A PRINCIPLED ENQUIRY INTO THE WAIVER OF ANNULMENT PROCEEDINGS

Harshad*

ABSTRACT

Whether parties to an arbitration agreement should be permitted to waive their right to annul an arbitral award is a question gaining increasing prominence in India. And to answer it in a holistic manner is a challenging exercise. On the face of it, this question appears to position the principle of party autonomy at loggerheads with the policy interests of a State, which it may endeavour to protect by retaining a minimum amount of judicial supervision over arbitral proceeding. However, a closer look reveals that a potential annulment of arbitral awards poses further hurdles, which are often overlooked in a zeal to make arbitration a more attractive proposition for potential litigants. As such, there is a need to address this issue from both positivist and normative perspectives. To put it differently, in addition to studying the (non-)mandatory nature of annulment proceedings in different jurisdictions, one must further ascertain the precise role of annulment proceedings in the overall arbitral process, and the consequences to follow if it is waived. That is precisely what the paper endeavours to do by analysing the parties' supposed autonomy to waive their right to annul an arbitral award, and tracing the relationship between annulment proceedings and the doctrine of arbitrability as well as the negative effect of compétence-compétence.

* Senior Associate, P&A Law Offices, New Delhi. The contents of this article reflect the personal views of the author alone and not of P&A Law Offices. The author also reserves his right to depart from these views in the future. He may be contacted at harshad.pathak@mids.ch.

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I. INTRODUCTION

In 2016, the Supreme Court of India rendered its judgment in *M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.,* [1] ('Centrotrade') providing some clarity on the permissibility of appellate arbitration in India. The Court noted that the possibility of annulment under Section 34 of the Indian Arbitration & Conciliation Act 1996 ('Indian Arbitration Act'), and that an award is final and binding, "does not exclude the autonomy of the parties to an arbitral award to mutually agree to a procedure whereby the arbitral award might be reconsidered by another arbitrator or panel of arbitrators by way of an appeal."[2]

In doing so, the Supreme Court delved into the conceptual domain of post-award remedies, in particular the annulment mechanism prescribed under Section 34 of the Indian Arbitration Act, and the parties' ability to tinker with it. It was likely the first instance when India's apex Court had prominently raised this question, which in the past has troubled many courts outside the country. And while the Supreme Court in *Centrotrade* did not specifically concern itself with the waiver of annulment proceedings *per se*, limiting itself to some incidental observations, it is now only a matter of time before this issue knocks the Court's doors. This is precisely why it becomes imperative to conduct a principled enquiry into the waiver of annulment proceedings today. "[I]t is the best work of the legal academy to discuss ideas a thousand days, or even longer, before their time has come."[3]

The question as to whether parties to an arbitration agreement should be permitted to waive their right to annul an arbitral award can be addressed from various perspectives. One

[1] *M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 278.
[2] *M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 278, ¶27.
[3] Charles L. Black Jr., 'The Supreme Court, 1966 Term – Foreword: "State Action", Equal Protection and California's Proposition 14', (1967) 81 Harvard Law Review 69, 106.

may perceive it as determining the contours of party autonomy, which symbolises parties' freedom to exercise control over their arbitration.[4] Alternatively, one may look at it as an enquiry into the mandatory nature of the annulment mechanism under a plethora of national laws.[5] But while both approaches lead to relevant conclusions, they remain inadequate; for there still remains the need to address this issue from a normative perspective. One must still ascertain the role of annulment proceedings in the overall arbitral process, and the consequences to follow if it is waived.

The parties' expectation from an arbitration proceeding is that it culminates in a valid and enforceable award. In this regard, the annulment mechanism assumes importance since it provides the first instance of judicial oversight over an arbitral award. It is the sole avenue for a competent national court to either affirm or deny the validity of the arbitral award, and lend further legitimacy to an otherwise private dispute resolution process. Admittedly, unless precluded under Article V of the New York Convention[6], an arbitral award must be recognized and enforced by a Contracting State,[7] without any leave for enforcement from the country of origin.[8] However, where an arbitral award is set aside by a competent court, it will *usually* be regarded unenforceable not only by such court, but also by national courts elsewhere.[9] Therefore, an agreement to exclude the possibility of reviewing an award at the annulment stage may adversely impact the legitimacy of the arbitration process as a whole.[10] It allows a person to perceive arbitration as a dispute resolution mechanism, which under the guise of efficiency and autonomy, seeks increasing insulation from even minimal judicial oversight. And perception is critical. To borrow words from Aldous Huxley – "there are things known and there are things unknown, and in between are the doors of perception."

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[4] Gary Born, *International Commercial Arbitration* (2014) 1609.
[5] See *Food Services of America, Inc. v. Pan Pacific Specialties Ltd.*, 1997 CanLII 3604 (BC SC); *Noble China Inc. v. Lei*, 1998 CanLII 14708 (Ontario).
[6] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) Art V. ('New York Convention')
[7] New York Convention, Art III.
[8] Albert Jan van den Berg, 'The New York Convention of 1958: An Overview', available at: http://www.arbitration-icca.org.
[9] New York Convention, Art V(1)(e); Nigel Blackaby and Constantine Partasides (eds.), *Redfern and Hunter on International Arbitration* (5th ed. 2009) 526.
[10] Michelle Grando, 'Challenges to the Legitimacy of International Arbitration: A Report from the 29th Annual ITA Workshop', Kluwer Arbitration Blog (19 September 2017) ("It has been argued that the arbitral process is too autonomous from domestic law and domestic court oversight…"); see generally Stephan W. Schill, 'Conceptions of Legitimacy of International Arbitration' in David D Caron, Stephan W Schill, Abby Cohen Smutny and Epaminontas E Triantafilou (eds.), *Practising Virtue: Inside International Arbitration* (Oxford University Press, 2015) 106.

But this discussion is not about legitimacy of the arbitral process, which is merely one facet of the question at hand. While the annulment mechanism has direct implications on both validity and enforceability of an arbitral award, it also shares an intricate, even if indirect, relationship with other avenues of the arbitration. The possibility of exercising judicial oversight over an award at the stage of annulment is conceptually critical in order to answer certain essential questions which do not relate to the arbitral award at all. Specifically, these include issues surrounding the scope of the arbitrability doctrine and the negative effect of *compétence-compétence*. In principle, the mere existence of an annulment mechanism constitutes the backbone of these principles. Thus, whether the parties are permitted to waive their right to annul an award, and minimise judicial oversight at this stage, must also be addressed by reference to its impact on these other avenues of arbitration. That is precisely what the paper endeavours to do.

Part 2 begins with an account of the position of law in several jurisdictions, including India, with respect to the parties' autonomy to waive their right to annul an arbitral award. Thereafter, Part 3 proceeds to discuss the relationship between an annulment proceeding and the doctrine of arbitrability, and its impact on the negative effect of *compétence-compétence*. Part 4 concludes.

II. PARTY AUTONOMY AND WAIVER OF ANNULMENT PROCEEDINGS

Issues surrounding the waiver of annulment proceedings entail an enquiry into the principle of party autonomy, and the extent to which it is recognised by individual national laws. While many institutional rules expressly waive the parties' right to seek annulment of a resultant arbitral award, the fate of such waiver is left to the applicable national law.

For instance, Article 35(6) of the International Chamber of Commerce's Arbitration Rules of 2017 ('ICC Rules') stipulates that "[e]very award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and *shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.*"[11]

[11] ICC Arbitration Rules 2017, Art 35(6). (Emphasis added.)

The London Court of International Arbitration (LCIA) Arbitration Rules 2014, in Article 26.8 also state that "[e]very award (including reasons for such award) shall be final and binding on the parties. The parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and *the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law.*"[12]

In the Indian context, Article 30.12 of the Mumbai Centre for International Arbitration's Rules 2016 ('MCIA Rules') prescribes that "[s]ubject to Rules 14 and 31, by agreeing to arbitration under these Rules, the parties undertake to carry out the Award immediately and without delay, and *they also irrevocably waive their rights to any form of appeal, review or recourse to any state court or other judicial authority insofar as such waiver may be validly made* and the parties further agree that an Award shall be final and binding on the parties from the date it is made."[13]

Accordingly, whether the parties to an arbitration agreement can waive their right to annul an arbitral award must be answered by reference to a variety of national laws. This in turn compels one to trace the statutory origins of party autonomy across jurisdictions, in addition to verifying its acceptance in international arbitration jurisprudence.

For countries that have either adopted or otherwise mimicked the UNCITRAL Model Law on International Commercial Arbitration[14] ('Model Law'), the principle of party autonomy can be traced to Article 19 of the Model Law. Article 19(1) prescribes that "[s]ubject to the provisions of this Law, the parties are free to agree on the procedure to be followed *by the arbitral tribunal* in conducting the proceedings."[15] Article 19(2) then clarifies that it is only failing such agreement that "the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate."[16] The Model Law contains

[12] LCIA Arbitration Rules 2014, Art 26.8. (Emphasis added.)
[13] MCIA Rules 2016, Art 30.12. (Emphasis added.)
[14] Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (11 Dec. 1985). ('UNCITRAL Model Law')
[15] UNCITRAL Model Law, Art 19(1). (emphasis added)
[16] UNCITRAL Model Law, Art 19(2).

similar provisions for designating the place of arbitration[17] and the language(s) to be used in the arbitral proceedings.[18]

A bare reading of Article 19(1) of the Model Law leads to two inferences. *First*, the parties' autonomy resulting from this provision is expressly confined to dictating the procedure for conduct of arbitral proceedings "by the arbitral tribunal". It does not appear to extend to the procedures to be followed by national courts in incidental court proceedings occurring prior to commencement of arbitration,[19] parallel to arbitral proceedings,[20] or subsequent to the publication of the award.[21] This is consistent with the fact that while an arbitral tribunal may be considered a creation of the parties' agreement,[22] no such assertion can be made in relation to national courts. *Second*, in any event, the parties' exercise of their autonomy under Article 19 is "subject to the provisions of" the Model Law, which will prevail in case of a conflict. This implies that unless the Model Law states otherwise,[23] its provisions are given an overriding effect over the parties' agreement to the contrary pursuant to Article 19(1). In such circumstance, can the parties' autonomy to tailor their arbitration extend to include a potential waiver of annulment proceedings? The answers invariably vary.

Article 19(1) of the Model Law is not the solitary source of the principle of party autonomy. For instance, Section 19(2) of the Indian Arbitration Act[24] corresponds to Article 19(1) of the Model Law. Nonetheless, it is consistent to source the principle of party autonomy to provisions in the Indian Contract Act 1872 as well. Specifically, Section 28(a) of the said Act renders void any agreements, which restrict a party "absolutely from enforcing his [or her] rights under or in respect of any contract by usual legal proceedings in the ordinary tribunals."[25] But the arbitration framework in India, which permits the contracting parties to oust the jurisdiction of national courts in favour of arbitral tribunals, still thrives due to the statutory exceptions to this provision. These exceptions provide that Section 28(a) shall neither render illegal "a contract, by which two or more persons agree that any dispute which may arise

[17] UNCITRAL Model Law, Art 20.
[18] UNCITRAL Model Law, Art 22.
[19] For instance, see UNCITRAL Model Law, Arts 9, 11.
[20] For instance, see UNCITRAL Model Law, Arts 9, 27.
[21] For instance, see UNCITRAL Model Law, art 34.
[22] See Piero Bernardini, 'The Role of the International Arbitrator' (2004) 20(2) AI 113; Geoffrey Hartwell, 'Arbitration and Sovereign Power' (2000) 17(2) Journal of International Arbitration.
[23] For instance, see UNCITRAL Model Law, art 24(1), art 25.
[24] Arbitration & Conciliation Act 1996 (India), s 19(2).
[25] Indian Contract Act 1872, Section 28(a).

between them in respect of any subject or class of subjects shall be referred to arbitration"[26] nor "affect any provision of any law in force for the time being as to references to arbitration."[27] One may construe this provision as recognising a broader and sturdier principle of party autonomy, which permeates beyond the conduct of proceedings by an arbitral tribunal. Such understanding would be consistent with the Supreme Court's description of party autonomy as a "guiding spirit"[28] and "backbone"[29] of arbitration.

Likewise, irrespective of its statutory origins, party autonomy in arbitration is recognised as a central tenet of the European tradition,[30] and rallies unquestioned support in the international arbitration community notwithstanding the extent of its statutory recognition.[31]

But the arbitration laws of several European States also differ from the Model Law, which makes comparisons with Model Law jurisdictions inappropriate. This absence of harmonisation paves the way for different jurisdictions to treat the principle of party autonomy differently, to arrive at seemingly contradictory conclusions with regard to waiver of annulment proceedings. In this process, courts also consider if the relevant statutory provisions for annulment of an arbitral award or refusing its recognition and enforcement are mandatory in nature, and thus, non-derogable. In a nutshell, the judicial response to the question regarding parties' autonomy to waive the annulment mechanism can oscillate from one extreme to the other.

On the one hand, several jurisdictions emphasise on the importance of party autonomy to allow contracting parties to waive their right to seek annulment of an arbitral award, or oppose its recognition or enforcement.

For instance, Article 192(1) of the Swiss Federal Statute on Private International Law provides that "[i]f none of the parties have their domicile, their habitual residence, or a business

[26] Indian Contract Act 1872, Section 28(a), Exception 1.
[27] Indian Contract Act 1872, Section 28(a), Exception 2.
[28] *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*, (2016) 4 SCC 126, ¶5.
[29] *M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 278, ¶36.
[30] H M Watt, 'Party Autonomy in international contracts: from the makings of a myth to the requirements of global governance' (2010) 3 ERCL 1, 4.
[31] See for instance, H Heiss, 'Party autonomy', in F Ferrari and S Leible (eds), Rome I Regulation: The Law Applicable to Contractual Obligations in Europe (Sellier de Gruyter 2009). ("Party autonomy has been and will remain the fundamental principle in European private international law in matters of contractual obligations.")

establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2)."[32] On the same lines, Article 1522 of the reformed Code of Civil Procedure in France, which only concerns international arbitration, stipulates that "[b]y way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside."[33] In both these jurisdictions, it appears that party autonomy visibly trumps the annulment mechanism provided for by the relevant statutes.

The position in Canada appears to be similar. In *Food Services of America, Inc. v. Pan Pacific Specialties Ltd.*,[34] the Supreme Court of British Columbia was asked to determine whether parties could waive their right to oppose recognition or enforcement of an award as enshrined in Section 36 of the International Commercial Arbitration Act of British Columbia. The parties had included the following provision in their contract, the validity of which was in question:

> "The parties intend that any award entered by the arbitrators in this case be final and binding, subject to enforcement either in Canada and/or the United States. In this regard, *both parties hereby expressly waive any entitlement they have or may have to rely upon the provisions of Section 36 of the International Commercial Arbitration Act of British Columbia (SBC 1986 c.14) and any similar provision in any comparable legislation in any other jurisdiction*, to seek to avoid recognition or enforcement of an arbitration award made pursuant to this Agreement."[35]

Acknowledging the importance of party autonomy in international arbitration, the Court held that "[i]t would not be appropriate for a court to go beyond the clear meaning of the words in an arbitration agreement and interpret them in such a way as to render the clause meaningless [...] the only possible conclusion is that the parties waived their right to oppose enforcement of the award [...] and the respondent's grounds for opposing enforcement cannot be supported as they clearly fall under that waiver."[36]

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[32] Federal Statute on Private International Law (Switzerland), art 192(1).
[33] Code of Civil Procedure, Book IV, Title II (France), Art 1522.
[34] *Food Services of America, Inc. v. Pan Pacific Specialties Ltd.*, 1997 CanLII 3604 (BC SC).
[35] *Food Services of America, Inc. v. Pan Pacific Specialties Ltd.*, 1997 CanLII 3604 (BC SC), ¶10.
[36] *Food Services of America, Inc. v. Pan Pacific Specialties Ltd.*, 1997 CanLII 3604 (BC SC), ¶15-16.

In 1998, the Ontario Court in *Noble China Inc. v Lei (Ontario)*[37] then extended this dictum to annulment proceedings. The Court noted that since the parties had waived their right to bring an application to set aside an award, "the court should give effect to this [as the] parties make their own agreements, so long as they do not derogate from [the Model Law's] mandatory provisions."[38] Crucially for other Model Law jurisdictions, the Court held that such waiver was "consistent with the philosophy and structure of the Model Law".[39] In its considered opinion, Article 34 was "not a mandatory provision of the Model Law. Parties may therefore agree to exclude any rights they may otherwise have to apply to set aside an award under this article."[40]

On the other hand, the position in the United States of America is blatantly different as far as the grounds for annulment in Section 10 and Section 11 of the Federal Arbitration Act ('FAA') are concerned. Notably, in *Hall Street Associates LLC v Mattel, Inc.*,[41] the Supreme Court of the United States of America ('SCOTUS') had to determine if the disputing parties could supplement these grounds by means of a contract. While the precise question before the court did not relate to waiver of the annulment mechanism *per se*, the SCOTUS' observations regarding the mandatory nature of this procedure are unquestionably relevant.

Expressly rejecting the parties' contractual expansion of statutory grounds for annulment, the SCOTUS, by way of a majority opinion, took a relatively narrow view of the principle of party autonomy. It observed that although the FAA undoubtedly permitted parties to tailor many features of their arbitration by contract, one cannot infer a general policy of treating arbitration agreements as enforceable without ascertaining whether the FAA has any textual features which stand at odds with the parties' contract. With respect to Sections 10 and 11 of the FAA, the SCOTUS answered this question in the affirmative, holding that the statutory "text compels a reading of [Sections] 10 and 11 categories as exclusive."[42] It went on to reason that since "a general term included in the text [of the FAA] is normally so limited, then surely a statute with no textual hook for expansion cannot authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just any legal error."[43] It poetically observed that "in light of the historical context and the broader purpose

[37] *Noble China Inc. v Lei*, 1998 CanLII 14708 (Ontario).
[38] *Noble China Inc. v Lei*, 1998 CanLII 14708 (Ontario).
[39] *Noble China Inc. v Lei*, 1998 CanLII 14708 (Ontario).
[40] *Noble China Inc. v Lei*, 1998 CanLII 14708 (Ontario).
[41] *Hall Street Associates LLC v Mattel, Inc.*, 552 US 576 (2008).
[42] *Hall Street Associates LLC v Mattel, Inc.*, 552 US 576 (2008), Opinion of the Court.
[43] *Hall Street Associates LLC v Mattel, Inc.*, 552 US 576 (2008), Opinion of the Court.

of the FAA, [Sections] 10 and 11 are best understood as a shield meant to protect parties from hostile courts, not a sword with which to cut down parties' "valid, irrevocable and enforceable" agreements to arbitrate their disputes subject to judicial review for errors of law."[44]

The SCOTUS' findings seem to resonate with the position under the UK Arbitration Act 1996, which expressly classifies the grounds enumerated in Section 67 for challenging any award of the arbitral tribunal as to its substantive jurisdiction,[45] or those stated in Section 68 relating to a serious irregularity[46], as being mandatory in nature.[47]

While Indian courts are yet to provide a similarly conclusive determination of the issue, there have been some relevant indicators in the past. Specifically, in *Hyderabad Precision Mfg. Co. Pvt. Ltd. v Government of India, Ministry of Defence*,[48] the High Court of Andhra Pradesh was tasked with determining whether two Indian parties could execute an arbitration agreement that excluded the applicability of the Indian Arbitration Act, and provided for an alternative mechanism for the annulment or setting aside of the arbitral award. The relevant clause provided as under:

> *"In the event of any dispute or difference relating to the interpretation and application of the provisions of the contracts, such dispute or difference shall be referred by either party for Arbitration to the sole Arbitrator in the Department of Public Enterprises to be nominated by the Secretary to the Government of India in-charge of the Department of Public Enterprises.* The Arbitration and Conciliation Act, 1996 shall not be applicable to arbitration under this clause. The award of the Arbitrator shall be binding upon the parties to the disputes provided, however, any party aggrieved by such award may make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry or Law & Justice, Government of India. Upon such reference, the dispute shall be decided by the Law Secretary or the Special Secretary/Additional Secretary, when so authorized by the Law Secretary, whose decision shall bind the

[44] *Hall Street Associates LLC v Mattel, Inc.*, 552 US 576 (2008), Dissenting Opinion of Justice Stevens and Justice Kennedy.
[45] Arbitration Act 1996 (UK), Section 67.
[46] Arbitration Act 1996 (UK), Section 68.
[47] See Arbitration Act 1996 (UK), Section 4(1) and Schedule 1.
[48] *Hyderabad Precision Mfg. Co. Pvt. Ltd. v Government of India, Ministry of Defence*, 2013 (6) ALD 492.

parties finally and conclusively. *The parties to the dispute will share equally the cost of arbitration as intimated by the Arbitrator.*"[49]

The High Court tested the validity of the above clause against the limitations imposed on the parties' autonomy to contract under the Indian Contract Act 1872. It held that the highlighted portion of the arbitration clause was contrary to law. Specifically, "providing for non-applicability of the [Indian] Arbitration and Conciliation Act, 1996 [was] void, under the provisions of Section 23 of the Indian Contract Act."[50] The High Court, thus, declared this portion providing for non-applicability of the Indian Arbitration Act "illegal and invalid", but severed it so as to preserve the remaining arbitration agreement.[51]

More recently, the Supreme Court of India in *Centrotrade* also opined on the relationship between the principle of party autonomy and the annulment mechanism in Section 34 of the Indian Arbitration Act. On the one hand, the Court observed that "[t]he intention of Section 34 […] is to avoid subjecting a party to an arbitration agreement to challenges to an award in multiple forums [...] not to throttle the autonomy of the parties or preclude them from adopting any other acceptable method of redressal such as an appellate arbitration."[52] On the other hand, the Court also clarified that while Section 34 does not disentitle the parties to mutually agree that their arbitral award might be reconsidered by another arbitrator by way of an appeal in a final and binding manner, this would only be "subject to a challenge provided for by the [Indian Arbitration Act]."[53]

In this light, the answer to the question whether the parties can waive their right to annul an award will necessarily depend on the jurisdiction where it is asked. This inherent contingency precludes one from answering this question definitively. In other words, in the absence of reference to a specific jurisdiction, it is futile to wonder whether the parties to an arbitration agreement *can* waive their right to set aside or annul an arbitral award. But whether they should be permitted to do so is an entirely different manner, involving a consideration of

[49] *Hyderabad Precision Mfg. Co. Pvt. Ltd. v Government of India, Ministry of Defence*, 2013 (6) ALD 492, ¶1. (Emphasis added.)
[50] *Hyderabad Precision Mfg. Co. Pvt. Ltd. v Government of India, Ministry of Defence,* 2013 (6) ALD 492, ¶6.
[51] *Hyderabad Precision Mfg. Co. Pvt. Ltd. v Government of India, Ministry of Defence*, 2013 (6) ALD 492, ¶11.
[52] *M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 278, ¶28.
[53] *M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 278, ¶27.

several aspects that travel beyond party autonomy and possible mandatory nature of annulment provisions in varied national laws. This remains the focus of enquiry in the subsequent parts.

III. THE IMPLICATIONS OF WAIVER OF ANNULMENT PROCEEDINGS

A. The Threshold of Arbitrability

The waiver of the right to annul an arbitral award has significant bearing on the burgeoning categories of disputes now deemed arbitrable. The doctrine of arbitrability entails a general enquiry into which types of disputes are capable of settlement by arbitration, and which are not.[54] Over the past few decades, a gradual decline in judicial hostility towards arbitration has caused significant expansion of the domain of arbitration. In the United States of America, for instance, matters of anti-trust law[55] and consumer rights,[56] initially suspected to be inarbitrable, are now referred to arbitration routinely. The same can also be said about Switzerland,[57] which has greatly contributed to its popularity as a preferred seat for arbitration of international disputes.

However, much like romanticised tales of unexpected joy, the relaxation of the arbitrability doctrine can be sourced to a pivotal moment. In this context, many rightly point towards the barter that took place in *Mitsubishi* in 1985. In *Mitsubishi v Soler Chrysler-Plymouth,*[58] the petitioner, a Japanese automobile manufacturer, was a joint venture between Chrysler International, a Swiss corporation, and another Japanese corporation. It sought to distribute its automobiles outside the United States through Chrysler's dealers. For this, the Petitioner and Chrysler executed an agreement with the Respondent, a Puerto Rico corporation, which in turn also provided for arbitration by the Japan Commercial Arbitration Association. Upon occurrence of a dispute, the Petitioner approached the Federal District Court to compel arbitration. But the Respondent objected, and filed counterclaims based on the Sherman Anti-Trust Act. The dispute eventually reached the SCOTUS, which was asked to determine the arbitrability of anti-trust disputes in relation to an international commercial

[54] Karim Abou Youssef, 'The Death of Inarbitrability', *in* Loukas A. Mistelis and Stavros L. Brekoulakis (eds.), *Arbitrability: International and Comparative Perspectives* (2009) 47.
[55] *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc.* 473 U.S. 614. ('*Mitsubishi*')
[56] *Scherk v. Alberto-Culver*, 417 U.S. 506.
[57] Federal Statute on Private International Law (Switzerland), Art 177(1).
[58] *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc.* 473 U.S. 614.

transaction. In a stark departure from the existing case-law,[59] the SCOTUS concluded that anti-trust disputes were arbitrable. However, it only did so on the basic premise that notwithstanding the parties' choice of law, as far as claims arising from the application of American anti-trust law were concerned; the arbitral tribunal was "bound to decide that dispute in accord with the national law giving rise to the claim."[60] The SCOTUS explicitly warned that if "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, [then it] would have little hesitation in condemning the agreement as against public policy."[61]

Admittedly, the SCOTUS foresaw that United States courts "will have the opportunity *at the award-enforcement stage* to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed."[62] This particular rationale also extends to annulment or set-aside proceedings; especially in today's globalised era where it is common for award-holders to pursue enforcement against the award-debtor's assets situated outside its home jurisdiction.[63] It is equally trite that the extent of any public policy enquiry available at the enforcement stage is far narrower than the one permissible at the stage of annulment.[64] Hence, the two avenues of judicial protection do not offer equivalent protection of any legitimate policy interests that a State may have.

Simply put, the SCOTUS had paved the way to relax the arbitrability constraint on a dual-condition that (1) the arbitral tribunal shall apply the relevant mandatory rules; and importantly (2) its competent national courts will have reasonable opportunity to ensure that its legitimate public policy considerations are protected. However, if the parties are permitted to waive the annulment mechanism by mutual agreement, then the second condition stands nullified. For instance, A and B, two corporations incorporated in the US, can agree to resolve their disputes in a New York-seated arbitration, but potentially waive any recourse to set aside the award. In such circumstance, if A secures an award against B and B has assets outside the USA, then the US courts will have no opportunity to ensure the preservation of its public policy

[59] *American Safety Equipment Corp. v. J.P. Maguire & Co*., 391 F.2d 821.
[60] *Mitsubishi*, 637.
[61] *Mitsubishi*, Footnote 19.
[62] *Mitsubishi*, 638.
[63] For instance, refer to the attempts at enforcement of the arbitral award in *Yukos Universal Limited v. The Russian Federation*, PCA Case No. AA 227 in USA, UK, France, Germany, Belgium and India.
[64] *Shri Lal Mahal Ltd. v. Progetto Grano Spa*, (2014) 2 SCC 433; *WSG (Mauritius) Ltd v MSM Satellite (Singapore) Pte Ltd*, Civil Appeal No. 895/2014.

considerations. Admittedly, this concern attains greater significance in arbitrations involving parties of the same nationality, as opposed to international arbitrations involving parties from different nationalities where the parties commonly seat their arbitration in a neutral foreign jurisdiction.

The above illustration demonstrates that permitting contracting parties to waive their right to annul an award strikes at the foundation of the edifice on which the arbitrability restraint was first relaxed in 1985. Several legal systems also subsequently enlarged the categories of disputes that can be submitted to arbitration on an identical expectation that their national courts will have reasonable opportunity to review the resultant arbitral award, even if only on limited grounds. In the contemporary paradigm where award-debtors need not seek any enforcement in the country of origin, the annulment mechanism becomes the lone basis to meet this expectation.[65]

Consequently, any a contractual waiver of this opportunity puts in question the barter that took place in *Mitsubishi*, and makes arbitration a fertile mechanism to evade judicial oversight. In such scenario, an over-emphasis on party autonomy has previously "allowed economic actors to escape from the internationally mandatory provisions which would otherwise have been applicable before their natural forum."[66] This not only affects the credibility of international arbitration, but may eventually constrain certain national courts to re-tighten the screws of arbitrability and limit the domain of arbitration. As such, the quest to preserve the growing domain of arbitration warrants that parties ought not to waive their right to set aside or annul an arbitral award.

B. The Negative Effect of Competence-Competence

Apart from the doctrine of arbitrability, the annulment mechanism, or waiver thereof, also bears proximity to the cardinal principle of *compétence-compétence*. It is accepted that an

[65] This expectation can also be defeated by designating a foreign seat of arbitration; conferring the jurisdiction to set aside an award on a foreign court. However, whether such autonomy exists is disputed in several jurisdictions, including India. For instance, see *Addhar Mercantile Pvt Ltd v. Shree Jagdamba Agrico Exports Pvt. Ltd*, Arbitration Application No. 197 of 2014 (Bom); *Sasan Power Ltd v. North American Coal Corporation India Pvt Ltd*, First Appeal No. 310/2015 (MP).

[66] H M Watt, 'Party Autonomy in international contracts: from the makings of a myth to the requirements of global governance', (2010) 3 ERCL 1, 20. See also Mohammad Reza Baniassadi, 'Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?', (1992) 10(1) Berkley Journal of Int'l Law 59.

arbitral tribunal "may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."[67] This is the positive effect of *compétence-compétence*.[68] However, many jurisdictions, particularly France, also recognise its negative effect, which proffers that an arbitral tribunal should decide questions surrounding its jurisdiction at the first instance, subject to a possible judicial review of its decision at the stage of annulment.[69]

Although the principle of *compétence-compétence* has gained significant acceptance in the international community, the jurisdictional battle between national courts and arbitral tribunals as to which forum should take precedence in determining questions of arbitral jurisdiction continues to be open.[70] Despite the increasing recognition of the negative effect of the principle, many legal systems remain undecided. In fact, some have previously rejected its application altogether.[71] Even the academic criticism of its policy origins and pragmatic utility is cogent and continuous. Notably, Stavrous Brekoulakis strongly argues "against the adoption of the negative effect of compétence-compétence."[72]

Brekoulakis' argument, and that advanced by hesitant jurisdictions, largely emanates from a discomfort in allowing tribunals to have exclusive priority in assessing their own jurisdiction. For instance, Brekoulakis insists that in order "to take this legal fiction [of *compétence-compétence*] a step further, and confer exclusive jurisdiction on a forum whose validity is at stake, defies not only logic but also any principle of legitimacy."[73] He instead suggests that "allowing for concurrent jurisdiction of arbitral tribunals and national courts over the validity of the arbitration agreement, strikes the right balance."[74] However, the Supreme Court of India was not so accommodating. In *SBP & Co. v. Patel Engineering Ltd. & another.*, a judgment under the pre-amendment incarnation of the Indian Arbitration Act, the Supreme Court not only held that the Chief Justice of India had the right to decide certain jurisdictional issues prior

[67] UNCITRAL Model Law, Art 16(1).
[68] Gary Born, *International Commercial Arbitration* (2010) 853.
[69] Jean-Fracois Poudret and Sebastien Besson, *Comparative Law of International Arbitration* (2007) 387.
[70] Stavrous Brekoulakis, 'The Negative Effect of Compétence-compétence: The Verdict has to be Negative', QMUL School of Law, Legal Studies Research Paper No. 22/2009, 12. ('Brekoulakis')
[71] *SBP & Co. v. Patel Engineering Ltd. & Anr.*, (2005) 8 SCC 618.
[72] Brekoulakis, 18.
[73] Brekoulakis, 13.
[74] Brekoulakis, 14.

to appointing arbitrators[75], but also that it can do so on the basis of a full and final review.[76] In both instances, the negative effect of *compétence-compétence* was shunted to oblivion.

In such circumstances, the sole avenue for buttressing the feasibility of the negative effect of *compétence-compétence* is the competent national courts' opportunity to conduct a judicial review at the stage of annulment. After all, the negative effect of *compétence-compétence* merely goes on to establish "a presumption of chronological priority for the tribunal [as against the national courts] with respect to resolving jurisdiction questions".[77] It does not necessitate any exclusivity in favour of arbitral tribunals. Any determination by an arbitral tribunal with respect to its own jurisdiction remains amenable for review by the competent national courts during annulment, which constitutes a much-needed safety net for preserving the rule of law.[78] This renders the possibility of providing chronological preference to arbitral tribunals only a matter of procedural efficiency and prevention of dilatory tactics by a recalcitrant party.[79]

But even this possibility to argue in favour of the negative effect of *compétence-compétence* is premised on an understanding that the national courts' jurisdiction to annul an award remains uncompromised. It cannot be made subordinate to the agreement of the parties. If the parties are permitted to waive their right to annul an award, it removes the proverbial safety net of judicial oversight. As stated above, the possibility to oppose the enforcement of an arbitral award, that too when it may be in a foreign jurisdiction, does not proffer equivalent protection. In such scenario, the waiver of annulment proceedings creates a justifiable basis to question the theoretical basis of the negative effect of *compétence-compétence*, and generally obstructs its pervasiveness. As such, the need, or at least preference, to promote the principle of *compétence-compétence* in its complete manifestation outweighs the supposed benefits of allowing parties to waive their right to annul an arbitral award. If this were not so, a pressing response to Brekoulakis' otherwise coherent rejection of the negative effect of *compétence-compétence* is likely to disappear.

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[75] *SBP & Co. v. Patel Engineering Ltd. & Anr.*, (2005) 8 SCC 618, ¶46(iv). See *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd*, (2009) 1 SCC 267.
[76] *SBP & Co. v. Patel Engineering Ltd. & Anr.*, (2005) 8 SCC 618, ¶38.
[77] Emmanuel Gaillard and John Savage (eds.), *Fouchard Gaillard and Goldman on International Commercial Arbitration* (1999) 401.
[78] UNCITRAL Model Law, Art 34.
[79] William Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' in Albert Jan van den Berg (ed.), *ICCA Congress Series No. 13, International Arbitration 2006: Back to Basics?* (2008) 81.

IV. CONCLUSION

To borrow words from Albert Jan van den Berg, "as long as arbitration has existed as an alternative to litigation in court, the award has been subject to some form of judicial review."[80] A cumulative consideration of the aforementioned parameters elucidates that the tide of time is yet to provide legitimate reasons to alter this paradigm. And while there is no definitive answer as to whether the contracting parties *can* waive their right to set aside or annul an arbitral award, a normative enquiry provides more certain conclusions. In the author's view, it is more appropriate for states to not permit parties to waive their right to annul their award.

[80] Albert Jan van den Berg, 'Should the Setting Aside of the Arbitral Award be Abolished?', (2014) ICSID Review 262, 264.