Reviewing Current India Backlog of Pending Cases and Excessive Judicial Intervention in Arbitration:

Focusing on Setting Aside and Enforcement with Ssangyong Case

- 인도의 법원적체현상과 과도한 법원중재개입에 관한 연구 -

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국문초록

인도는 3천만건의 소송사건이 법원에 계류되고 있을 정도로, 심각한 법원 적체현상을 경험하고 있다. 이를 해소하기 위하여, 조정과 중재제도를 법제화하는 노력을 보이기도 하였으나, 최근 이에 역행하는 행보를 보이고 있어 논란이 일고 있다. 조정과 중재제도 법제화의 중심내용은 중재에 대한 법원의 간섭을 최소화하는 것이었다. 이러한 노력을 통해 인도를 국제상사중재의 허브로 도약시키려는 시도였다. 그러나, 한국기업 (주)쌍용의 사례 (2019)에서 보인 인도대법원의 최신 판례는 이를 정면으로 부인하였다. 동 판례는 인도헌법 제142조와 인도중재법 제34조를 인용하며, 중재에 대한 법원의 개입을 확대하였다. 그 근거로 헌법상 “최대정의확보의 원칙(doing complete justice)” 과 인도중재법상 “공공이익의 원칙(public policy)” 등을 차용하여 법원의 권한을 확대하는 것이다. 이는 중재를 확대하려는 노력을 부정하는 것이며, 장차 중재에 대한 법원의 개입을 더욱 확대할 우려를 낳고 있다. 이는 간소화된 절차에 의하여 분쟁을 해소하려는 '대체적 분쟁해결제도'의 취지에도 맞지 않으며, 법원의 과중한 업무로 인한 적체현상이 심화되고 사회적 비용 증가도 우려된다.

주제어: 법원개입, 대체적분쟁해결제도, 중재, 적체, 인도

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Ⅰ. Introduction

The purpose of this research is to identify the problems of huge backlog of pending cases in India and excessive judicial intervention in the arbitration proceedings in India.[1] In this research, it introduces the current legal problems in India, caused by huge numbers of backlogged cases in Indian legal system.[2] Then, it reviews the most recently released Indian arbitration case related with one of Korean company in India.[3]

Even though the India judiciary has suffered from huge backlog of pending cases in this jurisdiction, the India Supreme Court applied the constitutional power of the court to an arbitration case which opened the floodgates for the modification of the arbitral award in 2019.[4] In addition, this "Ssangyong" decision may result in parties expecting to go up to the Supreme Court and getting the arbitral award modified by the application of Article 142 of the Constitution of India. Therefore, this parties' expectation is against the basic principal of arbitration, that is, the finality of the arbitration award. In this regard, it also examines the effect of the excessive judicial intervention in the arbitration proceedings.

In general arbitration proceedings, there are three different steps such as pre, during, and post arbitration proceedings. In this article, it focuses on the post-arbitration proceedings in India such as setting aside and enforcement of the arbitral award in India.

Value of this research not only to identify excessive court intervention on enforcement of arbitral award in India, but also to consider the Korean investor's perspective regarding to investing in India because India would be the most charming and rapidly developing country in Asia. Even though there were several articles written by Korean scholars, this article reveals the most recent India arbitration case

1) *See*, Marc Galanter and Jayanth K. Krishnan, *Bread for the Poor: Access to Justice and the Rights of the Needy in India,* 55 Hastings L.J. 789 (2004); See, Gary B Born, International Arbitration: Cases and Materials 797 (2015); P.C. Markanda, Naresh Markanda and Rajesh Markanda, Arbitration: Step by Step, 254 (2017)

2) https://www.prsindia.org/policy/vital-stats/pendency-cases-judiciary ("Pendency of Cases in the Judiciary') last visited Nov. 21, 2019.

3) Ssangyong Engineering & Construction Co. Ltd. v. National Highway Authority of India (NHAI) 2019 SCC OnLine SC 677; Bharat Sewa Sadan v U.P.Electronics (2007) 7 SCC 737; National Aluminium Co. v Pressteel Fabrications (2004) 1 SCC 540.

4) Ssangyong Engineering & Construction Co. Ltd. v. National Highway Authority of India (NHAI) 2019 SCC OnLine SC 677 paragraph 76-77.

involving with Korean company.[5] Also, researching on "Ssangyong" case, it would be value to guide Korean investor to understand the India arbitration process because most of international commercial contracts contain the arbitration clause.

Ⅱ. Problems of huge backlog of pending cases in India

After the globalisation phase, there has been immense competition in the market in all the industries, such as manufacturing, telecommunication, auto-mobiles, real estate, aviation and others, leading to increase in commercial disputes. Under the Indian jurisdiction, the judiciary lacks judges and there exists a huge backlog of case, all these circumstances make litigation a time taking process. However, on the other hand effective ADR mechanisms like Arbitration has become the standard dispute resolution method for the commercial parties. The commercial parties' main goal is to make profits in their business activities, the parties want to resolve their disputes anyhow and focus on their business. Then, India needed to activate its ADR programs and provide effective enforcement to the parties who have imposed their faith in ADR. However, these India ADR programs would be complicated procedures and another facet of the backlog through the judiciary, such as excessive court intervention of enforcement of arbitral award.[6]

Timely justice is an important face of justice.[7] In India, there are 33 Million cases are pending in courts,[8] litigation does not look like the best option for the litigants. Pendency before the Supreme Court and the High Courts have been increasing in the

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5) *Generally see,* Koon-Jae Shin, *A Study on the Ways of Disputes Resolution Against Indian Company through ADR System, [ADRul Tonghan Indogiupgwa Bunjaenghaegul Banane Gwanhan Yungu]* 14(3) Int'l Comm & Info Rev. 49 (2012);Yong-Sang Chung, *Overview on Indian Arbitration Law, [IndoJungjaebeobgaegwan]* 15 Busan Comp. L. Rev 63 (2004)

6) *Generally see* Ssangyong Engineering & Construction Co. Ltd. v. National Highway Authority of India (NHAI) 2019 SCC OnLine SC 677

7) Imtiyaz Ahmad v. State of Uttar Pradesh and Ors., AIR SC 2012 642: "Keeping in view that timely justice is an important facet to access to justice, the immediate measures that need to be taken by way of creation of additional Courts and other allied matters (including a rational and scientific definition of "arrears" and delay, of which continued notice needs to be taken), to help in elimination of delays, speedy clearance of arrears and reduction in costs."

8) https://www.indiatoday.in/india/story/3-3-crore-backlog-cases-in-courts-pendency-figure-at-highest-cji-dipak-misra-1271752-2018-06-28 ('3.3 Crore Backlog Cases in Courts, Pendency Figure at Highest: CJI Dipak Misra') last visited on Nov. 21, 2019.

last decade by more than 36% and 17% respectively.[9] According to the PwC Report, 91% of the companies in India have dispute resolution clause to resolve their dispute s.[10] Therefore, from the foreign investors' viewpoint, they want to escape from the litigation on the track of the India judicial process and to resolve the legal dispute through arbitration, expecting expedite process with less cost.

Some legal scholars criticize the formalistic court system as it is more time consuming, public in nature, more costly and less flexible.[11] Timely disposal of cases and access to justice is fundamental right.[12] In contradiction, the Law Commission Report No. 245 indicates that the judiciary is unable to deliver timely justice as there is a huge backlog of cases[13].

The most important suggestion proposed by the 20th Law Commission of India in its Report No. 245 was the need for doubling the appointment of the judges. The Commission has done very good work in collecting the data of subordinate courts from 2002 to 2012. It is surprising to note that, in Australia more than 70 percent of the cases in the subordinate courts are decided within 13 weeks.[14] In the Report, the Law Commission has based its data on the 'rate of disposal' per judge per year. For instance, if 10 judges are disposing 1,000 cases, 20 will dispose 2,000 cases. There sanctioned posts for are about 19.1 judges per million Indians, however the actual figure is 13.9 judges per million population. For strengthening the number judges, there is a great need for building the infrastructure.[15] Former Chief Justice of India Gogoi has pointed out that there is shortage of high court judges wherein 37 per cent of the

9) *Supra note* 2.

10) https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf ('Corporate Attitudes & Practices towards Arbitration in India' accessed 21) last visited on Nov. 21, 2019.

11) Galanter and Krishnan, *supra note* 1, at 789; Robert A. Baruch Bush, *Alternative Futures: Imagining How ADR May Affect the Court System in Coming Decades,* 15 Rev. Litig. 455, 457 (1996)

12) Asian Galaxy Pvt. Ltd. Vs Sidhivinayak Electric, C-482 No.2246 of 2019; Imtiyaz Ahmad v. State of Uttar Pradesh and Ors., AIR SC 2012 642.

13) http://lawcommissionofindia.nic.in/reports/report245.pdf ('Arrears and Backlog: Creating Additional Judicial (Wo)Manpower' (2014) Law Commission of India 245) last visited on Nov. 21, 2019.

14) https://www.rediff.com/news/column/a-simple-way-to-clear-judicial-backlog/20190930.htm ('A Simple Way to Clear Judicial Backlog') last visited on Nov. 21, 2019.

15) https://scroll.in/article/928468/clearing-indias-huge-backlog-of-legal-cases-isnt-quite-so-tough-6000-new-judges-could-do-it (Shailesh Gandhi, 'Clearing India's Huge Backlog of Legal Cases Isn't Quite so Tough – 6,000 New Judges Could Do It') last visited on Nov. 29, 20199.

sanctioned posts are vacant. Acting on that, the Prime Minister of India Modi has asked the Law Ministry to initiate structural changes in the existing judicial set up.[16]

Former Central Information Commissioner Shailesh Gandhi strongly advocates the appointment of judges with respect to the vacant judges. He suggests that the first step to resolve this humongous problem is to initiate a plan dealing with the vacant positions. Meanwhile there is a great need for improving the present infrastructure to accommodate the newly appointed judges.[17]

To counter this problem, the usage of ADR shall increase and consequently it will reduce the burden of the courts.[18] To increase the usage of ADR, it is essential to relax the excessive judicial intervention and provide a more friendly environment to the arbitration regime.

While the India judiciary has suffered from huge backlog, court intervention would be circumscribed by the width of the jurisdiction based on the Act of 1996.[19] However, the court could Recently, the Indian Supreme Court modified the arbitral award by upholding the minority award rendered by the arbitrators.[20] More specifically, while deciding an application to set aside the arbitral award under Section 34 of the Act, the Supreme Court of India applied Article 142[21] of the Constitution,

16) https://www.ndtv.com/india-news/find-out-a-way-pm-modi-to-law-ministry-on-backlog-cases-2114910 (Find Out A Way": PM Modi To Law Ministry on Backlog Cases) last visited on Nov. 29, 2019.

17) https://www.rediff.com/news/column/a-simple-way-to-clear-judicial-backlog/20190930.htm (A Simple Way to Clear Judicial Backlog') last visited on Nov. 29, 2019.

18) Erik Jensen & Thomas Heller, Beyond Common Knowledge: Empirical Approaches to the Rule of Law, 7 (2003)

19) P.C. Markanda, Naresh Markanda, & Rajesh Markanda, Law relating to Arbitration and Conciliation 179 (2016)

20) Ssangyong Engineering & Construction Co. Ltd. v. National Highway Authority of India (NHAI) 2019 SCC OnLine SC 677

21) Article 142 in The Indian Constitution
Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc
(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe
(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself

modified the arbitral award and upheld the minority award.[22] While the court would set aside and apply enforcement of the arbitral award in India, the court would allow parties to file much more significant number of cases from the post-arbitration proceedings.

Ⅲ. Problems of Excessive Court Intervention in Arbitration

a. Historical Development of Arbitration in India

It is generally believed that the origin of arbitration would have a long history with our civilization, traced back 4000 B.C.[23] And, there were so many different types of arbitration, such as Puga, Sreni, Kula and Panchayat that still be used in modern time in India.[24] There are several instances which indicates that the disputes were referred to head of the village groups for a final and binding settlement of the disputes.[25] The village groups were called as Panchayats and the adjudicating member were called Panch. The first law in the history of modern-day arbitration in India was the Bengal Regulations of 1772 which provided reference for a court dealing with arbitration. Later on, there were series of legislations related to arbitration before opening the doors of the Indian economy, such as the Arbitration (Protocol and Convention) Act, 1937, the Indian Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961. After the liberalisation, privatisation and globalisation in 1991, the Parliament

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Article 142 of the Constitution of India 1950 provides that the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it.

22) The Supreme Court was of the view that setting aside the order will lead to another arbitration which may cause more delay. Therefore, in order to do complete justice in between the parties, the Supreme Court upheld the minority award. However, this modification is not justified as the courts does not have the jurisdiction to modify the arbitral award. Moreover, it is against the principle of minimum judicial intervention enshrined under Section 5 of the Act.

23) Madhusudan Saharay, Textbook on Arbitration and Conciliation with Alternative Dispute Resolution, 2 (2015); Avtar Singh, Law of Arbitration and Conciliation and Alternative Dispute Resolution Systems 564 (2018)

24) *Generally see* Madhusudan Saharay, *supra note,* 23, at 2-3 (2015); *See* Galanter and Krishnan, supra note 1.

25) Indra Deva Shirama, Growth of Legal System in Indian Society 14.(1980)

of India passed the Arbitration and Conciliation Act, 1996 to modernise the outdated arbitration legislation.[26] In India, there is no clear definition of arbitration in the Act, 1996.[27]

In Preamble of the Act, 1996, the Model Law and Rules provide significant contribution to establish a unified legal framework for the fair and efficient settlement of disputes while the General Assembly of the United Nations has recommend the use of the UNCITRAL Model Law which was adopted on the UNCITRAL Conciliation Rules in 1980 and UNCITRAL Model Law on International Commercial Arbitration in 1985.[28] The Act has made provision for arbitral proceedings for "fair, efficient and capable of meeting needs of arbitration and to minimize the supervision role of court in the arbitral process" as main objectives and reasons of the Act.[29]

Actually, there was no section in the Act of 1990 which is corresponding to section 5 of this Act. The section 5 of Act is corresponding to both the English Arbitration Act of 1996 and the UNCITRAL Model law.[30] It means that section 5 of Act was engrafted in the provision of the UNCITRAL Model law and the interpretation would be similar with others which already adopted the Model law.[31]

The India perspective of section 5 of the Act is to "exclude any general or residuary powers given to the courts and judicial authorities in statutes other than Part I of this Act."[32] therefore, it might be correct to interpret that section 5 of the Act would "minimize the supervisory role of courts in the arbitral proceedings."[33] Because the purpose of arbitration is to encourage both parties to resolve dispute and to provide expedite and less expensive process with minimal intervention of the courts, the

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26) http://lawcommissionofindia.nic.in/reports/Report246.pdf ('Amendments to the Arbitration and Conciliation Act 1996' (Law Commission of India) 246) last visited on Nov. 21, 2019.

27) Saharay, *supra note* 23, *at* 1 (The Arbitration and Conciliation Act, 1940 also did not contain the definition of arbitration. And, it is necessary to provide a clear definition by authorities. "In Collins v. Collins, 28 LJ Ch 184, the court mentioned that an arbitration is a reference to the decision of one or more persons, either with or without an umpire, a particular matter in difference between the parties.")

28) The Arbitration and Conciliation Act, 19996 and Amendment 2015, Preamble.

29) Saharay, *supra note* 23, *at* 3-4; P.C. Markanda & Markanda, *supra note* 1, *at* 6-7, 253; Bare Act with Short Notes, The Arbitration and Conciliation Act, 1996, 2 (LexisNexis)

30) Justice B.P. Saraf & Justice S.M. Jhunjhunuwala, Law of Arbitration and Conciliation 105 (2012).

31) *Id.* 105; Markanda & Markanda, *supra note* 19, at 174.

32) Saraf & Jhunjhunuwala, *supra note* 30 at 105.

33) *Id.* at 107; Markanda & Markanda, *supra note* 1, *at* 253.

purpose of section 5 of the Act would generally provide to extend its jurisdiction with restricted or confined interpretation.[34]

While preventing or excluding excessive court intervention based on section 5 of the Act, it is necessary to under the term of "judicial authority" because it is previously described in section 2(1)(3) of the Act in order to distinguish from the arbitral tribunal's authority and jurisdiction.[35] The former judges mentioned that the term of 'judicial authority' in this section "contradistinction to court and principal civil court of original jurisdiction in a district and the High Court in exercise of its ordinary civil jurisdiction."[36]

b. Tendency of Court Intervention in Arbitration Proceedings in India

To counter this problem, the usage of ADR shall increase and consequently it will reduce the burden of the courts.[37] To increase the usage of ADR, it is essential to relax the excessive judicial intervention and provide a more friendly environment to the arbitration regime.

While our social and legal system tried to balance two fundamental legal theories: "stability and justice,"[38] the main purpose of the law is to provide equal protection and justice for all. However, in practice, some scholars criticized the formal court system for being ineffective, costly, and subject to significant delay.[39] Therefore, disadvantaged and excluded groups suffer from the limitations of litigation under our legal system because of "dark side of law".[40] The judicial system adopted the ADR

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34) *Id.*; P.C. Markanda & Markanda, *supra note* 1, *at* 253.

35) The Arbitration and Conciliation Act, 19996 and Amendment 2015, sec. 2(1)(e) ("Court" means in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original jurisdiction, having jurisdiction to decide the questions forming the subject-mater of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes); Justice B.P. Saraf & Justice S.M. Jhunjhunuwala, Law of Arbitration and Conciliation 110 (2012); Jagadeesh Candra Rao, The Law of Arbitration and Conciliation Act, 1996, 8 (2017)

36) Saraf & Jhunjhunuwala, *supra note* 30, *at* 110.

37) Jensen & Heller, *supra note* 18, *at* 7.

38) Thomas Fischer, Legal Gridlock: A Critique of the American Legal System 3 (2012).

39) *See generally* Galanter & Krishnan, *Bread for the Poor, supra note* 1, at 789; Robert A. Baruch Bush, supra note 11, at 457.

40) Jensen & Heller, Beyond Common Knowledge, supra note 7, at 7; *See generally* Catherine

program to reduce the caseload in courts and to improve access to justice.[41]

India also has a long history of alternative dispute resolutions.[42] The core concept of the arbitration is the "flexibility" and "party autonomy" based on the text of the Arbitration and Conciliation Act, 1996 because various articles in Part I of this Act contain terms such as "parties are free to agree on", "parties are free to determine", and "unless otherwise agreed by the parties."[43]

However, in order to fully understand the concept of arbitration, it is necessary to know relationship of parties' autonomy and court's jurisdiction. Even though "all the powers and jurisdiction is from a contract between the parties to the dispute, the arbitration is not an out of court settlement of a dispute per se."[44] Because the courts of law could still exercise the powers and have jurisdiction on arbitration proceedings from the Constitution and related statutory laws, such as Arbitration and Conciliation Act. Then, arbitration proceeding could begin from the parties' agreement and the courts could interfere the proceedings with limited conditions, reviewing pre to post-arbitration proceedings.[45]

Furthermore, it is also important to understand the relationship of courts and arbitral tribunals in order to narrow down the court's jurisdiction. The arbitral proceedings is not completely independent from the underlying support of the court.[46] Judges mentioned the relationship between these two is similar with "forced cohabitation and true partnership."[47] Therefore, section 5 would exclude the judicial authority's excessive intervention in matters governed by Part I of the Act.[48]

I found completely different approaches to arbitration in India; "minimizing the

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Albiston, *The Dark Side of Litigantion as a Socal Movement Strategy*, 96 Iowa. L. Rev. 61, 74 (2011).

41) Jensen & Heller, Beyond Common Knowledge, *supra* note 7, *at* 7-8.

42) Madhusudan Saharay, *supra note* 23, at 2; Avtar Singh, Law of Arbitration and Conciliation and Alternative Dispute Resolution Systems 564 (2018).

43) Mallika Taly, Introduction to Arbitration 13 (2015).

44) *Id. at* 1.

45) Id. The Arbitration and Conciliation Act, 19996 and Amendment 2015, sec. 5, (Extent of jurisdiction intervention) Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervened except where so provided in this Part. (Part I governs the domestic arbitration matters and award).

46) Saraf & Jhunjhunuwala, *supra note* 30, *at* 109.

47) *Id.*

48) *Id. at* 110.

supervisory role of courts in arbitral process for efficient and expedite proceedings" and "alternative method and mechanism of resolving legal dispute from the court process."[49] To resolve legal dispute, parties, who previously agreed to apply arbitration when they face legal dispute, would voluntarily bring their case to arbitral tribunal. Parties would expect to figure out their problem within the limited time period outside of court territory with spending less time and efforts because court try to minimize its supervisory power over the arbitral tribunal's authority.[50] But, in India, the court would treat the arbitration as an alternative mode of dispute resolution mechanism because the court frequently interfere with the on-going arbitration.[51] Even though the India judiciary definitely provide the dispute resolution methods on C.P.C. 89, listing such as arbitration, conciliation, judicial settlement including settlement through Lok Adalat or mediation.[52] Even though section 89 of the C.P.C. definitely manifested to apply the possible settlement, the courts manipulate this section which is listing the possible options outside the court and treating as a subordinate or secondary method by modifying an award.[53]

c. Possible legal problems after "Ssangyong" case in 2019

In India, the judiciary has suffered from a huge backlog of pending cases. Even though previously mentioned large number of pending cases in Chapter II of this paper, India could not properly provide the procedural justice, the Supreme Court of India currently released a case which was contrary to the precedent cases regarding the court intervention based on Article 142 of the Constitution.

The Indian Supreme Court has a tendency for excessive judicial intervention. In 2002, the Supreme Court allowed Indian courts to check the validity of the arbitral award from the foreign seated arbitration.[54] The Supreme Court of India overruled the previous stand and held that the courts cannot allow the setting aside of the foreign

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49) *Cf.* Markanda & Markanda, *supra note* 19, *at* 181.

50) Markanda & Markanda, *supra note* 1, *at* 6-7, 253.

51) *Cf.* Markanda & Markanda, supra note 19, at 181; *Cf.* Ssangyong Engineering & Construction Co. Ltd. v. National Highway Authority of India (NHAI) 2019 SCC OnLine SC 677

52) The Code of Civil Procedure, 1908 (Act No.5 of 1908) sec. 89.

53) *Cf.* Markanda & Markanda, supra note 19, at 181.

54) *Bhatia International v. Bulk Trading SA* (2002) 4 SCC 105.

seated arbitrations in India.[55]

I also agree that the Indian judiciary generally has limited jurisdiction and shall intervene the arbitration proceedings on confined conditions of Section 5 of the Arbitration and Conciliation Act of India, 19996 [thereinafter "Arbitration Act"].[56] But, with application of section 5 of the Arbitration and Conciliation Act, 19996 and article 142 of the Constitution of India [thereinafter "Constitution"],[57] the Supreme Court could excessively interfere with the post-arbitration proceedings. In paragraph 26 of *Bharat Sewa Sadan v U.P. Electronics* (2007) 7 SCC 737, the Supreme Court emphasized to make a balance with "doing complete justice to both the parties and not be titled in favour of either party ignoring the statutory provisions" because the Court should exercise its jurisdiction to "grant appropriate relief to the parties."[58] In the Court decision, the meaning of "doing complete justice" is to provide the complete justice by exercising its jurisdiction, interpreting "public policy," "fundamental policy of India law" or "morality or Justice" of India.[59] However, admitting the proper and appropriate jurisdiction on the arbitral award in the post-arbitration proceeding, the Supreme Court carefully narrowed down the extent of judicial intervention in the

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55) *Bharat Aluminium Co v. Kaiser Aluminium Technical Services* (2012) 9 SCC 559.

56) The Arbitration and Conciliation Act, 19996 and Amendment 2015, sec. 5, (Extent of jurisdiction intervention) Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part. (Part I governs the domestic arbitration matters and award).

57) *Supra note* 21, The Indian Constitution, Art. 142 (I want to emphasize the phrase of this article in "necessary for doing complete justice in any cause or matter pending before it" and Article 142 of the Constitution of India 1950 provides that the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it.)

58) Bharat Sewa Sadan v U.P. Electronics (2007) 7 SCC 737 para. 26.

59) The Arbitration and Conciliation Act, 19996 and Amendment 2015, sec. 34. (2)(b) (Application for setting aside arbitral award) An arbitral award may be set aside by the Court only if the court finds that

(i)The Subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii)The arbitral award is in conflict with the public policy of India.

In explanation of this section, it contains the lists in order to clarify that "an award is in conflict with the public policy of India, only if-

(i)The making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii)It is in contravention with the fundamental policy of India law; or

(iii)It is in conflict with the most basic notions of morality or justice.

arbitral proceedings.

The court generally could neither bypass the existing statutory proceedings to do complete justice nor intervene the proceedings under article 142 of the Constitution of India to prevent excessive intervention by the judiciary. Before Ssangyong Engineering & Constructure Co. Ltd v. National Highways Authority of India, India Supreme Court already held that it has limited jurisdiction and restrained to expand its jurisdiction by interpretation of Art. 142 of the Constitution of India.[60]

In *Bharat Sewa Sadan v U.P. Electronics* (2007) 7 SCC 737, the India Supreme Court has carefully considered the nature and ambit of the power of the Court under Article 142 of the Constitution in order to complete justice between the litigating parties. Furthermore, the Court has carefully "conceived to meet the situations which cannot be effectively and appropriately tackled by the existing provisions of law."[61]

In *Bharat Sewa Sadan,* the court held that the court cannot bypass the existing statutory proceedings to do complete justice by using its inherent powers under article 142 of the constitution of India.[62] In National Aluminium Co. v Pressteel Fabrications (2004) 1 SCC 540, the Supreme Court also held that when statutory provisions provided, the Supreme Court cannot intervene under article 142 of the Constitution of India.[63]

Even though the Act would exclude from the operation of all other statutes based on Part I of the Act which contains section 1 to 43 related to intervention by any judicial authority, the court shall have the power to intervene if so permitted especially by any of the provision in Part I of the Act.[64] It means that the court could not intervene based on the aid of other statutes, but would be allowed to intervene only by the Act itself, especially by Part of the Act.

Based on the object and purpose of promoting arbitration, the legislature would manifest its policy to minimize judicial intervention in arbitral proceedings and to "confine intervention as an exceptional category."[65] To provide an effective method of

60) Bharat Sewa Sadan v U.P.Electronics (2007) 7 SCC 737; National Aluminium Co. v Pressteel Fabrications (2004) 1 SCC 540.

61) Bharat Sewa Sadan v U.P.Electronics (2007) 7 SCC 737 para. 25.

62) Bharat Sewa Sadan v U.P.Electronics (2007) 7 SCC 737 para. 25-28.

63) National Aluminium Co. v Pressteel Fabrications (2004) 1 SCC 540 para. 10.

64) P.C. Markanda, Naresh Markanda, & Rajesh Markanda, Law relating to Arbitration and Conciliation 176 (2016).

65) Markanda, & Markanda, *supra note* 19, *at* 177; Markanda & Markanda, supra note 1, *at* 253.

resolution of a dispute, the role of the court could not make an obstacle for efficient and expedite proceedings.[66] Therefore, the courts and judicial authorities carefully consider that the court should least intervene in the arbitration proceedings in matters covered by the Act.[67]

As the Act limits the scope of enquiry of exercising its power during hearing an application for setting aside an award, a court could not enlarge its jurisdiction beyond what has been stipulated in the Act.[68]

The delay also would be caused by the exchange of pleadings while the arbitral case would be appealed in the court.[69] When the case would be referred to the arbitration proceedings and sent back to the court, the outcome of the dispute by the judiciary could not be produced within a reasonable time due to the costly and prolonged process.[70] Furthermore, the court intervention might also bring in many negative side-effects of delayed proceedings in order to do complete justice because either party could challenge in the arbitration proceedings and appeal in court proceedings.[71] Then, it means that the entire process of producing an outcome of the dispute would be prolonged and "doing complete justice" would be delayed.

An arbitral tribunal shall make a final and binding decision on the effect of the parties' mutual agreement for the arbitration clause. Then, the award would attain finality and be enforced by the parties.[72] After the arbitral tribunal's decision, the finality on tribunal is conclusive after 90 days for challenging. However, during the challenging period under section 34 of the Act, the award would be presented before the court.[73]

In my opinion, the section 2, 5, and 8 might provide the court's power to refer parties to arbitration based on the parties' agreement and to release its cases to arbitration proceedings, but section 34 might not provide a clear framework to the court to take back its case within the court authority. Even though the section provides the lists of court's powers to set aside of an arbitral award, the provision of

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66) Markanda, & Markanda, *supra note* 19, *at* 177.

67) *Id.*

68) Markanda & Markanda, *supra note* 1, *at* 259.

69) Madabhushi Sridhar, Alternative Dispute Resolution, Negotiation and Mediation, 67 (2006)

70) *Id.*

71) *Id. at* 66.

72) The Arbitration Act, sec. 35 and 36; Mallika Taly, *supra note* 43, *at* 140.

73) The Arbitration Act, sec. 34; Mallika Taly, *supra note* 43, *at* 140-41.

“conflict with the public policy” in section 34 does provide the unclear definition of public policy. Then, the court might have intervened the arbitration proceedings based on this policy because any arbitral award might conflict with India’s public policy and the court could set aside the award, intervening the process of post-arbitral proceedings upon the section 2.

Under the entire Part I for domestic arbitration in India, the judiciary and arbitral tribunal could make a balance of the jurisdiction for determining and enforcing arbitration without applying Article 142 of Constitution of India. If the court applies the Article for reviewing and modifying the arbitral award, a huge number of the arbitration cases would result in challenge and appeal to the judicial court. It is contrary to the purpose and objectives of the Arbitration Act.

Ⅳ. Conclusion

Currently, it was a trend of narrowing down its power of intervention of setting aside of award formed in domestic arbitration, interpreting the “public policy” of India of section 34 of Part I by India Supreme Court. Under section 34 of the Act, India Supreme Court currently has enough power to interfere of setting aside arbitration award which is reviewed by the judiciary. However, when the Supreme Court applies the article 142 of Constitution for reviewing and modifying the award, it could have too much discretionary power to interfere of arbitration process with applying “public policy” of section 34 of the Act. In this trend, the Supreme Court could review entire arbitration with contrary to the precedent cases and current trend of the interpretation of the public policy.

Based on the current trend of court intervention of Ssangyong case, the court would expend its power and jurisdiction to the enforcement of foreign award.[74] The court might interfere with the foreign seated award which foreign investor hope to enforce that award in India. It also needs to further research the problems of excessive court intervention in arbitration from a foreign investor’s perspective because it might interfere with the finality of the arbitral award.[75] Because reviewing post arbitral

74) Ssangyong Engineering & Construction Co. Ltd. v. National Highway Authority of India (NHAI) 2019 SCC OnLine SC 677

75) The Arbitration Act, sec. 35

proceedings and modifying arbitral award might inordinately delay to reach the finality of proceedings and also cause the parties' frustration.

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<Abstract>

Reviewing Current India Backlog of Pending Cases and Excessive Judicial Intervention in Arbitration: Focusing on Setting Aside and Enforcement with Ssangyong Case

Yonghwan Choung

Because of 3.3 million pending cases in India Court system, India has suffered from the huge backlog. To resolve these problems, the India judiciary has adopted the ADR, such as mediation and arbitration. Also, it tries to minimize the court intervention of arbitration process to become a hub in Asia's arbitration. However, the Supreme Court of India recently released "Ssangyong" case with contrary to the precedent cases that did not allow applying Article 142 of the India Constitution for interfering arbitration proceedings. Under the section 34 of 'public policy', the courts would review and set aside of arbitral award in the post arbitral process. The most recent decision on the arbitration by India Supreme Court would be contrary to the current trend of narrowing down the court intervention. This decision would be against the core concept of ADR and increasing the social cost due to build up other backlog of pending cases in India.

Key words: Court Intervention, ADR, Arbitration, Backlog, India