ISSN : 1875-4120
Issue : Vol. 12, issue 4
Published : July 2015

This paper is part of the TDM / ArbitralWomen special on "*Dealing with Diversity in International Arbitration*" edited by:

Rashda Rana SC
39 Essex Street
President ArbitralWomen

Louise Barrington
Independent Arbitrator and Director Aculex Transnational Inc

ARBITRALWOMEN
The International Network of Women in Dispute Resolution

Transnational Dispute Management
www.transnational-dispute-management.com

The Pervasion of Patriarchy in the Life Cycle of Arbitration - A Feminist Critique by A. Kurlekar

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

THE PERVASION OF PATRIARCHY IN THE LIFE CYCLE OF ARBITRATION - A FEMINIST CRITIQUE

Arthad Kurlekar[*]

INTRODUCTION

Arbitration including its process and applicable laws is ignored in the feminist discourse.[1] Usually, this is because there is no explicit reference to gender issues or a 'visible' impact on the marginalised sections of the society. However, in this essay I hypothesize that such systemic domination of the 'male', as is prevalent in law, is furthered albeit on subliminal levels by arbitral law and processes. Arbitration is a mode of dispute settlement which is designed to exclude the jurisdiction of the Courts[2] and therefore the court systems in a bid to get rid of the shackles formal legal systems which exist. Yet, the essay argues that that the same shackle of dominance by the male in municipal legal systems, seamlessly integrates with arbitral processes. I seek to expose this systematised dominance from its camouflage of objectivity and fairness.

I divide each section by identifying the most important relation at each stage of an arbitration proceeding. Thus the first section deals with the genesis of arbitration, the arbitration agreement. I seek to apply the feminist critiques of contract and extend those to arbitration agreements. For this purpose I rely on the some aspects which are discussed in connection with arbitration agreements: *first* I discuss the manner in which arbitration agreements are negotiated and formed in a bid to expose a prevalent male ethic. *Second,* I focus on the preference of strict adherence to text and the undermining of party intention and link in to the concept of abstraction and hierarchisation of rights. *Third,* as a corollary of the previous factor, I consider the doctrine of contra preferentum and *fourth* I consider the doctrine unconscionability in relation to arbitration clauses.

Thereafter I deal with the next stage of the arbitration, the relevant parties to the arbitration. In this section I will analyse the applicability of the principle of good faith and its corollary the Group of companies' doctrine. In brief, I also analyse the notion of party autonomy. Connecting these back to rights granted under a State as well as the prevailing patriarchal notions in the jurisdictions of the Parties, I seek to conclude that party autonomy to bargain and decide an arbitration agreement is reflective of a male ethic. I further demonstrate the domino effect this has resulting in the rejection of the good faith doctrine and the 'Group of companies' doctrine both of which reflect an ethic of care and inclusion.

---

[*]I would sincerely like to thank Prof. Catherine MacKinnon for the inspiration and support she provided and Ms Ira Chadha Sridhar for her editorial assistance. I would also like to thank Prof. Ruchira Goswami for the feedback and help she provided in conceptualizing the paper.

[1] Arbitration is considered to be a seemingly gender neutral law. *See*, Barnali Choudhury, *The Facade of Neutrality: Uncovering Gender Silences in International Trade*, 15(1) WILLIAM & MARY JOURNAL OF WOMEN AND THE LAW (2008).

[2] JULIANLEW, LUKAS MISTELIS, STEFAN KROLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶7-9 (2003).

Thereafter I proceed to analyse the constitution and the operation of the Arbitral Tribunal. Drawing from the analysis of party autonomy, I argue that the choice of arbitrator is nothing but a bargain of the parties' notions of objectivity. I seek to demonstrate the patriarchal nature of the term objective assessment by drawing parallels with Prof MacKinnon's critique of objectivity. I demonstrate the effect it has on the discretion of the arbitrators in the conduct of arbitral proceedings.

Finally, I move to the last step of arbitration: the enforcement proceedings. In this section I attempt to focus on the reconnect of the perceived vacuum of arbitration back to states. I rely on the risk of non-enforcement as one of the significant reasons why arbitration fails to have a dynamic shift from a feminist standpoint. I conclude that the necessity of engagement with State mechanisms for enforcement entrenches the same patriarchal notions in the practice of arbitration.

DEFINING THE LENSES OF THE CRITIQUE – THEORETICAL BASES

In order to situate the argument I rely on three broad theoretical bases of feminism. The first is the theory of 'pure' feminism advocated by Prof. Catharine MacKinnon.[3] She regards objectivity as the liberal legalism's conception of itself.[4] In order to explain this she gives an analogy of a hall of mirrors reflecting the same image that is portrayed in front of it.[5] She extrapolates this to objectivity stating that any 'objective' assessment in effect reflects the same power hierarchies prevalent in the society. This view, I argue, can be further elucidated upon through the results of Heinz dilemma experiment conducted by Prof Carol Gilligan.[6]

To illustrate a difference in socialization of a person of 'male' gender and of a 'female' gender she takes the examples of Jake and Amy.[7] Jake is a boy biologically and is socially constructed as a man/boy. Amy is a girl and is socially constructed as a woman/girl. The question posed to both, is what should Heinz do in a situation where his mother needs a medicine urgently and the medicine is beyond their financial means.[8] Her results suggests that a person socialized as male, looks at hierarchisation of rights whereas Amy looks to at more facts to solve the conundrum such as possibilities of negotiation or a loan, as opposed to hierarchizing rights.[9] From the experiment Prof Gilligan concludes that Jake uses the 'logic of justice' and Amy uses the 'ethic of care' in approaching the problem.[10] Prof Carol Smart warns that this differential feminist analysis could be construed as biological essentialism.[11] Thus a common misunderstanding of the theory could be if it was stated that women lack

---

[3] See generally, CATHARINE A. MACKINNON, *Feminism, Marxism, Method, and the State: An Agenda for Theory*SIGNS, VOL. 7, NO. 3, FEMINIST THEORY, (SPRING, 1982); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); CATHARINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF STATE (1989).
[4]CATHARINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF STATE, Ch.8 ¶10-14 (1989).
[5]*Id* at ¶17.
[6] See, CAROL GILLIGAN, IN A DIFFERENT VOICE, PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).
[7]*Id* at p. 26-28.
[8]*Id.*
[9]*Id.*
[10]*Id.*
[11] CAROL SMART, THE SOCIOLOGY OF LAW AND CRIME: FEMINISM AND THE POWER OF LAW, 72-75 (2002)

objectivity or reason, and are swayed by ethical reason and emotion. The objective of the study is not to demonstrate the presence or absence of specific values in a specific biological sex, and cannot be argued as such. The objective is to demonstrate that both objectivity and ethical reason can co-exist and are two diverging ways of approaching an issue. The socialization process tends to confer women, skilled in one way of perception whereas men in the other. The problem arises when one of the ways that of objectivity, is considered 'superior' or 'better' that the other.[12]What Prof Gilligan intends, is to demonstrate the difference in the socialization processes which ultimately lead to male and female ethical values.

Patriarchy which is synchronous with male identity, as per Prof MacKinnon, reflects the same 'logic of justice' in the form of dispassionate objectivity, at the exclusion of the 'female ethical values'. This exclusion stultifies the use of judicial discretion or sympathetic consideration for a black letter enforcement of law which in the natural law sense may not meet the ends of justice. Therefore, Prof MacKinnon concludes that the law promulgated by a State reflects the male dominance in the society.[13]Consistent to her analysis, as regards seemingly gender neutral laws, Prof MacKinnon states that the "*foundation of any neutrality of any law is a pervasive assumption that conditions that pertain among men on the basis of gender also apply to women and that the underlying assumption is that sex inequality does not exist in these domains*".[14]

Based on Prof MacKinnon's argument, Prof Carrie-Menkel Meadow argues for the prevalence of patriarchy in the very form of the adversarial system of justice.[15]She attributes one party winning over the other as a male ethic of the adversarial system.[16]She states:

> "*The basic structure of our legal system is premised on the adversarial model, which involves two advocates who present their cases to a disinterested third party who listens to evidence and argument and declares one party a winner. In this simplified description of the Anglo-American model of litigation, we can identify some of the basic concepts and values which underlie this choice of arrangements: advocacy, persuasion, hierarchy, competition, and binary results (win/lose).*"[17]

This forms a fundamental premise in my analysis. As I demonstrate below, adversarial jurisdictions also have an important role to play in arbitration. Crucially, the process of arbitration shares a resounding resemblance in terms of structure to the adversarial system

---

[12]Gilligan *supra* note 6: "She states 'the adversary system of justice impedes not only the supposed search for truth (the conventional criticism), but also the expression of concern for the person on the other side."'
[13] MacKinnon *supra* note 4.
[14]*Id* at ¶ 14.
[15] See Carrie Menkel Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1(1) BERKELEY JOURNAL OF GENDER, LAW & JUSTICE (Sept 2013). , Carrie Menkel Meadow, *Women in Dispute Resolution: Parties, Lawyers and Dispute Resolvers What Difference Does "Gender Difference" Make?*, DISPUTE RESOLUTION MAGAZINE, (2012)
[16] Carrie Menkel Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1(1) BERKELEY JOURNAL OF GENDER, LAW & JUSTICE 55 (Sept 2013).
[17]*Id* at pp. 50, 51.

and hence a critique of the adversarial system can be extrapolated to arbitration. Admitting that it is difficult to conceptualise a definition for arbitration a stock definition would define it as one or more neutral persons hearing and deciding a dispute between parties, where the decision is binding upon the parties.[18] Thus it closely resembles the adversarial process and is deemed to propagate the same one single winner view which ideally Jake the boy in Gilligan's study would adopt.

A next question which needs to be addressed is that of engagement of arbitration with State and correspondingly the engagement of feminism with State. Prof MacKinnon regards the schizoid engagement of feminism with law as a result of the failure of feminism to posit a theory a State.[19] This proposition becomes crucial in the analysis of arbitral law as arbitration was developed to create a vacuum from the state and to have minimal engagement of the State. Thus the operation of feminism in a sphere designed to be distinct from a State theory or intervention, becomes important.

Nevertheless it cannot be ignored that despite an express intent to situate arbitration outside state intervention, arbitration does involve interaction with the laws of State and its actors. Thus if the argument is premised on the interaction of arbitration with the State, a liberal feminist approach must be considered. Hence for this purpose, the next theoretical base in which I situate the argument is Prof Frances Olsen's exposition of the male-comparator in law.[20]Prof Olsen notes: *"Law is supposed to be rational, objective, abstract and principled, like men; it is not supposed to be irrational, subjective, contextualized or personalized like women. The social, political and intellectual practices that constitute 'law' were for many years carried out almost exclusively by men."*[21]Thus a reasonable man is also 'conditioned' as per the demographic that most defined law i.e. white middle-aged men. It is thus argued that the law carries a bias or simply includes as its 'value' the perspective of the dominant prevalent demographic section.[22] Thus in the next section I seek to analyse arbitral laws with demonstrative illustrations, to expose this value laden framework which excludes experiences of women and other non-dominant demographic sections.

PATRIARCHY IN ARBITRAL PROCESSES AND ITS INTERPRETATION BY COURTS

A question might arise as to why it is important from a feminist lens to consider the way in which arbitration agreements are treated by common law and civil law countries. It is because the seat of arbitration determines the way in which arbitration is conducted.[23] Although the

[18]PHILLIP CAPPER, INTERNATIONAL ARBITRATION: A HANDBOOK (2004)
[19]MacKinnon*supra* note 4.
[20]FRANCES OLSON, FEMINISM AND CRITICAL LEGAL THEORY: AN AMERICAN PERSPECTIVE, 18 INT'L J. SOC. L. 199 (1990);
[21]*Id* at p. 208.
[22]Thus in the Indian context it would be upper-middle class middle-aged men; whereas in European countries it would be white, upper middle class, middle-aged men.
[23]EMMANUEL GAILLARD AND JOHN SAVAGE (eds), FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, 635, (1999).

doctrine of precedent does not apply[24], the principle of comity plays a definitive role in shaping arbitral practice.[25]Furthermore if arbitrations are seated in one place, the arbitral institutions and arbitrators are also preferred from the same jurisdiction as a natural consequence.[26]Thus if increasing number of arbitrations seated in common law countries were to set a practice, it would certainly have an impact over most other seats and also on the way arbitral clauses are negotiated.[27] In a recent survey conducted by the Queen Mary University reported that London was the most preferred seat of arbitration, "*with 30% of respondents preferring London (the second most preferred seat was Geneva, at 9%).*"[28]

English law also has an impact on the choice of arbitral seat.[29] Although parties can agree on a seat of arbitration elsewhere a significant number of agreements provide for London as the seat when the governing law of contract as English law.[30] Thus it becomes even more important to analyse the practice of common law countries. From a feminist lens, contrasting London as the best choice for seat, with the fact that the process of arbitration is reflective of the adversarial system, it becomes important to analyse the practice of courts in England and common law for their role in shaping not only other courts, but also decisions of arbitral tribunals in the future. The coercive power of an enforcing jurisdiction to yield to the principles it adheres to, curtails the freedom arbitrators have in choosing the process of arbitration.[31] This paradoxical link between arbitration and municipal systems is what ensures the effectivity of arbitration. This link commences at the stage of the formation of the arbitral agreements, and reappears again at the stage of enforcement of the award. Arbitral agreements are formed through the exercise of party autonomy and hence in the next section I begin my analysis with that.

[24]ALAN REDFERN, MARTIN HUNTER, NIGEL BLACKABY AND CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION¶1-49 (2009).
[25]National Navigation Co v Endesa Generación SA[2009] EWCA Civ 1397: (The Court recognized the principle of comity)
[26] Michael Pryles, *Assessing Dispute Resolution Procedures*, 7 AM. REV. INT'L ARB 267, 280 (1996); Ilhyung Lee, *Practice and Predicament: The Nationality of The International Arbitrator (With Survey Results*) 31(3) Fordham International Law Journal (2007).
[27]As an illustration from 2002 to 2012, in India, the regime posited by Bhatia v Bulk Trading was in operation. This judgment envisaged that parties had to expressly or impliedly exclude Indian seat to avoid the jurisdictions of the Indian courts.
[28] Queen Mary University, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, available online at http://www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf (Last visited on April 24, 2015).
[29] Filip De Ly, *The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning*;12(1) NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS (1991).
[30]Professor Christophe Seraglini, Lucas de Ferrari, *The Battle of Seats: Paris, London or New York?*, available online at http://www.whitecase.com/files/Publication/98fab33c-5341-422d-a4a1-8e6f36d8a9ca/Presentation/PublicationAttachment/9c9b05ec-aa81-4aa5-a4a4-97de641798bc/article_The_battle_of_the_seats.pdf (Last visited on April 24, 2015).
[31]It is the threat of non-enforcement of the arbitral award by the Court, that leads to parties' choice being limited. I have argued this proposition elaborately in the subsequent section.

FORMATION OF THE ARBITRATION AGREEMENT

Party autonomy which is at the very root of arbitration is recognized by and indirectly statutorily created by the various legal systems.[32] Article 5 of the UNCITRAL Model Law and provisions of several other Arbitration Acts[33] provide for limited judicial intervention. Furthermore the statutes themselves allow for certain deviations such as 'unless otherwise agreed by the parties' which endorse the exercise of party autonomy.[34]By limiting judicial intervention it recognizes the right of the parties to tailor-make their arbitral clauses. Thus it is essential to analyse whether there is a disparity in power relations in the operation of party autonomy. One fundamental limitation is the fact that party autonomy is not absolute.[35]At the root of party autonomy is also the balance between its exercise and the mandatory provisions of the lex arbitri.[36] Thus an excess of party autonomy in contravention with the lex arbitri renders it invalid.[37]Consequently, parties bear in mind a threat of non-enforceability of the award, if they choose an 'abnormal' arbitration clause. Significantly limiting or conditioning this freedom is the fact that parties opt for standard form clauses without deviation.[38] Hence the operation of party autonomy as such is conditioned by the possibility of non-enforcement. In assessing the extent and validity of the exercise of the party autonomy, the same patriarchal thresholds in municipal jurisdictions such as 'objectivity', 'reasonableness' tainted by an imbalanced power-dynamic between the two genders are used by the Courts.[39]Furthermore, the clause is negotiated keeping in mind potential enforcing jurisdictions thereby adopting the same provisions promoting differential power relations to pacify the Courts of the state. Thus it gets carried over into the formation of the clauses itself where each party fends for the best solution for itself thwarting any chance for a synergetic outcome at the stage of an arbitration agreement. Drawing an analogy from Prof Menkel-Meadow's argument, the negotiation process reflecting a nature where one party fends for itself even to the detriment of the other is indicative of a male ethic.[40]

An arbitration agreement is a contract governed by the contract laws of the seat.[41]Akin to most contracts, even an arbitration agreement entails negotiations between the parties.[42] The choice of the lex arbitri, or drafting of the provision on interim measures is one such negotiation of utmost importance to any arbitration. As an example the IBA Guidelines on Drafting Arbitration Agreements, Guideline 4 states that both practical and juridical

[32] Article 19(1) of the UNCITRAL Model Law, Redfern & Hunter *supra* note 24 at ¶6-08
[33] Almost all the Model law jurisdictions provide for a provision equivalent to Article 5.
[34] Pryles *supra* note 26.
[35] *Id.*
[36] *Id*; Kroll *supra* note 2 at ¶15-20
[37] *Id*; Redfern & Hunter *supra* note 24 at ¶ 6-07
[38] Mark Patterson, *Standardization of Standard-Form Contracts: Competition and Contract Implications*, 51(2) WILLIAM & MARY LAW REVIEW, (2010)
[39] Olsen *supra* note 20.(By the 'same patriarchal thresholds', what I mean is that the courts will still look at party autonomy as 'free choice in the best interests of one party'. Thus objectivity which the Courts would use would also be conditioned by the same view of endorsing antagonistic negotiation at the exclusion of the ethic of care.)
[40] Menkel-Meadow *supra* note 16 at p. 51.
[41] Redfern & Hunter *supra* note 24 at ¶2-02
[42] *Id.*

considerations must be given before the determination of the seat of arbitration.[43] Yet from a feminist perspective such a negotiation brings into existence the same notions of patriarchy prevalent in the negotiation of any contract in a State.[44]A persistent feminist critique of contract law identifies the disassociation of contractual negotiations from any relational or co-operative modes and criticises its descent into an antagonistic trade-off of rights and obligations there under.[45]

Continuing the analogy of the IBA Guidelines, the comments which form part of the original IBA document, state that the choice of seat is an important consideration as it decides the influence of the courts to provide interim measures.[46]From a feminist view, yet again, this boils down to a negotiation between the parties, where e.g. the buyer would want the seat to be in a neutral venue but where the seller's assets are located. Contrarily, the seller would never agree to a seat such as what the buyer would suggest, simply for the fear that interim measures would cause inconvenience.[47] The negotiation thus effectively digresses from what in the interest of both the parties would be an effective mode of dispute settlement and becomes one of where one party would have higher advantage at the cost of efficiency of the proceedings. This negotiation specifically demonstrates the operation of patriarchy in a manner much similar to that identified by Prof Menkel-Meadow i.e. where parties seek to take the most from each other while giving out the least.

A second, argument can be made in the way courts regard the effect of party intention on the construing of an arbitration agreement. In most adversarial systems such as England, party intention is negated or given limited importance.[48] Thus it is only the text of the contract which is considered to be of paramount importance. This premise is a corollary of the previous premise of negotiation and hence can be critiqued on a similar basis. As a contract in the sense of a 'male ethical value'[49] is nothing but a compromise of conflicting wills, a common intention of the parties is difficult to identify and implement. Further as the parties have agreed upon the terms, any interpretation slightly deviating from the terms would substantially change the prevailing power (rights/obligations) dynamic between the parties and thus English Courts[50] have relied on contractual interpretation and sought to avoid, so far as possible, delving into the question of intention.[51] This is an illustrative demonstration of the patriarchal nature of contract law and therefore the consequent and apparent exclusion of the 'woman' identity from it. In case of arbitration agreements, most statutes require it to be

[43] IBA Guidelines on Drafting Arbitration Agreements, 12, (2010) Guildeline 4: "The parties should select the place of arbitration. This selection should be based on both practical and juridical considerations".
[44] Alice Belcher, A Feminist Perspective on Contract Theories from Law and Economics, 8(1) Feminist Legal Studies (2000);
[45]*Id*; Gillian K. Hadfield, *The Dilemma of Choice: A Feminist Perspective on the Limits of Freedom of Contract*, 33(2) OSGOODE HALL LAW JOURNAL, (1995).
[46] IBA Guidelines *supra* note 43.
[47] Lawrence Mortoff, David Robinson, Richard Chernick, *Before Closing That Killer Deal: Considerations For Negotiating and Drafting Appropriate and Enforceable Arbitration Provisions*, available online at https://www.adr.org/aaa/ShowPDF%3Fdoc%3DADRSTG_012247 (Last visited on April 24, 2015).
[48]Chartbrook Ltd -v- Persimmon Homes Ltd [2009] UKHL 38.
[49] Hadfield *supra* note 45.
[50] Lord Bingham was the only judge in England who persistently upheld the obligation of good faith e.g. Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd[1989] Q.B. 433
[51]Chartbrook Ltd -v- Persimmon Homes Ltd [2009] UKHL 38.

in writing and expressly mention the intention to arbitrate.[52] English Courts are wary of the interpreting arbitration agreements where there is no express arbitration agreement.[53]As arbitration agreements are treated like contracts, the Courts give the same considerations to that of arbitration agreements as they do to Contracts. The parties' consent to arbitrate is considered only through the text of the arbitration agreement.

A third aspect is the doctrine of contra preferentum in the interpretation of arbitration agreements. The doctrine of contra preferentum envisages the interpretation of a clause of a contract against a person who has drafted it.[54] The principle as is commonly known is to ensure that a party who is not aware of specific circumstances as a result of either asymmetry of information or otherwise is not prejudiced as a result of a drafting ambiguity created by the supplier of the provision.[55] Contra preferentum may thus be considered a shield to protect an innocent party from the other party taking benefit of its own error in drafting. Even this doctrine is in essence a corollary of the proposition that a contract is the result of an antagonistic struggle. The presumption hereunder is the fact that a party in order to protect its interest would render such an ambiguity.[56] In the least it can be stated that it is designed to prevent a party from dominating another on account of its own mistake. Thus an ambiguous arbitration agreement particularly as regards seat or interim measures would be resolved not in the determination of what the parties may have intended but rather an assessment of the protection of the rights of the parties based on the document.[57] The Courts thus employ a rights based analysis in abstraction rather than a contextualised analysis reflective of male value as marked by Prof Gilligan. Such an approach loses out on what may have achieved by co-operation or the 'ethic of care' ensuring mutual obligations and performance.

A final aspect in consideration of arbitration agreements as contracts is that of unconscionability. With reference to arbitral proceedings a clause may be rendered unconscionable if there is either an inequality of bargaining power of a gross inequality in the rights of the clause.[58] Unconscionability being one of the controversial topics, two streams of thought exist. One stream of thought seeks to enforce clauses even though they are unequal while the other does not. As regards the first view, prima facie, no distinction appears between common law and civil law jurisdictions in this regard. However, on closer examination, it appears that the reasons for which the clause is enforced are different. Adversarial countries enforce even a seemingly unconscionable, on the notion that the parties

[52]Chartbrook Ltd -v- Persimmon Homes Ltd [2009] UKHL 38.
[53] Section 7 of the Arbitration Act 1996 (England and Wales); Andrew Tweeddale, Incorporation of Arbitration Clauses available online at http://corbett.co.uk/wp-content/uploads/Arbitration-article-Incorporation.pdf (Last visited on April 24, 2015).
[54] International Institute for the Unification of Private Law, UNIDORIT Principles 2010, Art. 4.6.
[55] Commentary to the UNIDROIT principles *Id.*
[56]*Id.*
[57]*Id.*
[58]The Supreme Arbitrazh Court Of The Russian Federation, Moscow (Commercial Court), 19 June 2012 (CJSC Russian Telephone Company v Sony Ericsson Mobile Telecommunications Rus LLC). (Specifically the Court has used the terms 'equality of arms' as being necessary in an arbitration agreement.)

have struck a bargain.[59] Contrarily the civil law courts which enforce unequal provisions, reason that merely the possessing excess rights is insufficient to hold the clause unconscionable.[60] Thus the reasoning bases itself on insufficiency of disparity as opposed to a rejection of the notion. Whether a co-operative, relational approach would render a different conclusion in civil law countries is another matter. But its absence can certainly be felt in common law approaches. The other stream completely refuses the notion of unconscionability and is seen predominantly in cases of common law countries.[61] It is thus evident how common law sticks to the contractual approach of antagonistic negotiation even with respect to arbitration.

Thus in a common law court if a lawyer represents a party and claims unconscionability or argues on intention of parties, or prior negotiation, more often than not these would be construed as 'bad' arguments for their unreasonable nature. The causality of this to the 'feminine' value attached to these tools of argumentation is inescapable. It is only evident that court practice and in turn arbitral practice would prefer 'male' values over female values.

This notion affects other elements of arbitration as well, such as the profile of the arbitrators, the counsels to the parties etc. which has a direct nexus with the exclusion of women from arbitration which would be analysed in subsequent sections. However, a priori, it is relevant to consider the basis of the negotiations either those of an antagonistic struggle or those of relational, co-operative modes. The notion of implied and express good faith obligation in arbitration must be analysed through the feminist lens.

PARTIES AND THEIR OBLIGATIONS IN ARBITRATION

One of the most controversial principles in arbitration is that of good faith.[62]The principle of good faith implies importing honesty and fair dealing in the conduct of the parties, which is to be inferred from the true intentions of the parties.[63]The application of the principle of good faith allows a party to place reliance on the conduct of another to hold it liable for the detriment caused by its representations.[64]It is a consensual principle, which takes conduct of the parties as an indication of consent.[65]Thus, under a feminist lens, the good faith principle represents an ethic of care.[66] Extending the analogy, in Prof Gilligan's experiment, Amy's failure to adhere to Jack's 'logic' and in effect hierarchize rights effectively, is demonstrative of her belief that 'the relation between the pharmacist and Heinz's mother had to be

[59] Becker Autoradio U.S.A. v. Becker Autoradiowerk, 585 F.2d 39 (1978), Delaware Court of Appeal [U.S.A], 17 July 1978. Law Debenture Trust Corp Pty Ltd v. Elektrim Finance BV, [2005] EWHC 1412 (Ch.), High Court of Justice of England and Wales, 1 July 2005.
[60]Bundesgerichtshof [Federal Supreme Court], III ZR 141/90, 10 October 1991 (Seller v. Buyer).
[61]Law Debenture Trust Corp Pty Ltd v. Elektrim Finance BV, [2005] EWHC 1412 (Ch.), High Court of Justice of England and Wales, 1 July 2005; Becker Autoradio U.S.A. v. Becker Autoradiowerk, 585 F.2d 39 (1978), Delaware Court of Appeal [U.S.A], 17 July 1978.
[62]Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd[1989] Q.B. 433
[63]Fouchard, Gaillard, Goldman, *supra* note 23 at p. 256 ¶*477].*
[64]*Id.*
[65]ATF 121 III 38 at 3, p. 45; 4P.124/2001, at 2c (Germany)
[66]The good faith obligation is primarily designed at ensuring that the relationship between the parties remains preserved and hence it would represent and ethic of care.

preserved.'[67] She considers her legitimate responsibilities in a situation no matter how pressing. The good faith principle ensures that the parties perform their obligation keeping in mind the requirements or the intention of the other party.[68] Thus the obligation envisages parties to co-operate with each other, in conducting their contractual relations with the ultimate purpose of preserving the relation between the contracting parties. Thus the principle is to be considered as a feminine value. Akin to contractual interpretation even good faith as a notion is rejected in England.[69]

Good faith is recognized not only a principle of international arbitration law, but underlies all legal systems.[70] Even the UNIDROIT principles designed to harmonize international contract law, include deal with this principle.[71] Yet, its universal acceptance as an implied or explicit obligation remains controversial.[72]They differ in their extent and scope of application. Good faith, in the form of an implied duty or enforceability of an express duty is seen as a recognized principle in most civil law nations[73], but is absent from the common law discourse barring exceptions. The demonstrable point thus is that good faith an indicator of a female ethic is rejected by adversarial courts.

Its rejection in adversarial courts is due to it being dismissed as vague and ambiguous arguing that it often results in uncertainty in parties' obligations as well as arbitrariness in judicial decision-making.[74]To this effect in *Walford v Miles*[75] the English Court of Appeals stated: *"A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies."*[76]Adversarial or common law courts have further argued that even when the principle in considered to be a valid one, there are no set precedents that would aid a Tribunal in its application.[77] In situations where it has sought consideration, the courts have addressed the question of what constitutes a detrimental reliance by using an 'objective' assessment of the process of construction of the contract.[78]As has been argued above, an 'objective' dispassionate assessment ignores prior negotiation and hence devalues the basis on which good faith can be established. Furthermore the rejection of good faith implicitly promotes a necessity of increased caution in drafting and parties trying to take advantage of the other to prioritize their rights.

A corollary of the principle of good faith is the group of companies doctrine. The group of companies doctrine allows the tribunal to make a party which is closely connected to a

[67]Gilligan *supra* note 6.
[68]Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd[1989] Q.B. 433 per Lord Bingham.
[69]Walford v Miles 1992 [2] AC 128
[70]GARY B BORN INTERNATIONAL COMMERCIAL ARBITRATION 1415 (2012); Arbitral Award 4 March 2004; UNIDROIT PICC, 1.8, ¶1.
[71]UNIDROIT Principles *supra* note 54, Art. 1.
[72]Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd[1989] Q.B. 433 per Lord Bingham.
[73]*Id.*
[74]Bernardo M Cremades, *Good Faith in International Arbitration*, 27(4) AM. U. INT'L L. REV.766 (2012)
[75]Walford v Miles 1992 [2] AC 128
[76]Walford v Miles 1992 [2] AC 128
[77]First Federal Savings & Loan Association of Toledo, v. Perry's landing, inc. Et al., Court of Appeals of Ohio, Wood County 11 Ohio App. 3d 135 (1983).
[78]Yam Seng v. International Trade Corporation [2013] EWHC 111

signatory to the agreements such as for e.g. a parent company of a subsidiary which has signed an arbitration agreement, may be made a party to the arbitration despite not signing it.[79] The Group of companies doctrine is reflective of what is known as the 'ethic of inclusion' as it envisages the involvement of all those parties which form part of the dispute as opposed to merely those who have signed an agreement.[80]The acceptance of this doctrine is also highly controversial in practice. Most court and in this instance even civil law courts refuse to recognize the existence of this doctrine.

It has received very limited support such that its application is limited to a few jurisdictions of the world.[81] On the other hand, jurisdictions such as England, Germany, United States of America, Italy and Sweden have expressly criticised and rejected this doctrine.[82] Joinder of entities by virtue of the "Group of companies" doctrine implies a clear disregard to the principle of party autonomy as it compels a non-signatory to arbitrate without his consent, and further deprives him of his right to be heard in court and his right to judicial review.[83] Due to the violation of the principle of party autonomy, the "Group of companies" doctrine has found very limited support in both arbitral and judicial case law.[84] This rejection is evidence of patriarchy established in arbitration. In this instance the principle emerging from the ethic of inclusion is rejected for its contravention with a patriarchal exercise of party autonomy.

The patriarchal nature of arbitral law is reflected when arguments such as those based on good-faith or group of companies doctrine are consistently rejected and parties fail to win arbitrations on account of 'bad' arguments or invalid propositions of law which are 'co-incidentally' reflective of feminine values. As a further illustration, in *Peterson Farms Inc. vs. C&M Farming Ltd*., the English high Court stated that the group of companies doctrine was "*seriously flawed in law*".[85] Yet the determination of which arguments are bad and which are to be accepted, is done by the arbitral tribunal. Hence it is imperative to shift the gaze to analyse the constitution and functions of the arbitral tribunal from a feminist lens.

THE ARBITRAL TRIBUNAL

In this section, I analyse the operation of patriarchy first, in the appointment of arbitrators which form part of the tribunal and also, in the operation of the tribunal. The constitution of an arbitral tribunal is an exercise of party autonomy and is considered to be one of the most important features of arbitration. Yet, this right effectively reflects the same notion of objectivity that Prof MacKinnon criticises.[86]

[79]Chloro Controls(I) P.Ltd vs Severn Trent Water Purification (2013) 1 SC 641.
[80]A parallel can be drawn between including all relevant parties in order to resolve a problem, which reflects the ethic of inclusion and the group of companies doctrine.
[81]Redfern & Hunter *supra* note 24 at p. 102
[82]Redfern & Hunter *supra* note 24 at ¶2.45 Sarhank v. Oracle404 F3d 657.
[83]Redfern & Hunter *supra* note 24 at p. 99 ¶2.39].
[84]Born*supra* note 70 at p.1451.
[85][2004] APP.L.R. 02/04.
[86]MacKinnon *supra* note 4.

Article 11(2) of the UNCITRAL Model Law, followed by several countries,[87] states that the parties are free to agree upon an arbitrator. Simultaneously a duty is cast upon every arbitrator to act fairly and impartially.[88] The question thus arises is that if objectivity is one distinct ideal, a ubiquitous value like liberal feminists argue[89], then a similar outcome would be arrived at if an issue is 'objectively' analysed, nullifying any reason for parties to choose different arbitrators. I argue that the reason why parties choose different arbitrators is because of what I term a 'bargaining of the value of objectivity'. In order to elucidate I rely of the IBA Rules of Conflict of Interest for Arbitrators.[90] Within the Green List of permitted interests, it allows for "*previously expressed legal opinions*".[91] Thus e.g. if an arbitrator has written an award, or a legal article taking a position criticising the Group of companies doctrine, a party is free to choose an arbitrator for the same reason. If in the hypothetical arbitration, a question of applicability of the Group of companies doctrine arises, even on an objective assessment the arbitrator would take a position opposing the applicability of the doctrine. Thus an arbitrator chosen by a party for his legal views previously expressed on the Group of companies doctrine, would abide by the standard of objectivity of the parties. The enabling of such a choice as a 'reasonable' exercise of party autonomy, further endorses the same patriarchal threshold of assessment. Thus if the appointment of an arbitrator is challenged, the rules of bias, from the view point of a reasonable 'man' would be considered.

The illustration is sought to demonstrate the fact that objectivity of an arbitral tribunal is 'shaped' by the parties. Parties in turn choose arbitrators on the basis of their self-interests and as a result even the appointment of an arbitrator becomes an antagonistic struggle between the parties reflective of a male ethic.[92] Hence the objectivity used by the tribunal as such is patriarchal. The 'objective' judgment of such an arbitrator would never let feminine values be introduced into arbitration, as those were deliberately excluded in the conception of the Tribunal's objectivity itself.

Its effect could be seen on the very nature in which arbitrations are conducted. An illustration of the pervasion of patriarchy through the tainted mechanism for appointment of arbitrators can be seen in the exercise of the discretionary power of an arbitrator. The Arbitral Tribunal is vested with several powers to use its discretion or judgment. One such are is that of evidence taking. Municipal rules of evidence taking of the seat of arbitration are not applicable. It would thus be reasonable to expect a higher disassociation from the values of patriarchy.[93] Prof Gilligan suggests that Amy undertakes a contextualized analysis rather than abstraction of rules to come to her conclusion.[94] Similarly the feminine values brought into arbitration by a person and the male values present in arbitration would have differing effects.

[87]UNCITRAL Model Law, Article 11(2).
[88]Sierra Fishing Company and others v Hasan Said Farran and others [2015] EWHC 140 (Comm)
[89]HARDING, SANDRA. RETHINKING STANDPOINT EPISTEMOLOGY: WHAT IS STRONG OBJECTIVITY? FEMINIST THEORY: A PHILOSOPHICAL ANTHOLOGY. (CUDD, ANN E. AND ROBIN O. ANDREASEN, EDS. 2005).
[90]IBA Rules of Conflict of Interest for Arbitrators (2004).
[91]*Id,* Green List.
[92]Gilligan *supra* note 6.
[93]As an illustration Section 28 of the Arbitration Act of India. A higher disassociation is reasonable to be expected as without being bound by the laws of evidence arbitration is further distanced in this respect from State mechanisms.
[94]Gilligan *supra* note 6.

The effect of it in assessing the nature of evidence-taking in arbitration is significant. Yet objectivity and fairness an illusion which persists from the appointment of arbitrators, induces a patriarchal value to the exercise of discretion as well.

The IBA Guidelines of Evidentiary Rules 2010 provide for the 'best practice' in terms of taking evidence in arbitration proceedings.[95] Article 9(3)(e) states "*insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account: the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules*".[96] The IBA Guidelines also suggest exclusion of evidence for the purpose of lack of relevance, privilege, undue burden of a party to produce evidence, grounds of commercial or technical confidentiality, or proportionality, fairness or equality.[97] An inclusion of the feminine value to contextualise may necessitate a change in the stringency or the interpretation in the rules of application. E.g. the priority or weightage of what constitutes proportional could be different. From a male ethical value, the rights of the parties would be weighed higher, whereas form the female ethical value it would be the ultimate outcome that may take precedence thereby showing comparatively more leniency to the admission of facts before the Tribunal. Further, the recognition of the importance of the ethic of care and inclusion may propagate arbitrator initiated consent decrees even at the cost of what is called 'objectivity'. This may increase the efficiency of the process in addition to ameliorating the power dynamic.

Yet ultimately the award given by such a tribunal needs to be enforced before a Court. An award which leniently interprets evidentiary rules at the cost of the apparent objectivity would be set aside and not enforced. Hence the next aspect of the life-cycle of arbitration is the enforcement or setting aside proceedings before the courts.

BACK TO ITS PATRIARCHAL ROOTS – INTERACTION OF COURTS WITH ARBITRAL PROCEEDINGS

After the arbitral award is given, the next step is that of enforcement of an award. In considering whether an award is enforceable the municipal courts often import their own values, those prevalent in the municipal system in the assessment. Thus patriarchy prevalent in a legal framework automatically is transposed into the assessment of the Court. I analyse it through the interaction of the public policy exception with arbitration. This principle envisages that an award may be set aside or refused enforcement if it contravenes the public policy of a State. Although public policy remains an undefined term, courts have gone on to law down the meaning of public policy. An illustration can be seen through a recent case of the Indian Supreme Court, *ONGC v Western GECO*.[98] The decision comprehensively defines the meaning of fundamental policy of India which forms one limb of the threefold notion of

[95]IBA Guidelines of Evidentiary Rules (2010).
[96]*Id.*
[97]*Id.*
[98](2014)9SCC263

public policy[99], a ground used to set aside the award under Section 34(2)(b)(ii) of the Indian Arbitration Act.[100]

It states that there are three factors which form a part of the fundamental policy of India: first a judicial approach which envisages a "*fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration*."[101] As Prof Olsen has noted, the fairness and objective manner of what the parties would do, is conditioned by the choices of those who were prevalent in the profession.[102] In a patriarchal system the courts, while considering if the arbitrator took into consideration extraneous circumstances, would view it from a perspective of hierarchisation of rights.

Second the ONGC decision requires that "*the Court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other*."[103] Thus the tribunal is then bound to follow the adversarial notion of hierarchisation rights of one party over the other. This clearly demonstrates the patriarchal notion. Thus a tribunal may be deterred from promoting a consent or a compromise decree, if it deems the terms to be unfair by its standard of objectivity, thereby implicitly promoting a patriarchal standard.

Third, the Court warns "*that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained*".[104] The reasonability of the 'person' is in fact the reasonability which has been conditioned by the experience of those dominant in the field, "male middle-aged men"[105] and hence imposing such experience at the exclusion of others, promotes a patriarchy within arbitration. Without delving into the question of extent of such obligations, which a separate inquiry, it can be safely stated that duty to 'objectively' analyse evidence and give a finding is incumbent upon the tribunal.[106] Thus the same patriarchal notions demonstrated through the ONGC judgment apply to all the other jurisdictions subject to the degree in which these requirements are imposed.

The potential enforceability of an award plays a considerable role in the mind of the arbitrator. Ultimately, the duty of an arbitrator is to deliver an enforceable award.[107] Thus if a jurisdiction which could be potentially an enforcing jurisdiction recognizes or does not recognize certain principles the arbitral tribunal is more likely to follow a similar line of argument. Hence, if a jurisdiction by reason of its patriarchal nature, fails to recognize doctrines such as good-faith or Group of companies etc. an arbitral tribunal in its

[99]This three-fold test was given in Renusagar Power Corp case wherein the Court stated that if the award was contrary to the fundamental policy, interest of the State and morality of the State. This basic test was added upon in ONGC v Saw Pipes, where the Court added another parameter that of patent illegality.
[100]Arbitration Act, 1996 (IND), §34
[101](2014)9SCC263 at p. 29.
[102]Olson *supra* note 20.
[103](2014)9SCC263
[104](2014)9SCC263
[105]Olson *supra* note 20.
[106]Sierra Fishing Company and others v Hasan Said Farran and others [2015] EWHC 140 (Comm)
[107]Section 68 of the Arbitration Act 1996 (England and Wales); International Chamber of Commerce Rules (2012), Art. 41.

determination would also not consider those factors in a bid to render an award that courts of the enforcing jurisdiction would accept.

GENDER DISPARITY THE BEST KEPT SECRET IN ARBITRATION

Thus far I have discussed the entrenchment of masculine values into arbitration but a question arises is what is the effect it has on the involvement of women. There is very little empirical research done into the participation and influence of women in arbitration. I identify two reasons: first, much arbitration is ad hoc and therefore there are no records or statistics kept of which gender the tribunals are; and second even the institutions remain non-committal on gender equality merely mouthing a commitment of best efforts to promote equality. A study by Lucy Greenwood of Fulbright & Jaworski noted that only 6.5% of all commercial arbitrator appointments (both party appointments and institutional appointments) are of women.[108] Yet the study was based only on the data provided by 2 institutions the LCIA and the Stockholm Chamber of Commerce. Mr Van Harten in another study noted that of the total 247 individuals who have been appointed in the 249 known ICSID cases up through May 2010, only 10 were women, or 4%.[109] Of them, two women, Gabrielle Kaufmann-Kohler and Brigitte Stern, together captured 75% of female appointments.[110]

The disparaging numbers of why women do not participate has to be linked back to party autonomy. As I have argued above the exercise of party autonomy by itself is patriarchal. Thus it is the male "gender" values which dominate and are aspired as ideal in arbitration. Consequently, women substantially are considered as 'bad' arbitrators or lawyers and hence excluded from the choice of parties.[111] The seeking of the male ethic as a norm, detrimentally affects the participation of women in several spheres and arbitration is no such exception.

CONCLUSION

Arbitration portrays a potential ground where a set of laws could be created, in which, as Prof MacKinnon argues, there would be no need of feminism as there would be a collective consciousness of a 'woman'. It portrays a ground where it would be neutral from a value-laden framework for its disassociation with the State and laws. If arbitration is analysed simply for its purpose without considering the process, it is a hallmark of what Prof Gilligan attributes as the ethic of care. The history of arbitration narrates that arbitration was created to negotiate or decide upon issues between two merchants amicably, in a bid to protect the relationships between the parties.[112] Thus by negotiating and adjudicating the decision the

[108]Lucy Greenwood of Fulbright & Jaworski, Arbitration Report (2013), available online at http://adrresources.com/docs/adr/2-2-2896/informe-fulbright-2013-1-fulbright-jaworski-arbitration-report-1.pdf (Last visited on April 24, 2015).
[109]Gus Van Harten, The (lack of) Women in Investment Treaty Arbitration, available online at http://ccsi.columbia.edu/files/2014/01/FDI_59.pdf (Last visited on April 24, 2015).
[110]*Id.*
[111]Menkel-Meadow *supra* note 16. (She states objectivity as a reason why women are 'bad' lawyers in adversarial systems, the same analogy could be extrapolated to arbitration.)
[112]Redfern & Hunter *supra* note 24 at ¶1-02: "It is not difficult to visualise the "primitive" nature of the arbitral process in its early history. Two traders, in dispute over the price or quality of goods delivered, would turn to a third whom they knew and trusted for his decision. Or two merchants, arguing over damaged merchandise, would settle their dispute by accepting the judgment of a fellow merchant. And they would do so not because of

ultimate purpose was to preserve relationships, a demonstrative of an ethic of care. Yet if a female value was to be attributed, then the dismal number of women participating and the pervasion of patriarchy as I have argued above would not be the ugly truths of the profession.

In a bid to identify a reason for the same, I resort to a parallel with Prof MacKinnon's argument of the failure of feminism to have a separate theory of the State. Prof MacKinnon argues that feminism's disloyalty to both the Marxist and the Liberal theory is a result of its disparagement with both abdication of the law and the acceptance of law as the tool of struggle.[113] Implicitly, Prof MacKinnon argues that the lack of a theory of a State opens feminism to the critique of the specific theory it sides on.[114] Thus in a situation of dominance by the male, in a liberal framework the law looks at the woman from the eyes of a male, whereas in a Marxist framework the woman is left to fend for herself.[115]

Similarly, in arbitration, a lack of an independent effective enforcement mechanism forces arbitration to re-connect with what it sought to exclude: the intervention of States.[116] Drawing an analogy, arbitration is left with a Hobson's choice: to interact with the State or not. In the complete abdication or a Marxist model, arbitration would be non-enforceable. This would occur because arbitration cannot be devoid of parties, and parties from a patriarchal municipal jurisdiction would negotiate for a hierarchisation of rights. Thus with a failure of a sanction in case of non-compliance, arbitration the losing party would never enforce the award. Hence the choice to interact with the State is what is status quo, where for enforceability parties must approach State Courts. Like the liberal theory this envisages a sanction by the enforcing state (attachment of property etc.) in case of non-compliance. But the fallout with the interaction with State is that it propagates the same power dynamic reflective in its patriarchal judicial system of the enforcing state. It involves the same lenses of objectivity rationality and fairness which are conditioned by patriarchy. Thus since its inception arbitration carries and reflects a male dominant power dynamic.

At the stage of nascence that is the formation of the arbitral agreement, the contract laws operating upon the parties shape the way in which the terms would be framed. At the second stage once the arbitration has commenced, the determination of the obligation of the parties becomes of paramount importance. The threshold for this becomes that of prioritizing text in the contract, in a bid to hierarchize the arguments as opposed to contextualising through identifying the intention of the parties, particularly in common law countries. The arbitral tribunal which is supposed to make such determination of obligations, also bases its reasons on patriarchal reflections of objectivity and reasonability. The reflections stem from the 'threat' of non-enforcement of the arbitral award by the Courts. The standard by which the Courts adjudge an award as enforceable or non-enforceable is devised also on the basis of patriarchal notions of objectivity. Thus at both-ends, its nascence and its conclusion and because of it, even during the course of the arbitration is embedded with the State and

---

any legal sanction, but because this was expected of them within the community in which they carried on business."

[113] MacKinnon *supra* note 4

[114] *Id.*

[115] *Id.*

[116] Pryles *supra* note 26.

subsumes the same patriarchal power relations present in the systems of the State. The analogy of a ‘vacuum’ of arbitration from juridical systems despite substantially true from a male view, is an illusion. Drawing an analogy from Prof MacKinnon’s conclusions, arbitration would need a parallel enforcement mechanism devoid of the present theories of State to materialise the vacuum it is deemed to create to redefine the power relations in a bid to ameliorate the disparity therein.