EFFECTIVE INTERPRETATION OF DEFECTIVE ARBITRATION CLAUSES: AN INTERNATIONAL APPROACH

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The need to construct a defect-free arbitration clause arises from the verity that a valid arbitration clause is necessary to determine the jurisdiction of an arbitration tribunal. The existence of the arbitral tribunal's jurisdiction decides whether the parties are bound by the award or not. This paper in Section I elaborates the need for drafting a valid arbitration clause (for the purpose of this paper only bilateral contracts are considered). Section II deals with the requirements of formal validity of an arbitration clause and factors which makes an arbitration clause pathological. Section III enumerates the perspective change from restrictive to effective interpretation of arbitration clauses. Section IV explains the necessity of common intention of the parties and the principle of effective interpretation to sustain the validity of defective arbitration clauses.

Section I: The need for the perfect clause

An arbitration clause is the source or title from which the agreement to arbitrate disputes or differences arises. A valid arbitration clause is of supreme importance because it not only determines the jurisdiction of the tribunal but also ousts the jurisdiction of the national courts.[1] Moreover the arbitration clause creates a set of rights and obligations to amicably settle disputes through mutual dialogue.

As a matter of law, existence of arbitral tribunal jurisdiction is dependant on the validity of the arbitration agreement. Therefore, a valid arbitration must be preceded by a valid arbitration agreement[2] (which may be incorporated in the form of a clause).

The interconnection between a valid arbitration clause and jurisdiction of an arbitration tribunal is imperative because the existence of the arbitral tribunal's jurisdiction decides whether the parties are bound by the resulting award or not.[3] Therefore the question of the recognition and enforcement of arbitral award is allied to the validity of the arbitration clause. Under UNCITRAL Model Law[4] (which have played an enormous role in shaping international arbitration in its present form), and the New York Convention on Enforcement and Recognition of Arbitral Awards[5] (which has played a critical role in securing the enforceability of international arbitration agreements during the past several decades[6]), absence of the jurisdiction of the tribunal is an important ground for setting aside the award and refusing enforcement and recognition.[7]

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[1] Redfern and Hunter, *Law & Practice of International Commercial Arbitration* 134 (4th ed. 2004).
[2] O.P Malhotra, *The Law and Practice of Arbitration & Conciliation* (Lexis Nexis, Butterworths, 2002).
[3] *Ibid.*
[4] Hereinafter referred to as MAL.
[5] Hereinafter referred to as NYC.
[6] G.A. Born, *International Commercial Arbitration* 155– 296 (2nd ed. 2001), Kluwer Arbitration.
[7] Article V 1 (d) New York Convention.

Therefore the drafting of an arbitration clause, which serves as a foundation for an arbitration, requires utmost caution at all the three levels of concerns, i. e., first, the essential elements of the arbitration clause, which must be incorporated for the clause to be valid. Second, the generally recommended additions which may be the specific requirement of the parties and last, some tailor made adaptatations to meet peculiar situations.[8]

Section II: Formal validity of an arbitration clause

International standards prescribe that for an arbitration agreement to be valid, it must meet certain requirements. As a consequence, the legal rules governing the validity of international arbitration agreements are of great practical importance.[9] The requirements under both the instruments are as follows:

(a) That the agreement should be in writing.
(b) That it should deal with existing or future disputes.
(c) That the disputes should arise in respect of a defined legal relationship, whether contractual or not.
(d) That the dispute should concern a subject matter capable of settlement by arbitration.

These four positive requirements of a valid arbitration agreement are laid down in Article II 1[10] of the NYC. The first three are also contained in the MAL Article 7(1).[11] Another two requirements are added by the provisions of Article V 1 (a)[12] of NYC, which are also found in the MAL Article 34(2)(a)[13] and 36 (1)(a)(i)[14] mainly relate to the legal

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[8] Paul-A. Gélinas, "Arbitration Clauses: Achieving Effectiveness", ICCA Congress series no. 9 (Paris/1999), pp. 47 – 66.

[9] G.A. Born, *International Commercial Arbitration* 155– 296 (2nd ed. 2001).

[10] Article II 1reads as follows:

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any of differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

[11] Article 7(1) reads as follows:

Arbitration Agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

[12] Article V 1(a) reads as follows:

Recognition and enforcement of the award may be refused at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it to., failing any indication thereon, under the law of the country where the award was made.

[13] Article 34(2)(a) reads as follows:

An arbitral award may be set aside by the court specified in Article 6 only if the party making the application furnishes proof that;

(i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

capacity of the parties and the validity of the arbitration agreement under the law to which the parties have subjected it to.

Though much has been written on arbitration clauses, it is often one of the elements to which enough attention is not given in a commercial contract. As a result of which, the "null, void, inoperative, incapable of being performed" arbitration agreements are quite frequently seen in contracts. Sometimes it is assumed that at the time of contracting, the parties usually are acting in the spirit of cooperation and goodwill, and they do not desire to focus on the unpleasant prospect of a dispute. Even to discuss the subject may be construed as an unfriendly gesture and generate suspicion.[15]

The defect in the arbitration clause may relate to the requirements mentioned above, but in most cases problems arise due to faulty drafting of the clause. Negotiators, especially corporate officers and counsel, are generally well versed in the subject matter of their business contract, but rarely master the same skills when it comes to drafting arbitration clauses.[16] For example an arbitration clause may meet all the above mentioned requirements (i.e., the arbitration agreement may be in writing to arbitrate existing or future disputes, the dispute may arise out of a defined legal relationship, the subject matter may be arbitrable, the parties may be competent to contract and the clause may be valid under the *lex arbitri*) yet be considered pathological. Pathological clauses denote arbitration agreements, and particularly arbitration clauses, which contain a defect or defects liable to disrupt the smooth progress of the arbitration.[17] Arbitration agreements can be pathological for a variety of reasons.[18] The reference to an arbitration institution

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(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) *the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law.*

[14] Article 36 (1)(a)(i) reads as follows:

Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

[15] Thomas E. Carbonneau, *Resolving Tansnational Disputes through International Arbitration* 232 (University Press of Virginia, Charlottesville, 1984).

[16] Paul-A. Gélinas, "Arbitration Clauses: Achieving Effectiveness", ICCA Congress series no. 9 (Paris/1999), pp. 47 – 66.

[17] Frédéric Eisemann, *La clause d'arbitrage pathologique, in* COMMERCIAL ARBITRATION – ESSAYS IN MEMORIAM EUGENIO MINOLI 129 (1974) as cited in Fouchard Gaillard Goldman on *International Commercial Arbitration*, E. Gaillard and J. Savage (eds.)(1999), pp. 241 – 380.

[18] For a "chamber of horrors"of pathological clauses, see, besides Eisemann, Hugues Scalbert and Laurent Marville, *Les clauses compromissoires pathologiques*, 1988 REV. ARB. 117; Benjamin G. Davis,

may be inaccurate or totally incorrect[19], the agreement may appear to allow submission of disputes to arbitration to be optional[20]; it may contain a defective mechanism for appointing arbitrators, for example, the chosen appointing authority refuses to perform that function[21] alternatively, the agreement might itself appoint arbitrators who have died by the time the dispute arises.[22] The agreement may impose impracticable conditions for the arbitral proceedings (such as unworkable deadlines), or provide that certain issues (such as the validity of the contract) are not to be dealt with by the arbitrators, despite the fact that such issues are closely related to the dispute which the arbitrators are called upon to decide. Another example is an agreement that permits an appeal from the award before national courts in cases where the subject-matter is international.[23] Therefore pathological clauses might lead to litigation making the dispute resolution process more time consuming and expensive which will defeat the very purpose of incorporating an arbitration clause. Various scholars like Jens-Peter Lachmann, Karl Heinz Schwab, and Gerhard Walter opine that it is simply injudicious to introduce an arbitration clause whose contents have not been checked in depth. Hence factors like inadequacy, vagueness, ambiguity, equivocation and insufficient specification of the arbitral institution may invalidate the clause. Accordingly clauses like "in case of arbitration, the Rules of Arbitration shall apply..." is insufficient to create reliable arbitral jurisdiction.[24] Further, an agreement for reference to dispute under the rules of Tribunal of Arbitration, Bengal Chamber of Commerce or Indian Chamber of Commerce is vague and uncertain, as there is no reference to any particular individual or body by the agreement.[25] To be valid and enforceable, the terms of an arbitration agreement must be clear and certain.[26] However, sometimes the parties to a commercial contract incorporate terms in an

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Pathological Clauses – Frederic Eisemann's Still Vital Criteria, 7 ARB. INT'L 365 (1991); W. LAURENCE CRAIG, WILLIAM W. PARK, JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 157 *et seq.* (2d ed. 1990); Lazare Kopelmanas, *La rédaction des clauses d'arbitrage et le choix des arbitres, in* HOMMAGE À FRÉDÉRIC EISEMANN 23 (ICC Publication No. 321, 1978), *cf* Fouchard Gaillard Goldman on *International Commercial Arbitration*, E. Gaillard and J. Savage (eds.)(1999), pp. 241 – 380.

[19] *Astra Footwear Industry* v. *Harwyn International* 442 F.Supp. 907 (S.D.N.Y. 1978).

[20] For example: "The parties may refer their disputes to arbitration". On this issue, see Davis, at 367; Cass. 1e civ., Oct. 15, 1996, Calberson Int'l v. Schenker, 1998 REV. ARB. 409, and C. Malinvaud's note. Compare, in the United States, for the difficulties resulting from a clause providing that an arbitrator should be "chosen by mutual agreement"of the parties, *Cargill Rice, Inc*. v. *Empresa Nicaraguense de Alimentos Basicos*, 25 F.3d 223 (4th Cir. 1994); 5 WORLD ARB. & MED. REP. 164 (1994); 9 INT'L ARB. REP. D1 (June 1994), *cf* Fouchard Gaillard Goldman on *International Commercial Arbitration*, E. Gaillard and J. Savage (eds.)(1999), pp. 241 – 380.

[21] On the validation by Swiss courts of the appointment of an arbitrator by the ICC in the place of the director general of the World Health Organization (who was chosen by the parties but refused to carry out the task), see Swiss Fed. Trib., Apr. 16, 1984, Y. v. X., 1986 REV. ARB. 596, and observations by R. Budin, *cf* Fouchard Gaillard Goldman on *International Commercial Arbitration*, E. Gaillard and J. Savage (eds.)(1999), pp. 241 – 380.

[22] Fouchard Gaillard Goldman on *International Commercial Arbitration*, E. Gaillard and J. Savage (eds.)(1999), pp. 241 – 380.

[23] *Ibid.*

[24] Ronald Bernstein, John Tackaberry, and Arthur L. Marriot, *Handbook of Arbitration* 552 (London: Sweet& Maxwell, 1998).

[25] *Ganpatrai Gupta* v. *Moody Bros*., (1950) 85 Cal LJ 136, 142; *Seth Kirorimal Adwani* v. *Union of India*, AIR 1959 Cal 430.

[26] *Lobb Partnership Ltd* v. *Aintree Racecourse Company Ltd* (2000) B.L.R. 65.

arbitration clause which they don't intend to adhere to, alternatively they exclude terms which they intend to fulfill. To overcome such cacophonous situations, international commercial law favours effective interpretation of arbitration clause. The principle of effective interpretation helps to do away with the unintended lacuna created in the arbitration clause. However, such a broad and liberal interpretation has not always been preferred. The following section analyses the process and growth of the principle of effective interpretation, following which the principle is explained in detail.

Section III: Journey from 'restrictive' interpretation to 'effective' interpretation of arbitration clause

There was a phase in history when arbitration agreements were looked upon with mistrust and suspicion. Legislatures and courts in many nations treated arbitration agreements – both domestic and international as unenforceable.[27] Historically, U.S. and English courts held that agreements to arbitrate were revocable at will[28], because they "ousted" courts of jurisdiction contrary to public policy.[29] This grudging approach towards arbitration agreements reflected a variety of other factors, including skepticism about the adequacy and fairness of the arbitral process, and suspicions that arbitration agreements were often the product of unequal bargaining power.[30] This was true of many other countries as well. Many developing states particularly in the Middle East, Latin America and Africa took the position that international arbitration agreements were contrary to national interests and invalid.[31] For example the Constitution of Brazil provided that citizens have an

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[27] G.A. Born, *International Commercial Arbitration* 155– 296 (2nd ed. 2001).

[28] For commentary describing common law ambivalence towards arbitration agreements, *see* Jones, *Development of Commercial Arbitration*, 21 Minn. L. Rev. 240 (1927); Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Summary*, 1956 Wash. U.L.Q. 193; F. Kellor, *American Arbitration: Its History, Functions and Achievement* (1948); Mentschikoff, *Commercial Arbitration*, 61 Colum. L. Rev. 846 (1961); Sayre, *Development of Commercial Arbitration Law*, 37 Yale L. J. 595 (1927); Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. Pa. L. Rev. 132 (1934).

[29] *Home Ins. Co. v. Morse*, 87 U.S. 445, 457-58 (1874) (agreement to arbitrate future disputes illegal and void); *Dickson Mfg. Co. v. American Locomotive Co.*, 119 F.Supp. 488 (M.D. Pa. 1902).

[30] S. Rep. No. 536, 68th Cong., 1st Sess. 2-3 (1924) (citing "[judges'] jealousy of their rights as courts, coupled with the fear that if arbitration agreements were to prevail and be enforced, the courts would be ousted of much of their jurisdiction"); Joint Hearings on S. 1005 and H.R. 646 Before the Subcommittee of the Committees on the Judiciary, 68th Cong., 1st Sess. 21 (1924); *Tobey v. County of Bristol*, 23 Fed.Cas. 1313 (C.C.D. Mass. 1845). Some traced concerns of this nature to the desire of the common law judges to prevent competition – particularly competition for fees–from arbitrators.

The doctrine had its origin in the interests of the judges. There was no disguising the fact that, as formerly, the emoluments of the judges depended mainly, or almost entirely, upon fees, and as they had no fixed salaries, there was great competition to get as much as possible of litigation into Westminster Hall.... And they had great jealousy of arbitrations whereby Westminster Hall was robbed of those cases which came not into Kings Bench... *Scott v. Avery*, 25 L.J.Ex. 308, 313 (H.L). 1856.

[31] *See* Kassis, *The Questionable Validity of Arbitration and Awards Under the Rules of the International Chamber of Commerce*, 6 J. Int'l Arb. 79 (1989); Sornarajah, *The UNCITRAL Model Law: A Third World Viewpoint*, 6 J. Int'l Arb. 7 (1989) ("there is a definite ambivalence in the attitudes of developing countries towards international commercial arbitration"); *Afro-Asian Legal Consultative Committee, Report of the Seventeenth, Eighteenth and Nineteenth Sessions held in Kuala Lumpur (1976), Baghdad (1977) and Doha (1978)*, at 131 (institutional arbitration rules do "not work out particularly favourably for the developing countries in the matter of venue, choice of arbitrators, as also fees and charges leviable by the institutions concerned").

absolute right of access to the courts. Brazil adopted an Arbitration Law based on the principles of the UNCITRAL Model Law in 1996. That Law gave parties the right to agree irrevocably to binding arbitration of commercial disputes, and thus, in effect, to waive their constitutional right to sue. It was not until 2001 that the Supreme Court of Brazil, after years of uncertainty, held that the Arbitration Law was constitutional.[32]
During the 1920s, the signing of the Geneva Protocol and Geneva Convention, the enactment of the Federal Arbitration Act[33] in the United States, and the founding of the International Chamber of Commerce's arbitration facilities in Paris signaled important changes in national and international attitudes towards arbitration.[34] The FAA was strongly supported by the business community, which saw litigation as increasingly expensive, slow, and unreliable.[35] The drafting of the New York Convention (in 1958) and the promulgation of the UNCITRAL Arbitration Rules (in 1976) coupled with promulgation of the Model Law on International Commercial Arbitration marked important advances in international acceptance of arbitration as an alternative means of dispute resolution. In fact some scholars preferred to call it 'amicable dispute resolution'. In other parts of the world where liberalization, globalization and privatizations became the mantra in 1990s, also viewed arbitration as an effective means of resolving disputes. Ever since the above-mentioned instruments came into existence, arbitration agreements came to be given effective interpretation. Though some scholars point out that 'neutral' interpretation of an arbitration clause may be equally efficacious, however 'pro-arbitration' approach is certainly the more adhered to. The journey from restrictive to effective interpretation not only highlights a pro arbitration bias but also lends a forceful effect to ensuants of the expressed *will of both the parties*. Since the doctrine of effective interpretation is based on the intention of the parties, it becomes exceedingly necessary that the parties actually 'intend' to arbitrate as laid down in the contract.

Section IV: Common intention and principle of effective interpretation

Arbitration agreement is the manifest expression of the parties' intention and consent to arbitrate their disputes. International commercial arbitration is ordinarily based on the parties' voluntary consent to arbitrate their disputes.[36] The authority of the tribunal to carry on the process of arbitration and to decide the substantive rights of the parties is derived from the consent of the parties. That is why it is necessary that the tribunal has to be constituted either by the parties or by the method to which they have consented. The

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[32] Markham Ball, "The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration".

[33] Hereinafter referred to as FAA
[34] G.A. Born, *International Commercial Arbitration* 155– 296 (2nd ed. 2001).

[35] S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924); Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Act and its Application*, 11 A.B.A.J. 153, 155-6 (1925).
[36] There are limited (but important) categories of cases where international arbitration can be required even without a specific agreement between the parties to arbitrate. This is possible pursuant to some "bilateral investment treaties" ("BITs"), certain multilateral conventions (e.g., the so-called Energy Charter), and national law.

parties should be ad idem[37] regarding the arbitration clause and as a matter of law it must be accepted by the parties in the same sense.[38] When inserting an arbitration clause in their contract the intention of the parties must be presumed to have been willing to establish effective machinery for the settlement of disputes covered by the arbitration clause.[39] Since an arbitration agreement is commercial document between parties, it must be interpreted so as to give effect to the contract (agreement) rather then to invalidate it.[40] Accordingly, where a clause can be interpreted in two different ways, the interpretation enabling the clause to be effective should be adopted in preference to that which prevents the clause from being effective.[41] This is called the principle of effective interpretation. It has been upheld in many arbitral and is widely accepted not only by the courts but also by arbitrators who readily acknowledge it to be a "universally recognized rule of interpretation".[42] Accordingly, in *Star Shipping A.S. v China National foreign Trade Transportation Corp*[43] it was held that where there are realistic alternative interpretations of an arbitration clause, the Courts will always tend to favour the interpretation which gives a sensible and effective interpretation to the arbitration clause." Most national courts now regard arbitration as an appropriate way of resolving international commercial disputes and accordingly seek to give effect to arbitration agreement wherever possible.[44]

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[37] P.C Markanda, *Law Relating to Arbitration and Conciliation* (Nagpur: Wadhwa, 2003). *Ramji Dayawala Ltd* v. *Invest Import* AIR 1981 SC 2085, *Caerlton Tinplate Co.* v *Hugher* (1891) 60 LJQB 640; In Re *Anglo New Foundland Development Company* (1920) 2 KB 214; *Rawalpindi Theatre* v. *Patangal* AIR 1967 Punj 241; U.P. *Rajakiya Nirman Nigam Ltd* v. *Indure Pvt Ltd* AIR 1996 SC 1376.

[38] *Basu on Law of Arbitration and Conciliation*, revised by P.K. Majumdar, (10th edn, Orient Publishing Company).

[39] Preliminary award in ICC Case No. 2321 (1974), Two Israeli companies v. Government of an African state, I Y.B. COM. ARB. 133 (1976).

[40] O.P Malhotra, *The Law and Practice of Arbitration & Conciliation* (Lexis Nexis, Butterworths, 2002).

[41] This provision has been contained in the French Civil Code since its initial publication in 1804. Since then it has been adopted in a large number of jurisdictions. It was recently adopted in a transnational context in the UNIDROIT Principle 4.5 (UNIDROIT, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 96 (1994)).

[42] *See, e.g.*, ICC Award No. 1434 (1975); ICC Award No. 3380 (1980), Italian enterprise v. Syrian enterprise, 108 J.D.I. 927 (1981); for an English translation, see VII Y.B. COM. ARB. 116 (1982); ICC Award No. 3460 (1980), French company v. Ministry of an Arab country, 108 J.D.I. 939 (1981); the March 24, 1982 *ad hoc* award by P. Reuter, president, H. Sultan and G. Fitzmaurice, arbitrators, The Government of the State of Kuwait v. The American Independent Oil Co. (AMINOIL), 21 I.L.M. 976 (1982); IX Y.B. COM. ARB. 71 (1984); for a French translation, see 109 J.D.I. 869, ¶ 89 at 892 (1982), and the commentary by Philippe Kahn, *Contrats d'Etat et nationalisation, id.* at 844; *see* Pierre-Yves Tschanz, *The Contributions of the Aminoil Award to the Law of State Contracts*, 18 INT'L LAW. 245 (1984). In ICSID arbitration, the argument was raised in Case No. ARB/72/1, *Holiday Inns S.A.* v. *Government of Morocco*; *see* Pierre Lalive, *The First 'World Bank' Arbitration (Holiday Inns v. Morocco)–Some Legal Problems*, 51 BRIT. Y.B. INT'L L. 1980, at 123 (1982). See also, in French case law regarding the constitution of the arbitral tribunal, CA Paris, May 5, 1989, *B.K.M.I. Industrieanlagen GmbH* v. *Dutco Construction Co. Ltd.,* 1989 REV. ARB. 723, and P. Bellet's note; 119 J.D.I. 707 (1992), 1st decision, and C. Jarrosson's note; for an English translation, see XV Y.B. COM. ARB. 124 (1990); 4 INT'L ARB. REP. A1 (July 1989); TGI Paris, Jan. 31, 1986, Fillold C. M. v. Jacksor Enterprise, 1987 REV. ARB. 179, and P. Fouchard's note; CA Paris, Mar. 22, 1991, Mavian v. Mavian, 1992 REV. ARB. 652, and observations by D. Cohen on the application of this principle to certain pathological clauses.

[43] [1993] 2 Lloyd's Law Reports, pp. 445-453.

[44] *Federal District Court in Warnes SA* v. *Harvic International Ltd (* summarized in (1994) Arbitration and Dispute Resolution Law Journal 65).

Further in the *Euro- Mec Import Inc v. Pantrem*[45], the arbitration clause merely read, "Unless amicably settled, any dispute or difference which may arise between the parties hereto out of or in connection with this agreement shall be finally settled by arbitration held and conducted (sic) in Geneva." Plaintiff in this dispute argued that the arbitration clause is so lacking in specificity that it is indefinite and vague and therefore unenforceable because it does not specify the method for choosing arbitrators, the governing arbitration association, or the governing laws for the arbitration. However, it was held that, failure to provide for arbitrators is not fatal to enforcement of the arbitration provision. Moreover, if there is an agreement to arbitrate, in spite of ambiguity regarding the forum for arbitration, courts will still compel arbitration. Therefore, even if the interpretation of the arbitration agreement does not lead to an unequivocal conclusion with regard to the meaning of the agreement that would not necessarily render the arbitration clause invalid.[46] This is more so because the NYC under Article II incorporates a strong presumption to give effect to the parties' intention to arbitrate in cases where an arbitration clause is incorporated in a commercial contract. Courts in most major trading states have interpreted Article II in an avowedly "pro-enforcement" fashion.[47] In the words of the U.S. Supreme Court:

"*the goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed...*"[48]

Hence pursuant to the doctrine of effective interpretation, practical effect has to be given to the arbitration clause, especially since the parties' decision in favor of arbitration has to be respected in any circumstances.[49] One of the briefest arbitration agreements reported and enforced is one which merely stated 'arbitration to be settled in London'.[50] Thus, though arbitration agreements in which the chosen arbitration institution is

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[45] No. 92-2624, 1992 WL 350211 (E.D. Pa).

[46] *Lucky-Goldstar International (H.K)., Ltd* v. *Ng Moo Kee Engineering*., 2 H.K Law Reports (HKLR), 73=Y.B XX(1995)280; *Astra Footwear Industry* v. *Harwyn Intern Inc* 442 F.Supp. 907 (S.D.N.Y. 1978); *Euro-Mec Import, Inc*. v. *Pantrem* No. 92-2624, 1992 WL 350211 (E.D. Pa); HZI Research Center v. Sun Instruments Japan Co., Inc 1995 U.S. Dist. LEXIS 13707; 10 International Arbitration Report (1995, no. 10) pp. B-1 - B-4.

[47] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 626-27 (1985); *Rhone Mediterranee etc. v. Achille Lauro*, 712 F.2d 50 (3d Cir. 1983) ("Signatory nations have effectively declared a joint policy that presumes the enforceability of agreements to arbitrate").

[48] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 n.10 (1974).
The legislative history of the Convention's implementing legislation in the United States reflected pro-arbitration policies. *See* H.R. Rep. No. 1181, 91st Cong. (1970), *reprinted in* 1970 U.S. Code, Cong. & Admin. News 3601 ("the provisions ... will serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both U.S. and foreign courts").

[49] Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S., 24 (1983).; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Corp., 473 U.S. 614, 626-27; Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469 (9th Cir 1991); Laboratorios Grossman, S.A. v. Forest Laboratories, Inc., 295 N.Y.S, 2d 756,(1968).

[50] In Re *Tritonia Shipping Inc* v. *South Nelsons Forest Products Corporation.*

ambiguous in some way appear quite often in arbitral proceedings[51], it has been held that the courts should, if the circumstances allow, lean in favour of giving effect to the arbitration clause to which the parties have agreed and seek to give effect to their intention. Therefore, in situations wherein the parties are *ad idem* principle of effective interpretation may be used to do away with the lacuna created by the ambiguities in the clause.

Conclusion

The history of commercial arbitration saw different phases of differently interpreting arbitration clauses. Though the formal requirements are more or less the same in most of the instruments pertaining to international commercial law, the approaches to handle ambiguities vary. However, the modern global practice however seems to favour effective interpretation of an arbitration clause due to the pro- arbitration bias of international commercial law.

[51] Star Shipping A.S. v. China National. Foreign Trade Transport. Corporation., Court of Appeal 1993, 2 Lloyd's Law Reports, 445; Mangistaumunaigaz Oil Production Assoc. v. United World Trade., Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XXIVa (1999), pp. 806 - 812; Tennessee Imports, Inc. v. Pier Paulo Filippi and Prix Italia745F. Supp. (1990), 1314-1333.