiness of the law of arbitration and recommends a drastic reduction in this dead weight. Authorising arbitrators to use equity and *amiable composition* will certainly help to streamline the law of arbitration.

Equity and Arbitration Under Islamic Law:

The position which Islamic law takes on the application of equity to arbitration emanates from the following Quranic verse:

“... and when ye judge between man and man, that ye judge with justice...”³²

According to El-Ahdab:

“The prevailing opinion in Moslem law derived from this (Quranic) text, is that arbitrators must settle disputes according to the rules of fairness and with respect to the public order. Their position is rather close to that of the ‘amiable compositeur’, in, say, French law, who has to settle a dispute in an analogous spirit to that which the parties would have had, had they been able to agree on a compromise..³³ some writers even held that in the *Shari'ah*, arbitration in ‘amiable composition’ is the rule and arbitration proper is the exception.”³⁴

However, when a Muslim arbitrator is empowered to judge fairly, it does not mean that he may ignore principles of Islamic law applicable to the dispute, or refuse to take into account such of those Islamic commercial practices which form an integral part of the Islamic commercial law.³⁵

32 *Sūrah Al-Nisā (4), āyat 58*

33 El-Ahdab, *supra* n.14 at 48

34 *Id.* at 17, citing Omar El Kadi, *L'Arbitrage International entre le Droit Positif Francais et Egyptian*, pp. 190-191, these de doctorat, University of Paris

35 For details, see, for example, Beekun, Rafik Issa, *Islamic Business Ethics*, (International Institute of Islamic Thought, Herndon, Virginia, 1997); Al-Qaradawi, Yusuf, *alāl and • arām in Islam*, Eng. Tr. by

Occasions which might prompt the arbitrator under Islamic law to apply equity to seek a just result may include:

change in economic climate or condition of a country or person which may render the performance of some contractual obligation unduly burdensome;

things done in good faith affecting the best interest of a party adversely;

diligent, though not strict, performance of a contractual obligation by a party;

hoarding or making excessive profit or concealing defect in some commodity; etc.³⁶

Such occasions may confront any arbitrator in a common law country, but nothing could be done by him except to apply the rule as he finds it, ignoring the ill consequences which might be produced by such an application. This is what is required of him in the existing law.

It may not be correct to assume that uncertainty would be brought to the law of arbitration if equity is allowed to be applied to it. If certainty of law does not mean perversion of law certainty in its literal sense was never regarded as a stumbling block for considerations of justice, fair play and good conscience, and equity was allowed the ability to prevail over law. If it was true in the past and is still true today when courts are allowed to apply equity in appropriate circumstances, why the same could not be true today for the law of arbitration. If equity has not been allowed by the English jurists to be applied to arbitration, it should not be used as the reason to disallow its application to arbitration today.

Reluctance to Combine Arbitration and Mediation

Unlike the position in the Civil law jurisdictions,³⁷ arbitrators in the Common Law tradition cannot even think of mediating between the parties. If they do so, they become guilty of misconduct in the eyes of law and for this they may be removed. "I am a firm adherent to the school of thought", says Sir Laurance Street, "that denies acceptability of a person who has mediated subsequently filling the role of arbitrator, notwithstanding statutory recognition of this possibility."³⁸

Kamal Siddiqui and Shukry (Al Books, Delhi, 1988)(Chap.5); *Al Ghazali's Ihyâ Ulîm id-dîn*, vol.II, Eng. Tr. by Fazlul Karim (Kitab Bhawan, Delhi, 1982), pp.53-96

36 El-Ahdab, *supra* n. 14 at 49.

37 See, Koch, Christopher and Schafer, Erik, "Can it be Sinful for an Arbitrator actively to Promote Settlement?". *The Arbitration and Dispute Resolution Law Journal* (ADRLJ), pp.153-184 (Sept. 1999)

38 Street, Sir Laurance, "The Language of Alternative Dispute Resolution", [1992] ADRLJ 144

There are several reasons for this hostility, which on a closer examination appear very simple. For instance, it is alleged that in mediation, parties disclose many secrets to the mediator during caucus meetings, which he is not allowed to reveal without so authorized to anyone including to the other party. If the same mediator acts as arbitrator, he will naturally be carrying in his mind an unverified version of facts narrated by each party about itself and each other. It is contended the practice may affect the neutrality of the person who is converted from mediator to arbitrator. It is also said to violate due process and natural justice, as parties are deprived of their right to defend themselves. Sometimes, the negative allegations may affect the best judgment of the arbitrator.

However, these are not insurmountable problems in the sense that remedial measures can not be take care of these. For example:

- (i) Caucus may not be allowed, thereby eliminating the possibility of disclosure of secret informations to the mediator.
- (ii) Caucus may be allowed, but on a fully informed basis, that is, all the information received by the mediator-turned-arbitrator in private from a party shall be disclosed fully to the other party before the arbitration proceedings start; (Art. 10 of the UNCITRAL Conciliation Rules, 1980 provides that a conciliator may disclose the substance of any factual information received by him so that the other party may defend itself, unless the party giving the information requires him to keep it secret) or alternatively,
- (iii) Parties may appoint a different person as arbitrator.

Once these options are put to use, it may make the debate about the impartiality of med-arbitrator as only of academic interest.³⁹ The actual working of med-arb model and the success achieved in Asia and Europe by med-arb makes a strong case in its favour. It is worth mentioning that arbitration legislation in Australia⁴⁰, China⁴¹, Japan⁴², Hong Kong⁴³, India⁴⁴, Singapore⁴⁵,

39 Shilston, "Med-Arb- Can It Work?", 60 *Arbitration*, p.1(1994); Newman, "Mediation-Arbitration (Med-Arb) Can it Work Legally", 60 *Arbitration*, p.173(1994); and the correspondence on Med-Arb in 60 *Arbitration*, pp. 178-183 (1994); Buhring-Uhle, Christian, *Arbitration and Mediation in International Business: Designing Procedures for Effective Conflict Management*, p.209 (Kluwer Law International, The Hague, 1996)

40 Uniform Commercial Arbitration Act, S.27 (adopted by 5 of the 6 States and both of the Internal Territories).

41 Rules of the CIETAC (China International Economic and Trade Arbitration Commission) Arts. 45-50; also Arts. 51 and 52 of the Arbitration Law, 1994: See, Xiaobing Xu and George D. Wilson, "One Country, Two- International Commercial Arbitration – Systems", *Journal of Int. Arbitration*, vol.17, No.6(Dec. 2000), p.64

42 Rules of the Maritime Arbitration of Japan Shipping Exchange Inc. (Ordinary Rules), 1964, Section 24: Xiaobing Xu and George D. Wilson, *supra* n 40 at 65

43 Hong Kong Arbitration Ordinance, 1990, Sections 2A, 2B, 2C.

44 The Arbitration and Conciliation Act, 1996, section 30 (this section is similar in content as ss.2A, 2B & 2C of Hong Kong Ordinance).

45 International Commercial Arbitration Act, 1994

Korea⁴⁶, Bermuda⁴⁷, California and Texas⁴⁸ in USA and several Canadian Provinces and Territories⁴⁹ recognize med-arb.

If we take look at the provisions of the Hong Kong Arbitration Ordinance, 1990 it may give a broad idea of the contents of a model med-arb provision.⁵⁰

Combining arbitration and mediation may go a long way in helping to settle many international commercial disputes (i) speedily (by saving time wasted on undertaking the two separately), (ii) cheaply, and (iii) efficiently (by ensuring the judicial enforcement of mediated settlement as an arbitral award). The success achieved in China is quite revealing. More than 1000 disputes every year, representing the largest case load in Asia, are settled through med-arb under the aegis of CIETAC (China International Economic and Trade Arbitration Commission).⁵⁰

In Islamic law, combining mediation with arbitration is regarded as something normal as it treats arbitration as a forum for reconciliation.⁵¹ The

46 Commercial Arbitration Rules (approved by the Supreme Court) Art. 18(3) and 53: Branson, Cecil Q.C., "Alternative in Dispute Resolution", in Hartwell, GM Beresford (ed.), *The Commercial Way to Justice*, 191 at 206 (Kluwer Law International, 1997)

47 International Conciliation and Arbitration Act, 1993, ss. 3-21, 14(1): Branson, Cecil QC supra n. 45 at 206

48 California Conciliation Act, Cal. Civ. Proc. Code 1297. 341(West 1994); Texas International Commercial Arbitration and Conciliation Act, Tex. Rev. Civ. Stat. Ann. Art 249-34 (West 1994): Branson, Cecil Q.C., supra n. 45 at 206

49 Arbitration Acts of Alberta, British Columbia, Saskatchewan, Yukon, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Newfoundland

50 **Section 2A.** "Where an arbitration agreement provides for the appointment of a conciliator and further provides that the person so appointed shall act as an arbitrator in the event of the conciliation proceedings failing to produce a settlement acceptable to the parties (a) no objection shall be taken to the appointment of such persons as an arbitrator, or to his conduct of the arbitrator, or to his conduct of the arbitration proceedings, solely on the ground that he had acted previously as a conciliator in connection with some or all the matters referred to arbitration."....

Section 2B

(1) If all parties to a reference consent in writing, and for as long as no party withdraws in writing his consent, an arbitrator or umpire may act as a conciliator.

(2) An arbitrator or umpire acting as conciliator –

(a) may communicate with the parties to the reference collectively or separately;

(b) shall treat information obtained by him from a party to the reference as confidential, unless that party agrees or unless sub-section (3) applies.

(3) Where confidential information is obtained by an arbitrator or umpire from a party to the reference during conciliation proceedings and those proceedings, disclose to all other parties to the reference as much of that information as he considers is material to the arbitration proceedings.

(4) No objection shall be taken to the conduct of arbitration proceedings by an arbitrator or umpire solely on the ground that he had acted previously as a conciliator in accordance with this section."

Section 2C. ".....the settlement agreement shall, for the purpose of its enforcement, be treated as an award on an arbitration agreement and may, by the leave of the court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect."

51 Uscinski, Su and Zhang, "Alternative Dispute Resolution: China", in *Asia Business Law Review*, No. 21 (July, 1998), p.30 at 33, and Shinjian Mo, John, "Non-Judicial Means of Dispute Settlement", in

following Quranic verse is the one in which conciliation and arbitration are mentioned as parts of the same process:

“If ye fear a breach
Between them (husband & wife) twain
Appoint two arbitrators
One from his family
And the other from her’s;
If they wish for peace,
Allah will cause,
Their reconciliation...”⁵²

Thus, Islamic countries are all in favour of med-arb. A look at the arbitration laws currently in force in these countries shows the general acceptance of this concept.

Conclusion:

Problems discussed above are only indicative of the maladies with which arbitration and mediation suffer. These problems inevitably affect the rate of success achieved in the settlement of international commercial disputes. Some of the measures like *amiable composition* and med-arb are rarely used, probably due to lack of ADR culture or some latent suspicion lingering in the minds of traditionists against these initiatives.

Those who are entrusted to search for better ways to settle international commercial disputes, must show willingness to embrace new ideas. Such an attitude is a pre-requisite for starting a new era in dispute resolution.

The misplaced insistence of the Western arbitral institutions to separate arbitration and mediation need to be reviewed. This practice has already created the unintended result of relegating mediation to a secondary position *vis-a-vis* arbitration. For instance, the insistence of the ICC to have separate rules for arbitration and mediation created the consequence whereby it received 2, 049 requests for arbitration and only 49 for conciliation during four years between 1993 and 1997.⁵³ At the Regional Center for Arbitration, Kuala Lumpur, which has separate rules for mediation and arbitration, not even a single dispute has been put to mediation/conciliation since the time of inception of separate rules a decade ago.⁵⁴ No possible harm may result out of combining mediation and

Guiguo, Wang and Mo, John (eds.) *Chinese Law*, p.757 at 775 (Kluwer Law International, The Hague, 1999)

52 See, Art. 1850 of *Mejelle*, Eng.tr. of Ottoman Civil Code, *Majallah al Ahkâm Al-Adliyah*, by Tyser, et all. (Lahore, 1980; reprint of 1901 ed.)

53 *Surah Al Nisâ* (4), *âyat* 35

54 Schwartz, Eric A., “*International Conciliation and the ICC*”, *5 ICC International Court of Arbitration Bulletin* (1994), cited in Koch and Schafer, *supra* n.36 at 162

arbitration.

There is ample of justification for the application of equity in the law of arbitration. As equity is applied to reduce the harshness and inequity of law, its application should logically be extended to arbitration law also where it is found to be harsh or inequitable. An arbitrator deserves to be vested with power to apply equity in situations where he finds it to be just. Arbitrator's ability to apply equity should be treated as an extension of the already accepted principle of allowing arbitrators to apply *amiable composition* and *ex aequo et bono*.

As party autonomy and minimal judicial intervention are the basic norms of the law of arbitration, in particular, international commercial arbitration, the continuing readiness of many nations to enact laws which allow excessive intervention by national courts in international arbitration poses a big problem and should be discouraged.

There is a need to have a fresh look at the settlement of international commercial disputes to find ways and means to better utilize mediation and arbitration, unhindered by avoidable hindrances⁵⁵.

55 The information is based on author's personal enquiry at the Centre. Upto 2001, the rules of arbitration and conciliation were published together by the Centre in a booklet. Now, these are printed separately.