The National Law Institute University

Kerwa Dam Road, Bhopal, India -462044

VOLUME VI Indian Arbitration Law Review 2024

IALR

Indian Arbitration Law Review

VOLUME VI MARCH 2024

INDIAN ARBITRATION LAW REVIEW

Volume VI | 2024

March 2024

NATIONAL LAW INSTITUTE UNIVERSITY
Kerwa Dam Road, Bhopal, India-462 044

The Indian Arbitration Law Review is an annual peer reviewed journal devoted to arbitration. The Journal is published by the students of the National Law Institute University.

The Journal invites submissions of scholarly, original and unpublished written works from persons across the legal profession – students, academicians and practitioners. Such manuscripts should be sent in MS Word (.docx format) to ialr@nliu.ac.in. All citations and text must conform to the OSCOLA style of citation, 4th Ed.

The views expressed in the articles published in this Volume of the Indian Arbitration Law Review are those of the authors and in no way do they reflect the opinion of the Indian Arbitration Law Review, its editors, or the National Law Institute University, Bhopal.

Published by:

The National Law Institute University, Bhopal
Kerwa Dam Road, Bhopal, India 462044
Phone: +91 0755-2696784
Email: ialr@nliu.ac.in
Website: www.nliu.ac.in

Distributed exclusively by:

Eastern Book Company
34, Lalbagh, Lucknow - 226 001
U.P., India
Email: sales@ebc-india.com
Website: www.ebc.co.in

FOREWORD

—Justice A.K. Sikri[1]

> *"It bids us remember benefits rather than injuries, and benefits received rather than benefits conferred; to be patient when we are wronged; to settle a dispute by negotiation and not by force; to prefer arbitration to litigation — for an arbitrator goes by the equity of a case, a judge by the strict law, and arbitration was invented with the express purpose of securing full power for equity."*
>
> **—Aristotle, Rhetoric**[2]

These lines of the great Greek polymath Aristotle from his famous classic Rhetoric aptly depict the significance of arbitration in the settlement of commercial disputes. Talking about arbitration, he observes that it should be given preference over adversarial litigation as arbitration has not just been a method of resolving disputes amicably but has also been a tool for preserving equity—which is the touchstone of justice. Arbitration is perhaps the earliest method of peacefully resolving disputes among humans.[3] It existed *'far before law was formed, courts were structured, and judges formulated law'*.[4] In modern times too, arbitration is aiding globalization which has been a significant transformative force, bringing about an interconnected world defined by massively increased trade and cultural exchange. The contemporary significance of arbitral practice in a globalized world has amplified the significance of quality literature around the subjects governing the arbitral landscape.

---

1. Justice Sikri is a Former Judge, Supreme Court of India; former Chief Justice of the Punjab and Haryana High Court; former Acting Chief Justice of the Delhi High Court; and former Judge of the Delhi High Court.
2. Aristotle, *Rhetoric* (Dover Publications 2004).
3. Derek Roebuck, *Disputes and Differences: Comparisons in Law*, *Language and History* (2002).
4. Frances Kellor, *American Arbitration: Its History, Functions and Achievements* 3 (1948).

We have seen that in recent years, arbitration has become the most favoured form of dispute settlement method for disputes arising out of global trade in tandem with the globalisation of law. It is regarded to be less time-consuming, and in many places, more private than court processes. The New York Agreement on the Recognition and Enforcement of Foreign Arbitration Awards of 1958 ("New York Convention") makes it simpler for arbitral awards to be enforced in a foreign jurisdiction than court rulings. Moreover, it is now commonly recognised that arbitration is a neutral means for resolving commercial disputes between parties from different nations, allowing each party to bypass the *'home'* courts of their co-contractors. And most importantly, arbitration provides the parties the freedom to use the procedure of their convenience which can be irrespective of the procedural law of the state where it is seated.[5]

In this framework, contemporary arbitration is evolving towards a greater global synchronisation. Beginning with the New York Convention, the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("Model Law"), a series of national laws and institutional rules, as well as soft law texts such as the International Bar Association Rules on the Taking of Evidence, have been combined to form a transnational standard.[6] At the same time many distinct points of convergence also exist, including the separability of the arbitration agreement, *Kompetenz-Kompetenz* (the competence of an arbitral panel to determine its own jurisdiction), limited remedies against the verdict, and party autonomy. This tendency has been referred to as the formation of '*arbitral legal order*'[7] or the creation of '*transnational arbitration*'.[8]

5. Emmanuel Gaillard, John Savage (eds), *Fouchard, Gaillard, Goldman On International Commercial Arbitration* (1999).
6. Gabrielle Kaufmann- Kohler, 'Globalization of Arbitral Procedures' (2003) 36 Vand J Transnat'l L, 1313.
7. Emmanuel Gaillard, *Aspects Philosophiques Du Droit De L'arbitrage International* (2008) 60-66.
8. Marc Blessing, 'Globalization (and Harmonization?) of Arbitration' (1992) 9 J Int'l Arb, 79; Fali Nariman, 'East Meets West: Tradition, Globalization and the Future of Arbitration' (2004) 20 Arb Int'l, 123.

The COVID-19 pandemic further gave the international dispute resolution community an opportune time to reflect upon the progress made and to shape the future of arbitration as a dispute resolution mechanism by using the strategies and tools that have been fashioned to overcome the travel, quarantine and other restrictions imposed all over the world as a result of the pandemic. In this regard, the foremost thing that comes to my mind is the way the pandemic has normalized the incorporation of technology into arbitral practice, which would otherwise have taken many more years. Notably, the pandemic has enlivened the debate about the effect of technology on procedures such as case management conferences, document production and cross-examination of witnesses, and it has become apparent that technology can supplement and even enhance existing procedural innovations in many respects. We have seen that the overall adoption of technology adds value and reduces inefficiencies in arbitrations and the benefits significantly outweigh the costs.

However, over the decades, it also appears that some cracks have begun to form in the façade. Just as arbitral practice has been instrumental in the rise of globalization, there is a sense that it has, at least partially, also been complicit in its fall. This has manifested in what seems a growing wave of discontent with various aspects of international commercial dispute resolution; from Investor-State dispute settlement to international commercial arbitration. There are now mounting concerns both within and outside the legal fraternity as to whether the legal processes by which justice is delivered remain fit for their purpose in terms of being accessible, efficient, and contextualized to the dispute. These concerns go directly to the legitimacy of the global institutions which depend upon these legal processes and indeed globalism as a whole. But how precisely should arbitrators, arbitral institutions and other stakeholders engaged in cross-border arbitration respond?

This takes me to the role that mediation can play in filling the cracks and addressing these issues. Mediation is, moreover, exceedingly flexible[9]

9. Richard Hill, 'Common Points and Differences Among Different Types of Mediation' (2000) ADRLJ, 95; Jeswald Salacuse, 'Direct Negotiation and Mediation in International Financial and Business Conflicts' in Norbert Horn and Joseph Norton

and thus it adapts to diverse legal cultures and can mesh with arbitration without either process being unduly disrupted.[10] Indeed, both the processes can make each other stronger when pursued in coordination. Introducing mediation and negotiation into a dispute resolution clause, using it when a dispute arises or providing for it in the rules of the arbitral institutions is important for the use of arbitration and its own development. When used before or after arbitration, mediation reassures and makes arbitration more approachable and less distant from ordinary business practices than conventional dispute resolution techniques. Arbitration can either be the ultimate recourse after exhausting all means of seeking a settlement or, conversely, the springboard for a settlement, because the parties are then in a position to have an enlightened discussion after clearing up the legal issues or gaining a better understanding of the facts.

The Indian Arbitration Law Review has proven to be a perfect stepping-stone in this journey where complex intricacies around the subject are collated in the form of lucid prose. Each essay in this volume ensues a discussion around the wide range of issues arising from the evolution of arbitral practice in the context of some of the larger themes of our time—the role that globalization of business and trade is playing in the increasing disparity between and within nations, and the significance of dispute resolution mechanisms in it. The assembled papers also examine the new developments around the field in order to assess the best practices which can be imbued in the arbitral landscape. The journal is, as a consequence, relevant, engaging and helpful to all the stakeholders including policymakers, lawyers, arbitrators, judges, academics and students.

It is encouraging to see that the authors have endeavoured to examine and explore the strengths and weaknesses of the status quo of the arbitral landscape while suggesting some pragmatic reforms that could be

(eds), *Non-Judicial Dispute Settlement in International Financial Transactions* (2000).

10. Robert Dobbins, 'The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity' (May 2000) 1 Hastings Bus L J 161; James T. Peter, 'Med-Arb in International Arbitration' (1997) 8 Am Rev Int'l Arb 83, 103-06; Haig Oghigian, 'Perspectives from Japan: A New Concept in Dispute Resolution— The Mediation-Arbitration Hybrid' (Spring 2009) 2 N Y Disp Resol Law 110.

implemented to enhance efficiency and reduce the concerns highlighted above. The essays in this volume of Indian Arbitration Law Review also evidence the cogency of the frame of reference around arbitration law and remind us how important it is to engage in an academic analysis of the substance of law and the processes we use in modern-day arbitration practice. I congratulate all the contributors of this volume for both the ambition of their project, and the quality of manuscripts that have been produced. The Editors of this Journal also deserve deep appreciation for the tireless efforts made by them, which has given this volume the present form.

INDIAN ARBITRATION LAW REVIEW

Volume VI | 2024

This Volume has been published due to the time and efforts of the following persons:

BOARD OF ADVISORS

Mr. Ben Olbourne is a barrister at 39 Essex Chambers and provides advisory and advocacy services across a broad range of international commercial disputes, in England and other jurisdictions, in relation to both court and arbitration proceedings. He has been recommended in the leading global, regional and UK directories since 2013 for commercial, international arbitration, construction and infrastructure, energy, oil & gas, commodities and shipping.

Mr. Davinder Singh, SC is the Chairman of the Board of Directors of Singapore International Arbitration Centre and the Executive Chairman of Davinder Singh Chambers LLC. His legal experience spans almost four decades and he was in the first batch of Senior Counsel appointed by the Singapore Supreme Court in 1997. He is the only litigator in Singapore to be ranked by Chambers & Partners as a "Star Individual" for eleven consecutive years, from 2011 to 2021, and was the first lawyer in Asia-Pacific to be inducted into the "Hall of Fame" at Benchmark Litigation's 2019 Asia-Pacific Awards.

Mr. Gary Born is the chair of the International Arbitration Practice Group at Wilmer Cutler Pickering Hale and Dorr LLP. He is widely regarded as the world's preeminent authority on international commercial arbitration and international litigation. He has been ranked for more than 20 years as one of the world's leading international arbitration advocates and the leading arbitration practitioner in London.

Prof. (Dr.) Stefan Kröll is an internationally renowned arbitrator with experience of more than 85 arbitrations in all areas of national and international business law, including the involvement of state parties. He combines his practice as an arbitrator with extensive academic activities as Professor for International Dispute Resolution at Bucerius Law School and Director of its Center for International Dispute Resolution.

Prof. (Dr.) S. Surya Prakash has over 30 years' experience in academics and worked as Lecturer, Principal, DNR College of Law, Bhimavaram, AP, Faculty Member of NUJS, Kolkata and Principal, Law College, Nanded, Maharashtra. He has previously served as the Vice Chancellor of Damodaram Sanjivayya National Law University, Visakhapatnam and as Founder Vice Chancellor of Maharashtra National Law University, Aurangabad (Maharashtra) and Professor of Law at NLIU, Bhopal. He is presently the Vice-Chancellor of the National Law Institute University, Bhopal.

PATRON'S NOTE

—Mr. Prashant Mishra

The VIth Volume of the Indian Arbitration Law Review ("IALR") is a result of the excellent work that the dedicated team behind the Journal has consistently been putting into it, right from its conception. I am truly proud to be associated with IALR and thus, I write this note hoping to express my sincere appreciation of the efforts of the entire team behind it.

The importance of scholarly literature and critique of developments in the fields of law cannot be understated, and Arbitration is no exception. Such engagement requires a dedicated platform where new ideas can be discussed, and I am happy to note that the IALR is one such platform and meets the standards required to do justice to such academic discussions. The Articles published in the IALR provide insightful analysis focusing particularly on the importance of transparency, accountability, and autonomy, to enrich the reader's understanding of arbitration law and practice. The current Volume is particularly remarkable as it brings out the intersection of arbitration laws with other fields and provides the readers with a multidisciplinary perspective. The scholarship is compelling and pertinent.

As a patron of IALR, I am thrilled to see the strides that the journal is making in the field of Arbitration Law and am committed to providing support and contributing to its continued growth and development in the future.

I would like to take this opportunity to congratulate the writers, editors and management of the journal on successfully putting out another outstanding issue. My special appreciation to the Core Committee for their able leadership. This volume is the fruition of the collective labour of students, practitioners, and academics and I could not be prouder as the patron.

EDITORIAL NOTE

—Siddharth Sisodia and Arushi Bhagotra

This year marks the sixth year of the Indian Arbitration Law Review's (**"IALR"**) continued scholarship and research in the arena of arbitration law in India. Ever since its inception, IALR has under the wing of Mr. Prashant Mishra, our Patron, aspired to promote excellence by publishing the most incisive submissions selected after a rigorous review process. We are, further, thankful to Mr. Udyan Arya Srivastava, Mr. Prabal De, Mr. Pranjal Agarwal, Mr. Syamantak Sen, and Ms. Aadya Bansal, the Editor-in-Chief of the previous volumes, and their colleagues, for making us reach where we are today.

Our editorial enterprise has been defined by the guidance and vision of some of the most esteemed legal luminaries in the Indian as well as international arbitration landscape, who continue to indebt us as our Board of Advisors. The invaluable inputs and direction offered by these internationally recognised jurists, practitioners, and academicians, from around the world have consistently benefitted us and our predecessors immensely. We are further particularly thankful to retired Hon'ble Justice A.K. Sikri, who found time amidst his busy schedule to enlighten us by agreeing to pen the Foreword for this volume.

Arbitration is one of the drivers of economic and legal prosperity in India and the previous year has been monumentally important in the journey of arbitration in India. The Supreme Court of India has in many judgments, most particularly in *Cox and Kings Ltd.* v. *SAP India Pvt. Ltd. & Anr.* and in the judgment passed by the seven-judge bench reconsidering the opinion in *N.N. Global Mercantile Pvt. Ltd.* v. *Indo Unique Flame Ltd.* reaffirmed India's commitment to a pro-arbitration stance. This trend and dynamism inherent to the ever-evolving field of arbitration in India makes it incumbent upon the practitioners and students of arbitration law to stay

up to date. We aspire to play whatever little role we can in enabling the said practitioners and students of arbitration law in this eternal vigilance.

In pursuance of this aspiration, this Volume features many articles that incisively analyse the various contemporary issues that mark the field of arbitration in India. The authors in ***Stamping for Approval: Critiquing the Legal Conundrum of Unstamped Arbitration Clauses in India*** critically analysed the practical effects of *N.N. Global Mercantile Pvt. Ltd*. v. *Indo Unique Flame Ltd. Notably*; the article was written in anticipation of the judgment delivered by the seven-judge bench seized with reconsidering the judgment in *N.N. Global Mercantile Pvt. Ltd*. v. *Indo Unique Flame Ltd*. The article is particularly insightful, as to the credit of the authors the article's opinion coincides with the broader direction taken by the Supreme Court eventually.

Discussing the intricacies of arbitration in the field of investor state disputes, the authors in ***A Granular Look into the Interpretative Inconsistency in Investor-State Dispute Settlement and Navigating the Capacity Conundrum: Unravelling State Succession's Impact on Investor-State Dispute Settlement*** evaluate important aspects of Investor State Dispute Settlement mechanism. The article on the Interpretative Inconsistency in Investor-State Dispute Settlement cogently underlines the jurisprudentially concerning the problem of Investment Tribunals reaching different interpretations in similar circumstances. In a spirited defence of the legitimacy of the Investor-State Dispute Settlement mechanism, the authors offer a novel solution to the aforesaid problem by suggesting that the adoption of a concrete standard of review and an interpretative methodology. The article on ***Navigating the Capacity Conundrum*** discusses the relatively unexplored aspect of State succession in investment arbitration. The article discusses the various theories on the subject and further employs a hypothetical case to illustrate its doctrinal point.

Recognising the interdisciplinary nature of arbitration law, the authors in ***Interplay of Insolvency Code and Arbitration Act – The Legal Conundrum Emanating from Indus Biotech*** and in ***Patents: The***

Arbitrability of Connected Commercial Obligations and Claims discuss arbitration law in conjunction with insolvency law in the former and arbitration law in conjunction with intellectual property law in the latter. The article on the Interplay of Insolvency Code and Arbitration Act attempts to structurally solve the legal conundrum present in the interdisciplinary field of arbitration and insolvency law. Amongst other solutions, the authors posit using the 'dressed-up' petition test for the proper and fair adjudication of an insolvency petition juxtaposed with a Section 8 application under the Arbitration and Conciliation Act, 1996. Further, the article on Patents presents the reader with a comparative analysis of how different jurisdictions treat the subject of arbitrability of patent disputes.

In the article on ***The Challenge in the Enforcement of Foreign Awards in Terms of Public Policy***, the author undertakes the task of presenting the reader with an evolution and unfolding of the term 'public policy' in the context of the enforcement of foreign arbitral awards in India. Finally, the authors in ***Effect of Non-Disclosure by Arbitrator under Section 12 of the Arbitration and Conciliation Act, 1996*** highlight that the impartiality and fairness of an arbitrator are the ground norms of the megastructure of Indian Arbitration guaranteed by Section 12 of the Act. The article further discusses the extant law in India concerning the law in UK, USA, Singapore and France, whilst also explaining the consequences of a failure to disclose on the part of an arbitrator in line with Schedule V.

We must, before concluding, sincerely thank the members of the Peer Review Board for their dedication and unrelenting hard work. Furthermore, the efforts of the students of the Editorial Board of the IALR, who have worked tirelessly to sift through the overwhelming number of submissions and finalise a collection of articles written by seasoned authors, well versed in arbitration law, must not go amiss. Most importantly, we must thank our readers, who make us what we are today. With this, we present to you the Sixth Volume of Indian Arbitration Law Review. We look forward to receiving feedback for this volume from our readers.

CONTENTS

EFFECT OF NON-DISCLOSURE BY ARBITRATOR UNDER SECTION 12 OF THE ARBITRATION AND CONCILIATION ACT, 1996

—Mr. Arvind Nayar

(Mr. Arvind Nayar is a Senior Advocate. He has been assisted by Mr. Shubham Pandey, Associate at Chambers of Mr. Arvind Nayar (shubhcl181@gmail.com), Ms. Mehreen Garg, Associate at Chambers of Mr. Arvind Nayar and Assistant Research Associate at the Insolvency Law Academy (mehreen@insolvencylawacademy.com) and their Research Assistant who worked with dedication and contributed valuably to the completion of this article)

ABSTRACT

Against the backdrop of accelerated economic growth and expanding spheres of commercial activity, arbitration has emerged as one of the most feasible alternatives to the conventional means of dispute resolution which is suited to the unique needs of the swiftly-moving society. The unencumbered operation of arbitral proceedings and the associated transactions, however, rest on the cornerstones of neutrality and impartiality. The 2015 amendment to the Arbitration and Conciliation Act, 1996, which constitutes the legislative backbone of arbitration in India, sought to firmly integrate these features within the Indian legal framework governing arbitration. It is the author's contention that these cornerstones now constitute an integral part of the Indian law governing arbitration. Through a careful scrutiny of the recent judicial precedents, the author establishes the significance accorded to arbitral neutrality within the Indian arbitral framework, highlighting the consequences of failure to ensure the same. The author has drawn upon foreign jurisdictions to conclusively analyse the credentials of the Indian judicial framework by making a comparative examination of such provisions in light of the legislative and judicial framework of the UK, USA, Singapore and France. The article has been concluded with an assessment of the adequacy of the aforementioned Act with respect to disclosure obligations, an exposition of the challenges that encumber the ability of the aggrieved parties to seek relief along with suggestions to alleviate their distress.

1. INTRODUCTION

With the advancement of global development, there arises a dire need to promote a flexible, cost-efficient and time-saving method of conflict settlement, as the traditional justice delivery system may prove to be rigorous, resource-intensive, and time-consuming. In response to the requirements of the new world, the Arbitration and Conciliation Act of 1996 ("**Act**") was enacted in order to create a speedier and more effective process for resolving disputes and to promote arbitration as an alternative conflict resolution mechanism in India.[1] Arbitration is a legal process where a dispute is settled with the help of a selected professional (arbitrator) and the decision reached is legally binding on the parties.[2] In today's time-constrained culture, arbitration stands as one of the most sought-after methods of resolving conflicts outside the courts, saving significant time and resources of the parties involved.

The nomination of the arbitrator is a crucial initial step in the arbitration procedure as they serve as the cornerstone of the entire arbitral proceeding. Freedom and neutrality are key to equitable and unbiased arbitration.[3] In order to ensure efficient arbitration, it is imperative that the appointed arbitrator remains neutral and unbiased towards both parties. As the 1996 Act failed to provide a mechanism to assess neutrality, the Arbitration and Conciliation (Amendment) Act, 2015 came into effect on 23 October, 2015 with an objective to elevate the standards of commercial arbitration across the country.[4]

2. ARBITRATORS' OBLIGATION TO MAINTAIN INDEPENDENCE AND TRANSPARENCY

With the 2015 amendment, fair assessment and impartiality of the arbitrators was encouraged. Section 12 of the Act primarily regulates the arbitrators' impartiality. The 2015 amendment to Section 12(1) of the Act requires a prospective arbitrator to provide a written disclosure of certain circumstances that could cast doubt on their independence or impartiality. This provision prohibits an arbitrator from conducting an arbitration hearing if they have a bias against one or more of the parties involved. As per the 6th

1. The Arbitration and Conciliation Act 1996 (26 of 1996).
2. 'What is Arbitration?' (World Intellectual Property Organisation) <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> accessed 9 January 2024.
3. Craig R Tractenberg, 'Nuts and Bolts of International Arbitration' (2019) 38(3) Franchise Law Journal 451, 468.
4. The Arbitration and Conciliation (Amendment) Act 2015 (3 of 2016).

Schedule, every arbitrator is obligated to disclose all material facts before the commencement of arbitral proceedings. This disclosure forms the basis for determining whether any such condition exists or whether the arbitrator falls within the scope of any of the grounds, as envisaged in the Schedules 5 and 6.

The arbitrator must assess whether a circumstance casts a doubt on their objectivity. Section 12(1)(a) requires the arbitrator to disclose any financial, business, professional, or other interests in the subject-matter of the dispute that would affect their neutrality, as well as any direct, indirect, past, or present affiliations with the parties.[5]

To achieve an acceptable and just resolution, it is crucially important for arbitrators to maintain objectivity throughout the proceedings. The arbitrator must disclose their relationship with the parties, counsels, or subject-matter of the dispute, if any, at the time of their appointment in order to demonstrate objectivity.

Section 12(5) of the Act further clarifies the grounds for challenging the appointment of an arbitrator and reads as follows:

12. Grounds for Challenge -

> *(5)"Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator".*[6]

If it is later discovered that the arbitrator has a connection to any of the parties listed in the Seventh Schedule of the Act, or if he has a personal stake in the outcome, he will be deemed ineligible, and the arbitration proceedings may be challenged under Section 12(5) of the Act.

A. Judicial precedents defining the Scope of Section 12 of the A & C Act and the obligations of the Arbitrator

1. HRD Corpn v GAIL (India) Ltd[7]

In this case, the Hon'ble Supreme Court held that if an arbitrator fell under the category of Schedule Seven, they would not be eligible to conduct

5. The Arbitration and Conciliation (Amendment) Act 2015 s 12(1)(a).
6. The Arbitration and Conciliation Act 1996 s 12(5).
7. *HRD Corpn v GAIL (India) Ltd* (2018) 12 SCC 471 : 2017 SCC OnLine SC 1024.

arbitration. Section 12(5), read with the Seventh Schedule, specifies that if an arbitrator falls under any of the rules and regulations referred to in the Seventh Schedule, they would be ineligible for selection as an arbitrator in that case. The arbitrator would have to be substituted by another arbitrator under Section 14(1) of the Act. Furthermore, if the disclosure falls under the Fifth Schedule, such an arbitrator can be questioned before the arbitral tribunal, in accordance with Section 13 of the Act.

2. *Ram Kumar v Shriram Transport Finance Co Ltd*[8]

In the *Ram Kumar,* the Hon'ble Delhi High Court crystalised the obligation of a proposed arbitrator to disclose circumstances that may give rise to justifiable doubts with regard to their independence and impartiality, as mentioned under Section 12(1) of the Act. The judgment mandated that the proposed arbitrator, before appointment, shall disclose circumstances that are likely to give rise to doubts in context to their independence and impartiality. These circumstances are to be determined as per Schedule V of the Act by the proposed arbitrator. If circumstances giving rise to justifiable doubts are found to exist, the proposed arbitrator shall make a disclosure as per Schedule VI of the Act. Failure to make the required disclosure under Section 12(1), despite the existence of such circumstances, may constitute grounds for setting aside the award under Section 34 of the Act.

3. *A K Builders v. Delhi State Industrial Infrastructure Development Corpn Ltd*[9]

The Delhi High Court, in this matter, held that any objection under Section 12(5) of the Act, addressing a person's ineligibility to serve as an arbitrator, could only be waived by an express, written agreement made after the disputes between parties had arisen. The Delhi High Court emphasised that a person who was disqualified to serve as an arbitrator would also be unable to name an arbitrator.

8. *Ram Kumar v Shriram Transport Finance Co Ltd* 2022 SCC OnLine Del 4268 : (2023) 298 DLT 515.
9. *A K Builders v Delhi State Industrial Infrastructure Development Corpn Ltd* 2022 SCC OnLine Del 627.

4. C & C Constructions Ltd v Ircon International Ltd[10]

In this case, the Presiding Arbitrator failed to disclose his relationship with the Respondent and his appointment as an Independent External Monitor (IEM) in the initial disclosure. This information surfaced after the Petitioner's hearing to contest the appointment of the Arbitral Tribunal, raising concerns about the Presiding Arbitrator's objectivity. The Court held that the Petitioner's nominee for an arbitrator lost the right to continue serving in that capacity, and their separate terms as the arbitrator and as the Presiding Arbitrator ended. The court ordered that prior to proceeding further with the reference, the arbitrator must make the disclosure required under Section 12 of the Act.

5. Lanco-Rani (JV) v NHAI Ltd[11]

In this case, Mr. Basant Kumar was selected as an arbitrator by the National Highway Authority of India (NHAI) on March 30, 2005. Legal proceedings commenced on July 9, 2005, and the Award was announced on January 5, 2008, after 19 sittings. However, under Section 12 of the Act, it was not disclosed that Mr. Basant Kumar had become NHAI's technical advisor during this time, violating the law. The Court ruled that, as per Section 12(2), an arbitrator must promptly and in writing disclose circumstances mentioned in subsection (1) unless parties were already informed. As of October 23, 2015, Section 12(1) required disclosing circumstances likely to give rise to doubts about independence or impartiality. The Court held that the challenged Award dated January 5, 2008, could not be upheld in accordance with the law.

6. JV Engineering Associate v General Manager[12]

In this case, an employee of the respondent railways, covered by Clause 1 of the Seventh Schedule of the 1996 Act, served as the arbitrator. The person who selected the arbitrator was also protected by Section 12(5) in conjunction with the Seventh Schedule. However, the arbitrator violated Section 12(3) of the 1996 Act by failing to make the mandatory declaration. The contested award, which was given by an arbitrator ineligible to arbitrate, according to the Court, ought to have been revoked because there was no express written waiver as required by the proviso to Section 12(5).

10. *C & C Constructions Ltd v Ircon International Ltd* 2021 SCC OnLine Del 3148.
11. *Lanco-Rani (JV) v NHAI Ltd* 2016 SCC OnLine Del 6267.
12. *JV Engineering Associate v General Manager* 2020 SCC OnLine Mad 4829.

Analysis: The analysed judicial precedents collectively underscore the critical role of Section 12 in shaping the dynamics of arbitrator appointments and ensuring the fairness and transparency of the arbitration process. The consistent judicial emphasis on mandatory and timely disclosure requirements signifies a well-established legal landscape rather than a recent development. These decisions collectively underscore the importance of not only procedural compliance but also the substantive impact of non-disclosure on the legitimacy of arbitral awards. This evolving jurisprudence reflects a broader commitment to building trust in the arbitration process and upholding the validity of arbitral awards in India.

3. ARBITRATOR'S DUTY OF DISCLOSURE AND THE MECHANISM EMPLOYED BY FOREIGN JURISDICTIONS

According to international standards and practices, an arbitrator has a responsibility to disclose any fact or circumstance that, in the opinion of a reasonable third party, would give rise to reasonable doubts about their impartiality or independence. This disclosure is a crucial component in arbitration.[13] If a rational third party thinks it is likely that the arbitrator will decide the case based on criteria other than the merits of the case, justified doubts arise. This obligation applies before the arbitrator accepts an appointment to serve as an arbitrator and persists if new information or circumstances arise throughout the course of the arbitration proceedings. The obligation to disclose is anchored in the arbitrator's paramount duty to maintain objectivity and independence from the parties throughout the arbitration. Analysts have repeatedly emphasised the connection between arbitrator disclosure and the arbitrator's obligation to uphold independence and impartiality towards the parties. Since the arbitrator has easier access to the majority of the material necessary to evaluate their objectivity or independence, the responsibility lies with them to disclose such material facts.

A. Mechanism Employed in Foreign Jurisdictions

The duty of an Arbitrator to disclose has been dealt with differently in different jurisdictions, in this scenario, the instance of United Kingdom, United States of America, Singapore and France have been expounded.

13. Hiarlouski Vitali, 'Arbitrator's Impartiality and Independence' (Jus Mundi, 12 May 2023) <https://jusmundi.com/en/document/publication/en-arbitrators-impartiality-and-independence> accessed 9 January 2024.

1. United Kingdom

The Arbitration Act of 1996 in the United Kingdom[14] offers a regulatory framework for arbitration. Arbitrators have a responsibility to disclose any facts that can give rise to legitimate concerns about their independence or impartiality. References are frequently made to the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration.[15] If a party feels that the duty of disclosure has been violated, they may dispute the arbitrators; this issue may be handled in court or by the arbitral institution.

Judicial Precedents

A. Fiona Trust and Holding Corpn v Privalov[16]

In this case, the Court of Appeal of England and Wales addressed the issue of an arbitrator's duty to disclose potential conflicts of interest. The court held that, the duty of arbitrators to disclose circumstances that might give rise to justifiable doubts about their impartiality was an essential aspect of the integrity of the arbitral process. The decision emphasised the importance of maintaining the independence and impartiality of arbitrators, even when they were appointed by the consent of the parties. The case set a precedent for a robust duty of disclosure in the English law, highlighting the significance of arbitrators' ethical conduct.

B. C v D[17]

In this case, the High Court of England and Wales considered a challenge to an arbitrator's impartiality based on alleged non-disclosure. The court held that the arbitrator had failed to disclose relevant information about his involvement in a previous arbitration involving one of the parties. The failure to make this disclosure amounted to a breach of the arbitrator's duty to provide full and frank disclosure. As a result, the court set aside the arbitral award, highlighting the seriousness with which English courts view an arbitrator's duty to disclose any potential conflicts of interest.

14. The Arbitration Act 1996.
15. IBA Guidelines on Conflicts of Interest in International Arbitration adopted by Resolution of the IBA Council (23 October 2014).
16. *Fiona Trust and Holding Corpn v Privalov* 2007 Bus LR 686 : 2007 EWCA Civ 20.
17. *C v D* (2007) EWHC 1541 (Comm).

C. Halliburton Co v Chubb Bermuda Insurance Ltd[18]

This recent case was a challenge to remove the chair of a Bermuda Form ad hoc arbitration tribunal for apparent bias as a result of his failure to disclose his subsequent appointment to the tribunal by one of the parties in a separate arbitration initiated by a third party. That same arbitration resulted from the same Deepwater Horizon event in the Gulf of Mexico in 2010 and dealt with comparable issues. Although the Supreme Court denied the appeal and declined to remove the arbitrator, it welcomed the confirmation of the test for apparent bias in international arbitration, holding that there is a legal need to disclose facts that could give rise to the appearance of prejudice.

Analysis: In the United Kingdom, the regulatory framework for arbitration is primarily governed by the Arbitration Act of 1996. The UK places significant emphasis on arbitrators' duty to disclose any facts that may raise legitimate concerns about their independence or impartiality. Judicial precedents, such as *Fiona Trust*[19] and *C v D*,[20] have set a robust precedent for a duty of disclosure in the English law, highlighting the importance of maintaining the integrity of the arbitral process. The UK acknowledges the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration, further underlining the commitment to ethical conduct by arbitrators. In contrast, India, with its 2015 amendment to the Arbitration and Conciliation Act, has introduced explicit requirements for prospective arbitrators to provide written disclosure of circumstances that could cast doubt on their independence or impartiality.

Sections 12(1)(a) and 12(5) outline specific grounds for disclosure and challenge, respectively, emphasising financial, business, professional interests, and ineligibility based on relationships with parties or counsel. Judicial precedents in India, such as *HRD Corpn v GAIL (India) Ltd*[21] and *Ram Kumar v Shriram Transport Finance Co Ltd*[22], highlight the judiciary's commitment to upholding fairness and transparency in the arbitration process through stringent scrutiny of arbitrator disclosures. Both jurisdictions share a common commitment to maintaining the integrity of arbitration through robust disclosure requirements, reflecting a global trend

18. *Halliburton Co v Chubb Bermuda Insurance Ltd* (2020) 3 WLR 1474 : 2020 UKSC 48.
19. Fiona Trust (n 16).
20. *C v D* (n 17).
21. *HRD Corpn* (n 7).
22. *Ram Kumar* (n 8).

toward enhancing trust and accountability in alternative dispute resolution processes.

2. United States of America

In the United States, the duty of disclosure for arbitrators is typically governed by state and federal laws. The American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR) also have their own rules and guidelines.[23] Arbitrators are required to disclose any potential conflicts of interest, prior associations with the parties or their counsel, and other circumstances that could cast doubt on their impartiality or independence. Challenges to arbitrators based on a failure to disclose can be resolved in court or through the arbitration institution's procedures.

Judicial Precedents

A. Hall Street Associates, L.L.C. v Mattel, Inc[24]

The issue in this case was whether the parties to an arbitration agreement might contractually expand the grounds for judicial review of an arbitral verdict beyond those permitted under the Federal Arbitration Act (FAA).[25] Although the case was not primarily about an arbitrator's obligation of disclosure, its consequences for the arbitration process were substantial. The United States Supreme Court ruled that the FAA's grounds for vacating an arbitral award were exclusive, and that parties could not contractually enlarge those grounds. While not directly linked to disclosure, this decision emphasised the importance of arbitration finality and how challenges related to an arbitrator's failure to disclose must be limited to the statutory reasons specified in the Federal Arbitration Act (FAA).

B. Commonwealth Coatings Corpn v Continental Casualty Co[26]

In this case, the U.S. Supreme Court addressed the issue of an arbitrator's duty to disclose potential conflicts of interest. The Court held that arbitrators had a "duty to disclose to the parties any dealings that might create an impression of possible bias." The decision emphasized the importance

23. International Disputes Resolution Procedures, 1 March 2021.
24. *Hall Street Associates, L.L.C. v Mattel, Inc* 2008 SCC OnLine US SC 20 : 552 US 576 (2008).
25. Federal Arbitration Act 1925.
26. *Commonwealth Coatings Corpn v Continental Casualty Co* 1968 SCC OnLine US SC 215 : 21 L Ed 2d 301 : 393 US 145 (1968).

of an arbitrator's impartiality and the duty to avoid any relationships or circumstances that might lead to a perception of bias. This case has been cited as a foundational precedent in the United States for an arbitrator's duty of disclosure, underscoring the need for transparency and ethical conduct in arbitration.

*Analysis***:** In comparing the arbitrator disclosure practices in the U.S. and India, both prioritise transparency and ethical conduct. The U.S. offers flexibility, allowing parties to shape their own rules within statutory bounds, as seen in key precedents like *Commonwealth Coatings Corpn v Continental Casualty Co*[27] and *Hall Street Associates, L.L.C v Mattel, Inc*.[28] In India, under the Arbitration and Conciliation Act of 1996, a prescriptive approach mandates rigorous written disclosures by arbitrators, with specific challenge grounds outlined. Judicial decisions, like *HRD Corpn v GAIL (India) Ltd*[29] and *Ram Kumar v Shriram Transport Finance Co Ltd*[30], underscore the judiciary's commitment to scrutiny. Despite differences, both jurisdictions prioritise maintaining trust and integrity in alternative dispute resolution, aligning with global trends in robust arbitrator disclosure regulations.

3. Singapore

Singapore has become a hub for international arbitration, and its legal framework is based on the International Arbitration Act. Arbitrators in Singapore are required to disclose any potential conflicts of interest and circumstances that may affect their impartiality or independence. The Singapore International Arbitration Centre (SIAC) has its own rules and guidelines.[31] Challenges to arbitrators can be brought to the SIAC, and its Court of Arbitration has the authority to rule on such challenges.

27. ibid.
28. *Hall Street* (n 24).
29. *HRD Corpn* (n 7).
30. *Ram Kumar* (n 8).
31. Arbitration Rules of the Singapore International Arbitration Centre 6th edn ('SIAC Rules') (1 August 2016).

Judicial Precedents

A. PT Prima International Development v Kempinski Hotels SA[32]

In this case, the Singapore High Court considered a challenge to an arbitral award based on the alleged lack of impartiality of the tribunal. The challenge was related to the failure of the arbitrator to disclose a potential conflict of interest. The court ruled that the arbitrator's failure to disclose a prior relationship with one of the parties amounted to a breach of the arbitrator's duty to provide full and frank disclosure. As a result, the court set aside the arbitral award. This case underscored the importance of an arbitrator's duty to disclose potential conflicts in Singapore's arbitration jurisprudence.

B. First Link Investments Corpn Ltd v GT Payment Pte Ltd[33]

This case involved a challenge to an arbitral award on the grounds of apparent bias due to a failure to disclose potential conflicts of interest. The Singapore High Court ruled that the arbitrator had not provided sufficient information about a prior relationship with a law firm involved in the arbitration, leading to an appearance of bias. The court set aside the arbitral award, emphasising the importance of a high standard of disclosure to maintain the integrity of the arbitration process in Singapore.

Analysis: In Singapore, a burgeoning hub for international arbitration, the legal framework, anchored by the International Arbitration Act, mandates arbitrators to disclose potential conflicts of interest and factors that might compromise their impartiality or independence. The Singapore International Arbitration Centre (SIAC), as a leading institution, has established its own rules and guidelines, with its Court of Arbitration possessing authority to address challenges to arbitrators. Judicial precedents, such as *PT Prima International Development v Kempinski Hotels SA*[34] and *First Link Investments v GT Payment*[35] underscore the critical importance of arbitrators' duty to disclose potential conflicts and maintain the integrity of the arbitration process in Singapore. In *PT*

32. *PT Prima International Development v Kempinski Hotels SA* (2012) 4 SLR 98 : 2012 SGCA 35.
33. *First Link Investments Corpn Ltd v GT Payment Pte Ltd* (2014) SGHCR 12, Suit No 915 of 2013.
34. *PT Prima* (n 32).
35. *First Link* (n 33).

Prima, the court set aside an arbitral award due to the arbitrator's failure to disclose a prior relationship, highlighting the significance of full and frank disclosure. Comparatively, India, through its Arbitration and Conciliation Act of 1996, amended in 2015, shares a commitment to robust arbitrator disclosure. However, Singapore's emphasis on maintaining its status as an international arbitration hub is reflected in the stringent standards set by SIAC, demonstrating the jurisdiction's proactive approach to upholding the highest ethical standards in the arbitration landscape.

4. France

In France, international arbitration is governed by the French Code of Civil Procedure. The Code provides that arbitrators must disclose any circumstances that could affect their independence or impartiality. The International Chamber of Commerce (ICC), headquartered in Paris, is a widely used arbitration institution. Challenges to arbitrators can be submitted to the French courts, and the court has the power to decide on recusal.

Judicial Precedents

A. Samzun v De Wee[36]

In this French domestic arbitration case, the Cour de cassation, the highest court in the French judicial system, addressed the issue of an arbitrator's duty to disclose. The case involved an arbitrator's failure to disclose certain facts and relationships that could have given rise to doubts about his impartiality and independence. The Cour de cassation held that an arbitrator's duty of disclosure is a fundamental principle of French arbitration law and that the failure to disclose can lead to the annulment of the arbitral award. This decision underscored the importance of maintaining the integrity of the arbitration process in France by ensuring full transparency in arbitrator appointments.

*Analysis***:** In France, international arbitration, governed by the French Code of Civil Procedure, mandates arbitrators to disclose potential biases, with non-compliance risking annulment of arbitral awards, as seen in the *Samzun v De Wee*.[37] The International Chamber of Commerce (ICC) in Paris fortifies France's global arbitration standing, and challenges to arbitrators

36. *Samzun v De Wee* Cour de cassation, France, Decision No. 07-44.124 (2 July 2008).
37. ibid.

are adjudicated in French courts. In India, the Arbitration and Conciliation Act of 1996, amended in 2015, aligns with France's transparency commitment, requiring explicit written disclosure by arbitrators. Judicial precedents, such as *HRD Corporation v. GAIL*,[38] illustrate the judiciary's meticulous scrutiny of arbitrator disclosures. While both nations prioritise transparency, France leans towards annulment consequences for non-disclosure, whereas India opts for a procedural challenge path under Section 12 of the Act, showcasing nuanced approaches within the shared commitment to integrity and trust in arbitration.

4. ASSESSMENT

As indicated in Section 12(1) of the Act, the preceding opinion of the Supreme Court and several High Courts compel the proposed arbitrator to reveal information that is likely to create reasonable suspicions about their independence and impartiality as an arbitrator before being appointed. By referring to Schedule 5 of the Act,[39] the prospective arbitrator must determine whether these conditions exist. If circumstances give rise to reasonable suspicions, the proposed arbitrator must disclose them in line with Schedule 6 in Section 12(1) of the Act.

If, despite the existence of circumstances giving rise to reasonable doubts, a disclosure as required by Section 12(1) of the Act is not made, this could constitute grounds for setting aside the award[40] under Section 34 of the Act. Parties and potential arbitrators must pay special attention to compliance of Section 12(1) from the commencement of arbitral proceedings, as failure to disclose invalidates both the arbitral processes and the eventual award.

The main challenge that an affected party encounters is that the legislature has not specifically stated that the failure to provide material disclosure needed by Section 12(1) of the Act will result in the arbitrator's mandate being automatically terminated. As a result, the affected party will have to wait for the award to be issued before challenging it under Section 34. Therefore, a clear mechanism must be established to be followed if the proposed arbitrator fails to fulfil the mandate as anticipated in Section 12(1) of the Act, 1996.

38. *HRD Corpn* (n 7).
39. The Arbitration and Conciliation Act 1996 sch 5.
40. The Arbitration and Conciliation Act 1996 s 34.

THE CHALLENGE IN THE ENFORCEMENT OF FOREIGN AWARDS IN TERMS OF PUBLIC POLICY

—Sumes Dewan

(Mr. Sumes Dewan is the Managing Partner of Lex Favios, New Delhi)

ABSTRACT

This paper critically analyses the challenges inherent in the enforcement of foreign arbitral awards in India, with a particular focus on the complex exception of public policy. Governed by the Arbitration and Conciliation Act, 1996, Sections 36 and 48(2) delineate grounds for challenging arbitral awards, with public policy serving as a significant parameter. The 2015 amendment sought to bring Indian arbitration practices in line with international standards, explicitly detailing grounds for setting aside awards on public policy, including fraud, contravention of fundamental policy, and conflict with morality and justice. However, the judicial landscape has witnessed nuanced shifts over time. The landmark Renusagar case initially established a pro-arbitration stance, limiting the grounds for refusing enforcement to contraventions of fundamental policy, interests of India, or justice and morality. Subsequently, the SAW Pipes case broadened the scope by introducing the contentious concept of Arbitral Awards being reviewed on their merits, leading to increased judicial intervention. Recent decisions, including Vijay Karia v. Prysmian Cavi E Sistemi and Cruz City 1 Mauritius Holdings v. Unitech Limited, underscored the fact that a breach must be so fundamentally uncompromisable that it qualifies as a violation of public policy. The paper highlights the need for a delicate balance required between judicial intervention and preserving the autonomy of arbitral awards, intending to align Indian practices with international standards, such as those observed in jurisdictions like Hong Kong and Singapore.

1. INTRODUCTION

This paper attempts to analyse the challenges looming around the dynamic nature of the term *Public Policy* concerning the enforcement of Foreign Arbitral Awards in India.

The process of Arbitration is a prelude to Litigation, a method by which the parties strive to decide the conflict, so arisen, by following a rather flexible and efficient process. The process of arbitration concludes with the Arbitral Tribunal passing an arbitral award, which becomes a decree and can be executed the same way as it was passed by the Court. However, the enforcement of such an award can be challenged under the provisions of the Arbitration and Conciliation Act, 1996 (Hereinafter *Act of 1996).* The Act governs, both Domestic Awards and international awards which can be enforced or challenged in India.

Section 36 and Section 48(2) of the Act of 1996 provide for various grounds under which an arbitral award can be challenged. One such ground under which the enforcement of an award can be stayed is the ground of Public Policy.

The phrase Public Policy is dynamic and ever-evolving, as the concept of 'Public Policy' remains blurry in both international law and domestic law. The broad interpretation given to this term has opened floodgates for parties to invoke it as a ground for refusing and setting aside the Foreign Award.

Through this article, an attempt has been made to analyse the evolution of the phrase Public Policy through various precedents set by Courts in India, and the evolution of law, suiting the needs of businesses in India, especially foreign investors in India.

2. PUBLIC POLICY AND THE ENFORCEMENT OF ARBITRAL AWARDS

As per Section 44 of the Act of 1996, a Foreign Award means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, that are considered as commercial under the law in force in India:

a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

b) In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette.[1]

A difference lies between the recognition and enforcement of awards, wherein an award may be recognised, without being enforced; but if it is enforced then it is necessarily recognised. Recognition alone may be asked for as a shield against re-agitation of issues with which the award deals. Where a court is asked to enforce an award, it must recognise not only the legal effect of the award but must use legal sanctions to ensure that it is carried out.[2]

For an award to have an immediate effect on the rights of the parties, it must be enforceable by the Indian courts. Section 48(2), of the Act of 1996 lays down the conditions upon which the enforcement of a foreign arbitral award may be refused if the Court finds-

a) The subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

b) The enforcement of the award would be contrary to the Public Policy of India,

and that an award is in conflict with the Public Policy 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 of the fundamental policy of Indian law; or

iii. It is in conflict with the most basic notions of morality or justice.[3]

To determine contravention to the fundamental policy of India, the award must not be reviewed on its merits.

The 2015 amendment of the Arbitration and Conciliation Act, 1996 clarified that an award can be set aside on the ground that it is against the Public Policy of India if –

(i) the award is vitiated by fraud or corruption;

1. The Arbitration and Conciliation Act 1996 (26 of 1996) s 44.
2. *Brace Transport Corpn of Monrovia v Orient Middle East Lines Ltd* 1995 Supp (2) SCC 280 [13].
3. The Arbitration and Conciliation Act 1996 s 48(2).

(ii) it is in contravention to the fundamental policy of Indian law;

(iii) it conflicts with basic notions of morality and justice.

Further, it was clarified that the grounds of "patent illegality" to challenge an award cannot be taken in international arbitration, and the same will be available only in domestic arbitrations.

The rationale behind the doctrine of Public Policy is that even though the parties have the autonomy to make a contract and can refer the dispute to arbitration, the autonomy of the parties and the arbitral award given by the tribunal can be set aside if it is in opposition to the public interest.

3. THE CONUNDRUM RELATED TO PUBLIC POLICY

The Alternative Dispute Resolution method of Arbitration is to keep away from the Courts, however, the courts have taken it upon themselves to determine and interpret the lacuna in law that exists, as to what can and what cannot construe Public Policy. The looming issue arises from the lack of a workable definition of Public Policy in both international and domestic law, and the gap is being bridged by precedents set out by courts.

The Apex Court has time and again passed favourable judgments, to make India the preferred destination for arbitration, which is a testament that the concept and challenges presented by Public Policy can only be understood through analysing various judgments.

The decision of the Supreme Court in *Renusagar Power Co Ltd v General Electric Co*,[4] which is considered to be the first landmark decision in the Arbitration space brought a pro-arbitration stance in India, in tandem with International opinion, as the Hon'ble Supreme Court tried to strike a balance between the application of Public Policy and domestic laws concerning Foreign Arbitral Awards. The Hon'ble Court propounded a narrow approach for defining Public Policy and held that such an enforcement would only be refused if the award is in contravention to (a) the Fundamental policy of Indian Law, (b) the Interests of India, or; (c) Justice or morality. Further, the Apex Court, held that a distinction has to be drawn when the tenants of Public Policy are applied in a matter governed by domestic law and a matter involving a "Conflict of laws".

4. *Renusagar Power Co Ltd v General Electric Co* 1994 Supp (1) SCC 644.

The Apex Court's approach in the case left many to believe, that India is moving towards a pro-arbitration regime, where courts are refusing to review arbitral awards on merit, at the stage of enforcement. However, the opinion formed in *Renusagar*[5] was then changed by the dictum in the *Oil & Natural Gas Corpn Ltd v SAW Pipes Ltd*.[6]

The Apex Court was met at a crossroads, to decide whether the concept of "*Patent Illegality"* under Section 34 of the Act of 1996 could be applied to refuse enforcement of a Foreign Arbitral Award. The judgment resulted in the addition of the principle of *"Patent Illegality*" as a ground for non-enforcement of an arbitral award which blurred the distinction between the ambit of domestic and international arbitrations in terms of public policy. The Court defined patent illegality by stating *"Illegality must go to the root of the matter and if the illegality is trivial it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."*[7]

The judgment in *SAW Pipes Ltd*[8] was contradictory to what was held in *Renusagar,*[9] as a broadened interpretation was given to the phrase Public Policy, resulting in arbitral awards being reviewed on their merits. While *Renusagar*[10] promulgated three tenets to the phrase of Public Policy, the decision in *SAW Pipes Ltd,*[11] went further ahead to add a fourth tenet which struck at the root of the matter.

The decision in *SAW Pipes Ltd,*[12] instead of filling the lacuna in law, resulted in subduing the very core of arbitration as it opened floodgates for the intervention of the Courts in Arbitration proceedings. The Hon'ble Court further in *Phulchand Exports Ltd v O.O.O. Patriot*[13] held that, there is no logical distinction between foreign and Domestic awards to hold different standards of Public Policy for them and that the interpretation held under the *SAW Pipes Ltd*[14] case would also apply to Foreign Awards as well.

5. ibid.
6. *Oil & Natural Gas Corpn Ltd v Saw Pipes Ltd* (2003) 5 SCC 705.
7. *Oil & Natural Gas* (n 6) para 31.
8. *Oil & Natural Gas* (n 6).
9. *Renusagar Power* (n 4).
10. *Renusagar Power* (n 4).
11. *Oil & Natural Gas* (n 6).
12. *Oil & Natural Gas* (n 6).
13. *Phulchand Exports Ltd v O.O.O. Patriot* (2011) 10 SCC 300.
14. *Oil & Natural Gas* (n 6).

However, it was in *Shri Lal Mahal Ltd v Progetto Grano Spa* [15] that the Hon'ble Supreme Court overruled its decision in *Phulchand*[16] and held that the "Patent illegality" would not be a ground for refusal of enforcement of a Foreign Award under Section 48 of the Act of 1996, and such ground would only be limited within the purview of Section 34 of the Act of 1996.

While, the Arbitration Regime in India met with criticism for its approach towards the refusal of Foreign Arbitral Awards, the Division Bench in *Associate Builders v DDA,*[17] addressed the challenges faced in the enforcement of foreign arbitral awards in a more structured way. The Supreme Court laid down three juristic principles for testing the awards against the backdrop of the Fundamental Policy of India and that an award would only be set aside if it shocks the conscience of the court. The three juristic principles included *(a) Judicial Approach, (b) Natural Justice, and (c) Absence of Perversity or irrationality.*

It was held that if an arbitrator reasonably interprets a contractual term, it cannot be used as a basis for setting aside the award and that the interpretation of contractual terms is primarily the arbitrator's responsibility. Judicial intervention is only warranted if the arbitrator's interpretation is so unreasonable that no fair or reasonable person could have made it.

Though the dictum in *Associate Builders*[18] interpreted the term Public Policy broadly, however, the judgment was passed with a regressive approach as the Apex Court, interpreted Sections 48 and 34 of the Act of 1996 conjointly, and failed to establish a distinction between the two provisions, which though were separate as the former covered the scope of Foreign Awards and latter Domestic Awards.

It was the 246th Law Commission Report,[19] that suggested reinstatement of the dictum followed in *Renusagar,*[20] and consequently, the Commission Report titled "Public Policy- Developments Post Report No. 246,"[21] criticised the broad approach of the judiciary and advised them to interpret the Act of 1996 in line with international practices to encourage the

15. *Shri Lal Mahal Ltd v Progetto Grano Spa* (2014) 2 SCC 433.
16. *Phulchand Exports* (n 13).
17. *Associate Builders v DDA* (2015) 3 SCC 49.
18. ibid.
19. Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Report No 246, 2014).
20. *Renusagar Power* (n 4).
21. Law Commission of India Report (n 19).

possibility of international arbitration in India. The Legislature then passed the 2015 Amendment Act[22] incorporating changes to the law, and that contravention of the fundamental policy of Indian law would not warrant a review on merits.

The 2015 amendment,[23] added Explanation 2 to Section 48, stating "*Explanation 2: For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."*[24]

Recently, the Apex Court while explaining whether a breach of Foreign Exchange Management Act, 1999 (FEMA) provisions would result in setting aside an arbitral award, in the recent *Vijay Karia v Prysmian Cavi E Sistemi SRL*[25] highlighted that a violation of the fundamental policy of Indian law must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised. These would be the core values of India's Public Policy as a nation, reflected not only in statutes but also time-honoured, hallowed principles that are followed by the Courts. The Hon'ble Supreme Court held that a breach under Foreign Exchange Management Act (FEMA)[26] can never be held to be a violation of the fundamental policy of Indian law, as it is a curable breach.

The Court noted that legislative policy dictated that, insofar as Foreign Awards were concerned, parties could only have one substantive attempt at challenging such enforcement at the time of putting forward their objections under Section 48 of the Act of 1996.[27] If such an attempt failed, the Supreme Court ought to be very cautious in interfering with such orders enforcing foreign awards, especially in terms of the limited ambit of Article 136 of the Constitution of India.[28]

Similarly, an award was challenged for being violative of FEMA[29] by being contrary to public policy in *Cruz City 1 Mauritius Holdings v Unitech Ltd*[30]

22. The Arbitration and Conciliation (Amendment) Act 2015 (3 of 2016) s 48.
23. ibid.
24. ibid.
25. *Vijay Karia v Prysmian Cavi E Sistemi SRL* (2020) 11 SCC 1.
26. The Foreign Exchange Management Act 1999 (42 of 1999).
27. The Arbitration and Conciliation Act 1996 s 48.
28. The Constitution of India 1950 art 136.
29. The Foreign Exchange Management Act,1999.
30. *Cruz City 1 Mauritius Holdings v Unitech Ltd.* 2017 SCC OnLine Del 7810.

and the High Court of Delhi addressing the issue held that the width of defence of Public Policy is narrow and cannot be equated to offending any particular provision or statute and contravention of a provision of law is insufficient to invoke the defence of public policy when it comes to the enforcement of a Foreign Award. The expression fundamental Policy of Indian law refers to the principles and the legislative policy on which Indian Statutes and laws are founded.

Explaining the expression "fundamental policy", under Public Policy the Court held that it connotes the basic and substantial rationale, values, and principles that form the bedrock of laws in our country.

4. CONCLUSION AND SUGGESTIONS

Public Policy is considered to be an unruly horse as no workable definition has been promulgated. The Courts, to tame the horse have time and again widened the principle to understand if an award is unjust. Although the judiciary faces criticism for its increased oversight and interference in reviewing cases, which strikes at the core of the process of Arbitration, the judicial interpretation has offered sufficient guidance to understand the ever-evolving concept of Public Policy.

Despite several challenges over the years, the threshold laid down in the *Renusagar case*[31] is still considered the yardstick for understanding the ambit of Public Policy under Section 48 (2) of the Act of 1996. It is pertinent to mention that any violation should be of the most fundamental values, which serve as the foundation for the laws of the Country, and not merely a statutory violation. Further, issues revolving around curable defects such as FEMA[32] violations do not strike at the conscience of the Court, and thus cannot be granted umbrella protection under the guise of Public Policy.

Countries like Hong Kong and Singapore, at present, are the most preferable seats for Arbitration in the Asian region. In Singapore, a rather narrow interpretation has been provided for Public Policy and the law enumerates that enforcement of an arbitral award can only be challenged if it shocks the conscience or is against the notion of morality to set aside an arbitral award.[33]

31. *Renusagar Power* (n 4).
32. The Foreign Exchange Management Act 1999.
33. John K Arthur, '*Setting Aside or Non-Enforcement of Arbitral Awards in International Arbitration on the Public Policy Ground— A Regional Perspective*' (2017) Aus ADR Bullet 115.

The challenges presented by Public Policy under Section 48 of the Arbitration and Conciliation Act 1996 are yet to be definitively resolved. However, considering fundamental legal and moral principles that are recognised in all civilised countries, the approach of the legislature and judiciary can help to plan a unified framework for deciding on the enforcement of foreign arbitral awards.

Moving forward, a restrictive approach should be taken by the enforcing Courts while deciding challenges to Arbitral Awards under Section 48(2)(b) of the Act of 1996, as Public Policy remains the best last resort for losing party to delay or even completely absolve them of their liabilities.

PATENTS: THE ARBITRABILITY OF CONNECTED COMMERCIAL OBLIGATIONS AND CLAIMS

—Sharan Kukreja and Rachita Shah

(Mr. Sharan Kukreja is a Partner {Dispute Resolution} at Cyril Amarchand Mangaldas and is based out of the Bengaluru office of the firm. Ms. Rachita Shah is an Associate at Cyril Amarchand Mangaldas)

ABSTRACT

Specific issues of arbitrability concerning patents forming the subject-matter of an underlying commercial contract are yet to be fully explored by the Indian Judiciary. While issues which directly claim invalidity of patents are not arbitrable, contentions arising out of breach of contractual obligations concerning the underlying patent demand a different approach. Such contentions may include damages for contractual breaches on the premise of infringement, reverse engineering or replication of the patent, licensing of patents or their validity. The article analyses the jurisprudence around arbitrability of patents and connected commercial claims in other jurisdictions and provides a holistic comparative overview.

1. INTRODUCTION

Party autonomy is integral to arbitration as a dispute resolution mechanism. The jurisdiction of the arbitrator follows from the consent of the parties to refer disputes to it. As a result, the scope of the arbitrator's jurisdiction is strictly limited by the agreement between the parties. However, in arbitrations involving patents, apart from the nature of the agreement between the parties, there are other considerations that are intertwined which, at times, may cause ambiguity on how to proceed in an arbitration involving patents.

A patent right, like all intellectual property rights, is a right against the world i.e. right in *rem*. The nature of patent rights and whether they are arbitrable have often come into conflict. The Indian jurisprudence on

arbitrability of patents is at a nascent stage. However, progress has been made to determine arbitrability of connected commercial claims concerning underlying intellectual property rights in general.

Gary Born advocated that "*In principle, there is no reason that issues of patent…validity cannot be resolved by arbitration – but only insofar as the parties to the arbitration are concerned. An arbitral tribunal obviously cannot affect registrations or invalidate a patent generally, thereby affecting the rights of the public or third parties. There is no reason, however, that an arbitral tribunal cannot apply rules of intellectual property law in other contexts to decide claims between contracting parties that a particular intellectual property right is invalid or does not exist.*"[1]

Against this background, the authors have attempted to provide a brief snapshot of the manner in which Indian courts and international jurisprudence have dealt with the conflicting character of arbitration and patent rights.

2. DISPUTES THAT MAY ARISE

The kind of disputes that can arise from patent rights are wide-ranging. For instance, a dispute may arise from a licence agreement between parties to use or exploit or improve the technology which is protected by a patent. Under licence agreements, some of the most common disputes relate to whether royalties are payable, the extent of the licensed rights, the ownership of the improved patented technology, circumstances under which a licence can be terminated, damages for breach of the licence agreement, replication of the patent and reverse engineering.[2] In an acquisition agreement, wherein the seller transfers intellectual property to the buyer, disputes may arise out of the seller warranties provided against the transfer.[3] In the case of employment agreements, disputes may arise to determine the ownership of the patent for a technology developed in the course of employment with the company.[4]

1. Gary Born, *International Commercial Arbitration* (2020) <International Commercial Arbitration - Gary B. Born - Google Books> accessed 28 December 2023.
2. 'Final Report on Intellectual Property Disputes and Arbitration' (ICC International Court of Arbitration Bulletin vol 09 no 1, May 1998) <ICC Digital Library (iccwbo.org)> accessed 28 December 2023.
3. ibid.
4. ibid.

Considering the complexity in the disputes involving patents which is not only limited to the underlying contract between two parties but can also extend to the interpretation of technical specifications and other statutory rights, parties prefer to file these disputes in court to avoid jurisdictional challenges. The Indian arbitration jurisprudence has not been fully explored as against the several scenarios in which disputes may arise out of connected commercial obligations and claims concerning the underlying patent. A brief snapshot of the Indian position is produced below.

3. INDIAN POSITION

The Supreme Court of India in *Booz Allen and Hamilton Inc v SBI Home Finance Ltd* held that all disputes relating to rights in *rem* are required to be adjudicated by courts and public tribunals. However, disputes relating to subordinate rights in *personam* arising from rights in *rem* are to be considered as arbitrable ("**Booz Allen Principle**").[5] This principle becomes very important to understand the extent of arbitrability of disputes especially considering the complexity in patent related disputes.

Despite the Booz Allen Principle, the Bombay High Court in *Steel Authority of India Ltd v SKS Ispat and Power Ltd*[6] ("**Steel Authority of India case**") took a rigid approach and held that an infringement and passing off suit was not amenable to arbitration as it was related to a matter in *rem*. This was a case where the Steel Authority of India Limited ("**SAIL**") sought an injunction for infringement of its trademark. However, the court concluded that such a claim was not under the contract between the parties containing the arbitration agreement.

Subsequently, the Bombay High Court in *EuroKids International (P) Ltd v Bhaskar Vidhyapeeth Shikshan Sanstha*[7] and *Eros International Media Ltd v Telemax Links India (P) Ltd*[8] took a more liberal approach in determining the arbitrability of disputes in relation to intellectual property rights.

In *EuroKids International (P) Ltd v Bhaskar Vidhyapeeth Shikshan Sanstha*[9] an agreement to license the proprietary marks of the Petitioner

5. *Booz Allen and Hamilton Inc v SBI Home Finance Ltd* (2011) 5 SCC 532.
6. *Steel Authority of India Ltd v SKS Ispat and Power Ltd* 2014 SCC OnLine Bom 4875.
7. *EuroKids International (P) Ltd v Bhaskar Vidhyapeeth Shikshan Sanstha* 2015 SCC OnLine Bom 3492.
8. *Eros International Media Ltd v Telemax Links India (P) Ltd* 2016 SCC OnLine Bom 2179.
9. *EuroKids International (P) Ltd* (n 7).

for an initial period of 3 (three) years was entered into with the respondent. A dispute arose between the Petitioner and Respondent as the Petitioner alleged that the Respondent pre-maturely started advertising (without waiting for confirmation from the petitioner) and also failed to pay the royalty fee. A petition under Section 9 of the Arbitration and Conciliation Act, 1996 seeking an interim injunction against the Respondent was filed and the Respondent as a defence contended that the Arbitration and Conciliation Act, 1996 cannot be invoked as the dispute involves infringement of intellectual property rights, which is a right in *rem*. The court held that the dispute did not concern the ownership of the trademark or of the copyrighted material. Hence, it was not a dispute involving a right in *rem*.

Similarly, in *Eros International Media Ltd v Telemax Links India (P) Ltd,*[10] which was a dispute where Eros International Media Limited ("**Eros**") had filed a suit for infringement of copyrighted material against Telemax India Private Limited ("**Telemax**") and others, the question arose whether the infringement of copyrighted material against Telemax could be considered as a subordinate right in *personam* arising from a right in *rem*.

The Bombay High Court elucidated that a dispute opposing an application filed for registration of trademark would be an action in *rem* and hence, non-arbitrable because such an application would result in the granting or non-granting of the registration, which affects the world at large. On the contrary, an infringement or passing off action binds only the parties to it and is hence, arbitrable. The Bombay High Court provided an example where 'A' may succeed in a suit of infringement and passing off by 'B'; however, this does not necessarily mean that 'A' will succeed in a similar action against 'C'. This would be an action in *personam*. The right which would be considered in *rem* is the registrant's entitlement to bring that action, since such entitlement is a result of acquiring copyright. The Bombay High Court distinguished the Steel Authority of India case on the ground that the dispute in that case was not arising out of the contract between the parties.

The decision of the Supreme Court in *Vidya Drolia v Durga Trading Corpn*[11] ("**Vidya Drolia judgment**") now holds the field in determining arbitrability of disputes. In brief, the Supreme Court discussed the question

10. *Eros International Media Ltd* (n 8).
11. *Vidya Drolia v Durga Trading Corpn* (2021) 2 SCC 1.

of arbitrability in depth and laid down a four-fold test[12] for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable:

> *(i) when cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem;*
>
> *(ii) when cause of action and subject-matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;*
>
> *(iii) when cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and*
>
> *(iv) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).*

The Supreme Court held that actions in *rem* give rise to judgments in *rem* which determine the status of a person or thing against all persons whether parties, privies or strangers to the proceeding. By contrast, an action in *personam* gives rise to a judgment in *personam* which merely determines the rights of the litigants *inter se*. While an action in *personam* may be concerned with a right in *rem*, it does not give rise to a judgment that has the effect of binding the world. In other words, it does not have an *erga omnes* effect which would require centralised adjudication. Decisions and adjudicatory functions of the State that have a public interest element are non-arbitrable as the State alone has the exclusive right and duty to perform such functions.

Applying the four-fold test laid down by the *Vidya Drolia* judgment brings some assurance insofar as non-arbitrability of disputes is concerned. Therefore, going by the Booz Allen Principle and the law laid down in the *Vidya Drolia* judgment, an action for the issue/grant of patents or for determining the validity of a patent will be non-arbitrable. However, the Indian jurisprudence, insofar as patent disputes are concerned, does not have any conclusive precedent where claims are made by a party in an indirect manner as a matter of claim/counter claim which would decide the validity of a patent and consequently be entitled to relief (monetary or

12. *Vidya Drolia* paras 76.1 to 76.4.

injunctive reliefs). There may be instances where such an indirect claim will be put to the test of trial despite such claim not being arbitrable. There is a lack of defined framework that an arbitral tribunal must follow when such indirect claims are made. It is mandatory that when an application seeking to question the jurisdiction of the arbitral tribunal is filed by a party, the same leads to a conclusive finding whether *prima facie*, the dispute or such indirect relief claimed is arbitrable or not.

4. INTERNATIONAL POSITION

A. Hong Kong & Singapore

In Singapore, under the Singapore Arbitration Act, 2001 and the International Arbitration Act, 1994 (collectively, "**Singapore Arbitration Laws**"), a dispute over the enforceability, infringement, subsistence, validity, ownership, scope, duration or any other aspect of an intellectual property right; a dispute over a transaction in respect of an intellectual property right; and a dispute over any compensation payable for an intellectual property right are arbitrable ("**IPR Dispute**").[13] An IPR Dispute is arbitrable whether it forms the main issue or the incidental issue in the arbitration.[14] The Singapore Arbitration Laws also clarify specifically that validity of a patent may be put in issue in arbitral proceedings.[15] Awards under an IPR Dispute cannot be set aside for being incapable of arbitration and/or for being contrary to public policy.[16] In line with the consensual nature of arbitration, such awards are only binding between the parties to the arbitration and on any person claiming through or under them.

The arbitration law of Hong Kong is largely similar to the Singapore Arbitration Laws.[17]

B. Australia

In the case of *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd,*[18] *the* arbitrability of intellectual property disputes and connected commercial obligations was contested. In this case, Larkden Pty Limited ("**Larkden**") and Lloyd Energy System Pty Limited ("**Lloyd**") had entered into a licence

13. Singapore Arbitration Act 2001, s 52A; International Arbitration Act 1994, s 26A.
14. Singapore Arbitration Act 2001, s 52B; International Arbitration Act 1994, s 26B.
15. Singapore Arbitration Act 2001, s 52F; International Arbitration Act 1994, s 26G.
16. Singapore Arbitration Act 2001, s 52D; International Arbitration Act 1994, s 26E.
17. Arbitration Ordinance, pt 11A.
18. *Larkden Pty Limited v Lloyd Energy Systems Pty Limited* [2011] NSWSC 268.

agreement whereunder Larkden granted a licence to Lloyd to *inter alia* use, commercialise, exploit and improve certain technologies. As per Clause 5.4 of the licence agreement, Larkden was to own any improvements or modifications to the technologies developed by Lloyd. Patent applications were filed by Solfast Pty Ltd. ("**Solfast"),** a wholly owned subsidiary of Lloyd and Areva Inc (formerly Ausra Inc) ("**Ausra**") each covering inventions which Larkden alleged were modifications of, or improvements to, the technologies. Lloyd argued that Larkden did not have any right, title or interest in the inventions or the patent applications.

Consequently, Lloyd commenced an arbitration against Larkden. Larkden disputed the jurisdiction of the arbitrator on the ground of arbitrability. Larkden argued that *firstly*, Lloyd's notice of dispute raised issues for determination by the arbitrator which were exclusively within the province of a statutory body and *secondly*, the arbitration would affect Solfast and Ausra, who were not parties to the arbitration.

Lloyd argued that the arbitrator merely has to determine whether Clause 5.4 of the licence agreement is engaged. The relief claimed is not "in *rem*".

The Court decided that the powers to grant a patent, to make a declaration of eligibility and to decide the case where the grant of a standard patent is opposed, are powers conferred by the provisions of the Patents Act on a statutory body. While these statutory powers cannot, by private arrangement, be conferred by parties on an arbitrator, there is no impediment to the parties investing in the arbitrator power to resolve a dispute as between themselves as to their rights in and entitlements to a patent application, or for that matter an invention. The Court noted that neither the notice of dispute nor the pleadings in the arbitration call for the arbitrator to make any declaration as to eligibility or to grant a patent. The arbitrator has only been called upon to resolve the dispute which has arisen between Larkden and Lloyd as to their respective rights and obligations under Clause 5.4 of the licence agreement. The Court asserted that any arbitral determination regarding whether the patent applications were 'improvements or modifications' to the technologies would not prevent Solfast or Ausra from pursuing their patent applications or prevent Larkden from pursuing its applications under Section 36 of the Patents Act for determining eligibility of Ausra.

C. USA

The Patent Act of the United States of America[19] provides for voluntary arbitration of patent related disputes. The Act provides that a contract involving a patent or any right under a patent may contain a provision requiring arbitration of any dispute relating to patent validity or infringement arising under the contract. In the absence of such a provision, the parties to an existing patent validity or infringement dispute may agree in writing to settle such dispute by arbitration. The Act clarifies that any award issued by the arbitrator shall be final and binding between the parties to the arbitration only. The Act requires that where an award is issued by an arbitrator, the patentee, licensee, or his assignee shall give notice of the award in writing to the director of the United States Patent and Trademark Office ("**Director**"). The Director shall, upon receipt of the notice, enter the same in the record of the prosecution of such patent. The award shall be unenforceable until the notice is received by the Director.

D. United Kingdom

The United Kingdom's Patent Act, 1977 states that arbitration is available only in very limited cases with specific sanction of the courts. The validity of patents, however, is an arbitrable issue, but binds only the parties privy to the arbitration.[20]

E. Japan[21]

Disputes concerning infringement of patent rights are considered arbitrable. However, disputes that decide the validity or invalidity of the patent right have commonly been contested and decided as non-arbitrable.

5. SUGGESTIONS AND CONCLUSION

A holistic analysis of the international position reveals that arbitration is being given an impetus and many disputes arising out of an underlying patent, including disputes where the validity of the underlying patent

19. Patent Act 2006, s 294.
20. Kenneth R Adamo, '*Overview of International Arbitration in the Intellectual Property Context*' 2 Global Bus L Rev 7 (2011) <Overview of International Arbitration in the Intellectual Property Context (csuohio.edu)> accessed 29 December 2023.
21. Matthew R Reed, Ava R Shelby, Hiroyuki Tezuka and Anne-Marie Doernenburg, Wilson Sonsini Goodrich & Rosati and Nishimura & Asahi, 'Arbitrability of IP Disputes' (21 December 2022) <Arbitrability of IP Disputes - Global Arbitration Review> accessed 29 December 2023.

is in question (directly or indirectly) are being accepted as arbitrable. There is fair reason for such impetus being given to arbitration given the commercial nature of the disputes, speed and efficiency of the mechanism, confidentiality of the proceeding, forum neutrality and expert decision makers.[22]

However, such impetus will lead to conflicting decisions as the award will be binding only between the parties to the arbitration and may further cause a disruption insofar as the ownership of an invention is concerned. Even indirect claims, where the arbitral tribunal may be deciding damages for unauthorized use of the intellectual property will not be conclusive in nature since claims will be dependent on the validity of the patent or a decision may have to be rendered on the ownership of the patent. This is inherently an in *rem* action, though not directly so since such relief of declaration may not be explicitly claimed by a party to the arbitration. The settled principle of law – what cannot be done directly, cannot be done indirectly either, must be kept in mind insofar as India as an arbitration jurisdiction is concerned.

Therefore, it is absolutely necessary that an arbitral tribunal deciding claims in relation to patents, keep the following guidelines (which are mere suggestions) in mind. An arbitral tribunal in India must:

1. Decide whether the claims fall within its jurisdiction or in any manner relate to a decision which would decide on the validity of the patent, either *suo motu* or if an application challenging the arbitral tribunal's jurisdiction is filed by a party challenging such claims being made.

2. Such disputes touching upon validity of patents are to be held as non-arbitrable at the very threshold. The position of law in *Vidya Drolia* judgment is clear.

3. The arbitral tribunal must put a party making indirect claims to the test of prima facie establishing that such claims do not have an element of an in *rem* action. If a party making a claim fails to establish such *prima facie* case, such claims should be held as being beyond its jurisdiction.

4. The arbitral tribunal must not defer the decision in such indirect claims, as far as possible, to be dependent on trial/evidence, where

22. WIPO, 'Why Arbitration in Intellectual Property' <Why Arbitration in Intellectual Property? (wipo.int)>.

a party fails to establish *prima facie* that such claims do not have an element of an in *rem* action. Delay can be counter-productive as, should a decision be reached after conclusion of evidence/trial that the disputes are not arbitrable, there could be a risk of limitation having expired to make necessary claims before a court.

The authors would like to leave you with a simple example of where a tribunal has been set up under the Singapore Arbitration Laws and a party's patent has been held invalid in an arbitration and consequent damages have been awarded to the claimant. This finding will be binding only between the parties to the arbitration. To conclusively invalidate the party's patent in *rem*, a fresh suit may have to be filed before a Singapore court or the prescribed authority (based on Singapore law). At that stage, the limitation period for filing of a suit for invalidation of patent may be questioned. Another layer of complexity would arise if the decision of such court/ authority is that the patent is a valid patent. Would the parties then have to return to the tribunal to review its finding based on the court/authority's decision which is of a wider ambit?

The Supreme Court in the *Vidya Drolia* judgment asserted that "*various countries have already allowed inter parties arbitration with respect to in rem rights concerning intellectual property through a statutory framework. It is worthwhile to study the feasibility of the same, if we want to provide impetus to arbitration*."

While the authors are in agreement that an arbitration friendly approach must be adopted when determining arbitrability of disputes, it is essential that this approach is applied keeping in mind the private nature of arbitration, and the logistical and practical hurdles in using arbitration to determine disputes that touch upon the validity of an underlying patent. It is best for any in *rem* actions to remain with courts.

INTERPLAY OF INSOLVENCY CODE AND ARBITRATION ACT – THE LEGAL CONUNDRUM EMANATING FROM *INDUS BIOTECH*

—Aditya Vikram Singh and Anmol Gupta

(Mr. Aditya Vikram Singh is a Principal Associate at Saraf and Partners and Mr. Anmol Gupta is an Associate at Saraf and Partners. The article has been written by the authors in their personal capacity and does not represent the views of the firm. The authors are graduates of National Law School of India University, Bangalore)

ABSTRACT

The present article delves into the legal conundrum created by the judgment of the Supreme Court in Indus Biotech (P) Ltd v Kotak India Venture (Offshore) Fund,[1] *("**Indus Biotech**"). In Indus Biotech**,** the Supreme Court held that the consequence of an insolvency petition filed under the Insolvency and Bankruptcy Code, 2016 ("**Code**") (whether it is admitted or rejected on its own facts by the Adjudicating Authority) would fall upon the application under Section 8 of the Arbitration and Conciliation Act, 1996 ("**Act**") filed by the corporate debtor seeking reference of the dispute with creditor raised in insolvency petition to an arbitral tribunal. In the event, the insolvency petition is admitted, the application under Section 8 of the Act would stand dismissed. However, if the said petition is rejected, the Adjudicating Authority shall consider the application under Section 8 of the Act. Such being the case, it does not align with another extant legal position that an arbitration proceeding can be invoked and initiated by the corporate debtor for its benefit even during the corporate insolvency resolution process ("CIRP"). It is proposed in the present article that applying the test of "**dressed up petition**", the Adjudicating Authority may be able to resolve such conundrum at the origin by examining the real objective of the insolvency petition in light of the application seeking reference to arbitration under Section 8 of the Act. Subsequently, this article will also shed light on the adjudication of counterclaims by an appropriate forum in case of a dispute regarding the amount of default. Additionally, it*

1. *Indus Biotech (P) Ltd v Kotak India Venture (Offshore) Fund* (2021) 6 SCC 436.

will be contended that even if an application seeking reference to arbitration under Section 8 of the Act is dismissed, the same should not act as a precedent to the adjudication of an application under Section 11 of the Act, seeking appointment of arbitrator in terms of the agreement.

1. INTRODUCTION

Indus Biotech pertains to a tussle between the application under Section 8 of the Act and the initiation of insolvency proceedings under Section 7 of the Code. Here, the dispute arose as to the number of shares that the respondent-creditor would be entitled to, pursuant to the conversion of the Optionally Convertible Redeemable Preference Shares (**"OCPRS"**). However, the creditor contended that since the period of redemption of the OCRPS had completed, the sum (equivalent to the worth of the shares) had become due and payable, and the non-payment of the same would constitute a default of financial debt. Pursuant to this, an application under Section 7 of the Code was filed by the creditor. Correspondingly, an application under Section 8 of the Act was filed by the appellant-debtor, seeking to refer the parties to arbitration, as envisaged in agreements between them. The Adjudicating Authority, being the National Company Law Tribunal, Mumbai (**"NCLT"**) allowed the application for reference to arbitration under Section 8 of the Act and dismissed the application under Section 7 of the Code. The dispute was then appealed to the Supreme Court by way of a Special Leave Petition on the question of priority of consideration of the application under Section 8 of the Act and application under Section 7 of the Code, both being special provisions in their own realm. While the Hon'ble Supreme Court did consider the argument of relegating the case back to the National Company Law Appellate Tribunal (**"NCLAT"**) (for appropriate procedure of appeal as per Section 61 of the Code), the Court was ultimately of the view that since an Arbitration Petition, filed by Indus Biotech Private Limited (the debtor) under Section 11 of the Act, was already pending before the Court, it deemed it fit to decide the case on merits.

The Supreme Court, in *Indus Biotech*, made the following observations: a) an application under Section 7 of the Code would convert into proceedings *in rem* only on the admission of the application, and not the filing of it; b) albeit, if posed with an application under Section 8 of the Act and that under Section 7 of the Code, the Adjudicating Authority is duty bound to *first* advert to the material before it in the application filed under Section 7 of the Code, even if the application under Section 8 of the Act is on record.

This, the Supreme Court observed, was because if the application under Section 7 of the Code is admitted, the need to adjudicate the application under Section 8 of the Act would not arise, as the proceedings would then get transformed "*into proceedings in rem, having erga omnes effect, due to which the question of arbitrability of the so-called inter-se dispute sought to be put forth would not arise*."[2]

While the judgment of the Supreme Court in *Indus Biotech* is hailed as a landmark judgment and has been cited across all courts and tribunals, the following legal issues emanates from it which require attention:

First, is there any scope available to the Adjudicating Authority to decide an application under Section 8 of the Act prior to adjudication of an insolvency application under Section 7 of the Code? Can *Vidarbha Industries Power Ltd v Axis Bank Ltd*[3] ("***Vidarbha Industries***") be interpreted to avail such narrow scope to employ the test of "dressed up" petition?

Second, is the Adjudicating Authority the correct forum to decide substantial issue of the existence and the *quantum* of counter-claim of corporate debtor in the summary proceedings conducted before it?

Third, should the dismissal of an application under Section 8 of the Act be a precedent for an application for appointment of an arbitrator(s) under Section 11 of the Act, as seen in *Koyenco Autos (P) Ltd v BMW India Financial Services (P) Ltd*[4] (*"**Koyence Autos***")?

2. APPLICABILITY OF 'DRESSED-UP' PETITION IN PROCEEDINGS UNDER THE CODE

Time and again, the courts have been faced with a situation where notwithstanding a valid dispute resolution clause and an apparent palpable dispute between the parties, a financial creditor has exercised its right to file an application under Section 7 of the Code, the admission of which has rendered the dispute resolution clause redundant. While the Courts and Tribunals have iterated that an application filed under Section 7 of the Code should not be used as a debt recovery mechanism, however there is a dearth of judicial guidance on tests that may be employed by the Adjudicating

2. *Indus Biotech* (n 1) para 26.
3. *Vidarbha Industries Power Ltd v Axis Bank Ltd* (2022) 8 SCC 352.
4. *Koyenco Autos (P) Ltd v BMW India Financial Services (P) Ltd* ARB. P. 870/2011 Order dated 26-7-2022.

Authority to discover such ulterior motives, to prevent unnecessary initiation of corporate insolvency resolution process (**"CIRP"**). Such ulterior motives may be the instances of avoidance of the dispute resolution clause contained in *inter se* agreement, or to use an insolvency petition to obtain forced settlement with a corporate debtor.

The test of "dressed up petition" could be an effective way to deal with an insolvency application file with an ulterior motive. The test requires the concerned forum to see through the real intent of the petitioner as to whether a genuine petition has been filed or a "dressed up petition" in order to avoid the contractually agreed remedy. A similar applicability to proceedings under the Code would require the Adjudicating Authority to find if an application under the garb of insolvency, seeks to avoid the arbitration clause, attempting to benefit out of the uncertainty created by a summary adjudication under the Code.[5] It is submitted that employing the test of 'dressed-up' petition by the Adjudicating Authority could ensure that a dispute is referred to arbitration in deserving cases, provided that the dispute is within the realms of a valid arbitration clause which would otherwise suffer if CIRP is initiated in a summary manner.

The major argument against employing the test of "dressed up petition" at the stage of adjudicating an insolvency application is the view of Supreme Court in *Innoventive Industries Ltd v ICICI Bank* ("***Innoventive Industries***"),[6] that the Adjudicating Authority is merely required to see if a "default" is established in terms of Code. While the said judgment is *locus classicus* on the ambit of examination under the Code at pre-admission stage, it would also be worthwhile to note that the Supreme Court in *Vidarbha Industries* has taken a view that, "*The title "Insolvency and Bankruptcy Code" makes it amply clear that the statute deals with and/or tackles insolvency and bankruptcy. It is certainly not the object of the IBC to penalise solvent companies, temporarily defaulting in repayment of its financial debts, by initiation of CIRP. Section 7(5)(a) of the IBC, therefore, confers discretionary power on the Adjudicating Authority (NCLT) to admit an application of a Financial Creditor under Section 7 of the IBC for initiation of CIRP.*"[7]

5. *Rakesh Malhotra v Rajinder Kumar Malhotra* 2014 SCC OnLine Bom 1146 : (2015) 192 Comp Cas 516.
6. *Innoventive Industries Ltd v ICICI Bank* (2018) 1 SCC 407.
7. *Vidarbha Industries* (n 3) para 81.

While the two judgments seem contradictory at a glance, however in yet another judgment i.e., *M. Suresh Kumar Reddy v Canara Bank*,[8] the Supreme Court has clarified that "..... *by the order in review that the decision in the case of Vidarbha Industries was in setting of facts of the case before this Court. Hence, the decision in the case of Vidarbha Industries cannot be read and understood as taking a view which is contrary to the view taken in the cases of Innoventive Industries and E.S. Krishnamurthy. The view taken in the case of Innoventive Industries still holds good.*"

Therefore, since it is established that the Adjudicating Authority can look into factors beyond the establishment of a 'default', it is argued that the Adjudicating Authority, when faced with an application under Section 7 of the Code, can determine whether the application is 'dressed-up' or not. In fact, the Adjudicating Authority, in its previous avatar as the Company Law Board ("**CLB**"), has used the test on multiple occasions. In the case of *Vijay Sekhri v Tinna Agro Industries Ltd*[9] ("***Tinna Agro***"), when an application under Section 397 and 398 of the Companies Act, 1956 ("**1956 Act**") was filed, alleging oppression and mismanagement, it was contended by the petitioners that the reliefs against oppression and mismanagement were beyond an arbitration tribunal, the arbitration clause could not be invoked. The petitioners also contended that the reliefs in the dispute can only be granted by the tribunal exercising its statutory power under Section 402 of the 1956 Act. The CLB, using the test of "dressed up petition" in this case, held that since a valid shareholders agreement and an arbitration clause existed and that the dispute arose from the shareholders agreement itself, the argument that the proceedings under Section 397 and 398 are outside the purview of arbitration would not stand. Similar stand was taken by the CLB in the case of *Airtouch International (Mauritius) Ltd v RPG Cellular Investments and Holdings (P) Ltd,*[10] wherein it was held that, "… *even in a Section 397/398 proceeding, if the party applying for referring the disputes to arbitration is able to establish that there are bona fide disputes arising out of an arbitration agreement and that the arbitrator could settle the disputes by appropriate reliefs, then, the CLB will have to refer the parties to arbitration in terms of Section 8 or Section 45 of the Act, 1996, as the case may be.*"

8. *M. Suresh Kumar Reddy v Canara Bank* (2023) 8 SCC 387 para 13.
9. *Vijay Sekhri v Tinna Agro Industries Ltd* 2010 SCC OnLine CLB 135 : (2010) 159 Comp Cas 336 (CLB).
10. *Airtouch International (Mauritius) Ltd v RPG Cellular Investments and Holdings (P) Ltd* 2003 SCC OnLine CLB 23 : (2004) 121 Comp Cas 647 (CLB) para 6.

Furthermore, the Petitioners, in *Vijay Sekhri*, also argued that since it is the statutory right of the shareholders to move the CLB in cases of oppression and mismanagement, and that the CLB cannot abdicate its statutory duty, the petitioners were justified in moving to the CLB. However, the CLB held that, "*all the ingredients of Section 45 of the Arbitration and Conciliation Act, 1996, are present. Once it is so, we feel that there is no further scope for us to take into consideration the arguments of Shri Singh about the statutory rights of the shareholders to move the Company Law Board, and that a specially constituted Tribunal cannot abdicate its jurisdiction, etc. We have to do what the law mandates us to do. Section 45 requires us to refer the parties to arbitration and we have no discretion in this matter.*"[11] The said principles are applicable even for Section 8 of the Act as well. While it can be contended that once an application under Section 7 of the Code is filed, Section 238 of the Code comes into play, the judgment of the Supreme Court in the case of *Vidarbha Industries* comes to rescue, providing a slightly enlarged scope for the Adjudicating Authority. The Supreme Court held that, "*In the case of an application by a Financial Creditor who might even initiate proceedings in a representative capacity on behalf of all financial creditors, the Adjudicating Authority might examine the expedience of initiation of CIRP, taking into account all relevant facts and circumstances, including the overall financial health and viability of the Corporate Debtor. The Adjudicating Authority may in its discretion not admit the application of a Financial Creditor.*"[12] Therefore, relying on the above-mentioned judgments, it would be appropriate to say that the Adjudicating Authority has the discretion to also press in service the test of "dressed up petition". It is also to be kept in mind that such unique situations does not arise in all matters, but in rarity when such case facts are posed before the Adjudicating Authority, it would be necessary to separate wheat from the chaff.

3. ADJUDICATION OF COUNTER CLAIMS

One of the first steps that the Adjudicating Authority takes, when seized of an application under Section 7 of the Code, is to ascertain whether there exists a default. Default, as defined under Section 3(12) of the Code, is the "*non-payment of debt when whole or any part or instalment of amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be*". This, the adjudicating authority

11. *Vijay Sekhri* (n 9) para 22.
12. *Vidarbha Industries* (n 3) para 77.

does basis the records of information utility or on the basis of any evidence furnished by the financial creditor.[13] What is also significant to mention here is that any debt, including a ***disputed debt***, as long as due, would still prompt the Adjudicating Authority to term the debt as a 'default'.[14]

The Adjudicating Authority's scope in the ascertainment of the default is limited to whether there is a debt 'due and payable'. It does not take into consideration any other objections. For instance, the Adjudicating Authority does not consider any counterclaims that may exist before or during the pendency of the dispute. These counterclaims may exist and operate in terms of a 'set-off': if the claim of both the financial creditor and the corporate debtor are allowed, then there would be no 'dues' remaining to be paid. Therefore, the objective of proceedings at pre-admission stage is to disallow any 'moonshine defenses' raised by the corporate debtor to obstruct the insolvency proceedings, albeit in such routine exercise, even substantial defenses get overlooked.

Given the above, the proper adjudication of a counter-claim is possible only if relegated to a civil court or subjected to arbitration. It is also clarified that the proceedings under Section 7 of the Code transform to proceedings *in rem* only if the application is admitted. Therefore, since the dispute regarding the default of the corporate debtor, in light of the counter-claims, is a dispute *in personam*, the same is arbitrable and the Adjudicating Authority, if it finds that the insolvency application is in the nature of a "dressed up petition", must refer such disputes for arbitration, instead. Besides, the consideration for Adjudicating Authority and Courts changes in a post-admission stage as Section 14 of the Code bars any suit (especially for the recovery of dues) against the corporate debtor once moratorium is imposed. However, it does not bar any suit instituted by the corporate debtor, or any proceeding "*unless such proceeding has the effect of endangering, diminishing, dissipating or adversely impacting the assets of the corporate debtor.*"[15] Therefore, any counterclaim by the corporate debtor with respect to or against any claim made by a creditor can be appropriately pursued before an appropriate forum, including an arbitration or a civil court.[16]

13. The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 7.
14. *Innoventive Industries* (n 6).
15. The Insolvency and Bankruptcy Code, 2016 s 14.
16. *SSMP Industries Ltd v Perkan Food Processors (P) Ltd* 2019 SCC OnLine Del 9339 : (2019) 177 DRJ 473.

The question regarding initiation or continuation of proceedings in a post-admission stage came up in the case of *Perkan Foods.*[17] In this case, the plaintiff, which was the corporate debtor, filed a suit of recovery against a creditor, who had a counterclaim against the plaintiff, in the High Court of Delhi, after the insolvency process had already commenced. The question arose whether adjudication of the counterclaim would be liable to be stayed in view of Section 14 of the code. Here, the claim made by the plaintiff-corporate debtor was far greater than the counterclaim made by the defendant-creditor, to the extent that if both the claims were allowed, the plaintiff would still be entitled to recovery of dues from the defendant. Therefore, it was held by the Delhi High Court that the ascertainment of the claim amounts of both parties cannot be done by the NCLT (for the reasons of summary process followed there), and would require detailed pleadings and examination of evidence, which could appropriately be conducted before a civil court or an arbitral tribunal. Such view was also taken by the Supreme Court of India in the case of *New Delhi Municipal Council v Minosha India Ltd*[18] In this case, the question that the Court sought to address was whether the period under moratorium would be excluded in case of a suit/application filed by the corporate debtor. In answering this question, the Court held that "*Under the IBC, by virtue of the order admitting the application, be it under Sections 7, 9 or 10, and imposing moratorium, proceedings as are contemplated in Section 14 would be tabooed.* ***This undoubtedly does not include an application under Section 11(6) of the 1996 Act by the corporate debtor or for that matter, any other proceeding by the corporate debtor against another party.*** *At least there is no express exclusion of the jurisdiction of the Court or authorities to entertain any such proceeding at the hands of the corporate debtor.*"[19]

It can, thus, be argued that owing to the Supreme Court's decision in *Innoventive Industries*, the Adjudicating Authority has to mandatorily admit an application under Section 7 of the Code if 'default' under the Code is established. However, as mentioned above, the coordinate bench of the Supreme Court in the case of *Vidarbha Industries* held that an application under Section 7 can be kept in abeyance or be rejected, depending on the facts and circumstances. The Hon'ble Supreme Court held that, "*The Adjudicating Authority (NCLT) has been conferred the discretion to admit the application of the Financial Creditor.* ***If facts and circumstances so***

17. ibid.
18. *New Delhi Municipal Council v Minosha India Ltd* (2022) 8 SCC 384.
19. *New Delhi* (n 18) para 24.

warrant, the Adjudicating Authority can keep the admission in abeyance or even reject the application. *Of course, in case of rejection of an application, the Financial Creditor is not denuded of the right to apply afresh for initiation of CIRP, if its dues continue to remain unpaid*." Since the application can be kept in abeyance, the dispute surrounding the claims and counterclaims can be appropriately adjudicated by the arbitral tribunal without the Authority hastening to admit an insolvency application. This would give the parties an equal chance to present their claims and defenses, and allow the parties to adduce evidence, something that cannot be done in a summary proceeding before the Adjudicating Authority.

4. DISMISSAL OF AN APPLICATION UNDER SECTION 11 OF THE ACT ON PRIOR DISMISSAL OF AN APPLICATION UNDER SECTION 8 OF THE ACT – A PRECEDENT BAD IN LAW

As captured above, moratorium under Section 14 of the Code does not bar suits by the Corporate Debtor. However, the view expressed in *Indus Biotech* judgment confounds another aspect of the jurisprudence surrounding arbitration law in India. In the said case, an arbitration petition was filed by the petitioner-debtor under Section 11 of the Act, seeking appointment of an arbitrator to adjudicate upon the disputes between the concerned parties. The Supreme Court held that if it is found that there exists a default, and basis that an application under Section 7 of the Code is admitted, then any pending application filed under Section 8 of the Act would be dismissed. Consequently, the need for the court to adjudicate the application under Section 11 would also not arise. The same was also followed in the case of *Koyenco Autos* by the Delhi High Court. In *Koyenco Autos*, the petition was filed by the Petitioner under Section 11 of the Act. While there were various issues, one of the issues was whether the initial pendency and ultimate dismissal of an application under Section 8 of the Act would bar the remedy under Section 11 of the Act. It was held by the Delhi High Court that since the application under Section 8 of the Act was rendered infructuous on the admission of an application under Section 7 of the Code, the petition under Section 11 of the Act could not be allowed. This effectively neutralizes the scope of arbitration by the corporate debtor against the petitioning financial creditor. Additionally, this creates an anomalous position as a corporate debtor can file a suit or an arbitration petition under Section 11 of the Act during moratorium, however, a prior dismissal of an application under Section 8 of the Act, as per *Indus Biotech* and *Koyenco Autos*, would erroneously act as a bar to pursue Section 11 application.

The logic of such a holding, in the opinion of the authors, is confusing and palpably untenable for two reasons. *First*, the fora for adjudication of an application under Section 8 of the Act and Section 11 of the Act are different, and *second,* an application under Section 8 of the Act is kept in abeyance pending adjudication of an application under Section 7 of the Code and may get ultimately dismissed as infructuous without examination on its merits in the event insolvency application is admitted. Further, if the cases above are to be followed, an application under Section 11 of the Act would not be adjudicated upon or simply dismissed if an application under Section 8 of the Act is dismissed. This would be contrary to the position of law that any proceedings for its benefit can be pursued by the corporate debtor even during moratorium.

Therefore, there would be a larger legal risk in treating an application under Section 8 of the Act as a precedent for deciding an application under Section 11 of the Act, more so as the dismissal of the former is not based on merits. Such a proposition also ignores the doctrine of party autonomy and goes against the law laid down by several landmark judgments of the Supreme Court.[20]

5. CONCLUSION

The article discusses the interplay of arbitration and insolvency laws. The article critiques *Indus Biotech* from a practical perspective and takes into account ground realities of what is and might happen in a situation where the Adjudicating Authority is faced with the above permutation and combination of situation. Accordingly, the article suggests employing the test of "dressed up petition" at the pre-admission stage to separate wheat from chaff and allow only such cases to undergo CIRP where it is not for the ulterior purposes, other than resolution.

While the need for an established insolvency law and mechanism cannot be understated, the supremacy granted *vide* Section 238 of the Code must not be misconstrued. The Adjudicating authority must acknowledge, while admitting an application under Section 7 of the Code, that such an application is genuinely for the resolution of the corporate debtor and not for some ulterior or *mala fide* purposes, dressed up in a manner to avoid arbitration agreement under the garb of exercising statutory right. Further, the adjudication of counter-claims can be done appropriately by an arbitral

20. *BALCO v Kaiser Aluminium Technical Services Inc* (2016) 4 SCC 126; *PASL Wind Solutions (P) Ltd v GE Power Conversion India (P) Ltd* (2021) 7 SCC 1.

tribunal, as the Adjudicating Authority need not adjudicate upon a dispute between the parties, and ought to admit the corporate debtor into insolvency upon merely finding the existence of a default. Therefore, in order to effectively create a system that curbs spurious insolvency applications, it would be extremely important that an application under Section 11 of the Act is not dismissed basis prior dismissal of an application under Section 8 of the Act, happening of which may also impact the overall scheme of the Code to maximise the value of corporate debtor.

The above article, therefore, urges the courts, especially the Adjudicating Authority, to keep in mind the holding of the Supreme Court in the case of *Vidarbha Industries*, and give due regard to 'disputed' defaults before admitting an application under Section 7 of the Code. In doing so, the Adjudicating Authority, in no manner, would be relegating its statutory functions as entrusted with it under the Code.

A GRANULAR LOOK INTO THE INTERPRETATIVE INCONSISTENCY IN INVESTOR-STATE DISPUTE SETTLEMENT

—Tushar Behl and Abhisar Vidyarthi

(Mr. Tushar Behl, ACIArb is a practicing Advocate based in New Delhi. Mr. Abhisar Vidyarthi is a BCL Candidate at the University of Oxford'24. *The Authors are extremely thankful to their Research Assistant for her relentless efforts and able assistance throughout the formulation of this manuscript)*

ABSTRACT

*Investment tribunals are often alarmed for giving different interpretations to similar questions of treaty interpretation. This, in turn, gives rise to jurisprudential inconsistency in international investment law. Inconsistency in decision making is the nemesis of any dispute settlement mechanism, and has accordingly given rise to legitimacy concerns against the investor-state dispute settlement ("**ISDS**") mechanism. This has caused stakeholders to call for reforms to address the interpretative inconsistency plaguing the ISDS mechanism. While some of the reforms seek to find solutions within the existing ISDS mechanism, other more extreme ones seek an overhaul of the ISDS mechanism itself. While each proposal has its own positives and negatives, their underlying objective is the same i.e., to ensure predictability, consistency and coherence in decision making and avoiding inconsistent decisions. Any reform to the ISDS mechanism would require all stakeholders to carefully consider the issue, as well as the scope, nature, and reasonableness of each potential reform. In this context, this article explores the currently debated questions of interpretative inconsistencies at a granular level, critically reviewing the approaches taken by tribunals in succeeding arbitral awards. It also analyses the various proposed front-end and back-end solutions for tackling such inconsistency. Lastly, the authors propose solutions: a concrete standard of review and an interpretative methodology to preserve the legitimacy of international investment law.*

1. INTRODUCTION

Lack of consistency and predictability in decision making has been a constant and longstanding criticism of the investor-state dispute settlement ("**ISDS**") mechanism. Investment tribunals are often alarmed for giving different interpretations to similar questions of treaty interpretation, which in turn gives rise to jurisprudential inconsistency in international investment law. While a certain degree of interpretative inconsistency is inborn to any adjudicatory mechanism, the systemic inconsistency plaguing ISDS threatens to compromise the very objective of the investment treaty regime, namely providing a predictable and stable framework to protect and promote foreign investment while balancing state regulation.

The absence of *stare decisis* or a precedent-based doctrine, coupled with the inherent fragmented structure of international investment law, contributes to the lack of coherence and consistency in ISDS. Investment tribunals are constituted on an ad hoc basis to adjudicate upon individual investor-state disputes arising out of investment treaties, and are under no obligation to follow earlier investment awards. There is evidence to show that this has given rise to divergent interpretations being given to substantive as well as procedural treaty provisions, which are often similarly worded or constructed. Contrarily, it is imperative that the application of *stare decisis* does not compromise the flexibility and party autonomy that arbitration ensures.[1] Consequent to this underlying uniqueness of arbitration, consideration of expansive principles of fairness, efficiency, due process and commercial prudence is prioritised as opposed to national courts that rely exclusively on the jurisprudence of the national law.

Moreover, a precedent-based system may also have conflicting implications with respect to civil law countries.[2] For example, in Germany and France the doctrine of *jurisprudence constante* is followed. Accordingly, only a trend of concurring decisions can establish a binding precedent. Contrarily, the prevailing practice in common law countries, in accordance with the doctrine of *stare decisis,* allows a single court decision to create a binding precedent. In this regard, it must also be noted that cognisance of

1. 'International Law Association International Commercial Arbitration Committee's Report and Recommendations on "Ascertaining the Contents of the Applicable Law in International Commercial Arbitration"' (2010) 26 Arbitration International 193.
2. See more at: Vincy Fon & Francesco Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2006) 26(4) International Review of Law and Economics 519.

this contrast alone does not provide firm grounds to explain the issues of interpretative inconsistencies in these legal systems.[3]

Concerns relating to interpretative inconsistency have given rise to calls for reforms of the ISDS mechanism, focused on harmonising international investment law, with coherence and consistency as guiding principles. One of the proposed solutions has been to overhaul the existing ISDS mechanism in favor of establishing a standalone investment court. It has been suggested that a standalone investment court, as against ad hoc tribunals, would ensure interpretative and jurisprudential consistency.[4] However, such a reform must be contemplated against the very purpose the ISDS mechanism was established. The possibilities of achieving the goals of establishing an efficient and speedy mechanism while also maintaining neutrality may be compromised. Another proposal has been the introduction of an appellate forum, allowing for broader review and scrutiny of investment awards for consistency in decision making.[5] There have also been attempts to find front-end and back-end solutions within the existing ISDS mechanism. This includes the proposal to guide tribunals in their interpretations, granting greater significance to the doctrine of *jurisprudence constante*, whereby tribunals strive to follow prior relevant decisions unless they are distinguishable on the facts or if the tribunal believes that they are wrongly decided. This solution can act as a strong mitigating factor for interpretative inconsistency, while preserving the ISDS mechanism as it stands today. Various back-end solutions have also been proposed, inviting active state participation through joint interpretative declarations, precise treaty drafting with the use of clear exceptions and reservation clauses, establishing joint consultation committees on

3. John T Hood Jr, Book Review (1975) 35(5) Louisiana Law Review 1303 <https://digitalcommons.law.lsu.edu/lalrev/vol35/iss5/14> accessed 11 November 2023.
4. August Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?— The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' (2016) 19(4) Journal of International Economic Law 761; see also Eduardo Zuleta, 'The Challenges of Creating a Standing International Investment Court', in Jean E Kalicki & Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 2015); Sir Michael Wood, 'Choosing Between Arbitration and a Permanent Court: Lessons from Inter-State Cases' (2017) 32(1) ICSID Review–Foreign Investment Law Journal 1.
5. Giovanni Zarra, 'The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?' (2018) 17(1) Chinese Journal of International Law137; Donald McRae, 'The WTO Appellate Body: A Model for an ICSID Appeals Facility?' (2010) 1(2) Journal for International Dispute Settlement 371.

treaty interpretation, cross-fertilisation of treaties, non-disputing state participation in arbitration, among others.

While such back-end reforms may indeed be useful in interpreting specific treaties, they may not necessarily solve interpretative inconsistencies within identical provisions in different treaties. This is particularly so because the idea of an internationalised resolution of investment disputes survives on a limited concession of sovereignty by the states. A certain degree of inconsistency is therefore endemic to the system, and an overemphasis on systematic consistency involves risks. Moreover, such proposals may work better with future treaties, but significant difficulty will be encountered in implementing these reforms for the significant number of treaties which are already in existence. Staying true to this reality, attempts must be made to provide practical and holistic solutions which mitigate and dilute the scope of interpretative and insufficient inconsistency.

The lack of coherence in decision making is therefore a pertinent issue plaguing international investment law. One of the many instances of such interpretative inconsistency is evidenced by the varying decisions and interpretations arrived at by tribunals in disputes that arose out of the USA-Argentina BIT which is further discussed in the subsequent sections.[6] Such issues have also given rise to the issue of perceived bias in ISDS wherein it is suggested that developing countries suffer from unfavorable interpretations of treaty provisions.[7] It is for this reason that several developing countries, including India, have refrained from becoming signatories to the ICSID Convention.[8] Implementation of any reforms would therefore require careful considerations given the large ramifications it would carry for all stakeholders. The reforms should not only be focused on ensuring consistency but also on providing a holistic and stable mechanism for dispute settlement. It is thus essential that hasty reforms are

6. Cases dealing with the interpretation of the exceptions clause in Article XI of the United States– Argentina BIT and the "necessity" defence under customary international law: *CMS Gas Transmission Co v Republic of Argentina* ICSID Case No ARB/01/8, Award (12 May 2005) paras 304-394; *LG&E Energy Corpnv Argentine Republic* ICSID Case No ARB/02/1, (3 October 2006) para 226.
7. George Kahale III, 'Is Investor-State Arbitration Broken?' (2012) 7 TDM 9 <www.transnational-dispute-management.com/article.asp?key=1918> accessed 11 November 2023.
8. Abhisar Vidyarthi, Revisiting India's Position to not Join the ICSID Convention (Kluwer Arbitration Blog, 2 August 2020) <https://arbitrationblog.kluwerarbitration.com/2020/08/02/revisiting-indias-position-to-not-join-the-icsid-convention/> accessed 11 November 2023.

avoided and there is sufficient deliberation between stakeholders to find the right balance and credibility of the system.

Interpretative inconsistency also dilutes integration of values within international investment law, which derives force from other public international law perspectives, such as environment law and human rights law. It is therefore essential to ensure to mitigate any contrasting interpretations between rights of investors under the investment treaties with any larger public international law concern.

In this context, this article explores the currently debated questions of interpretative inconsistencies at a granular level, critically reviewing the approaches taken by tribunals in succeeding arbitral awards. It also analyses the various front-end and back-end proposed solutions for tackling such inconsistency. Lastly, the article proposes consistent solutions, determining a concrete standard of review and an interpretative methodology to preserve the legitimacy of international investment law.

2. DEBATED QUESTIONS OF INTERPRETATIVE INCONSISTENCIES

It is generally accepted that investment tribunals should accord respect to prior decisions on similar issues and treaty provisions. Despite this reservation, investment tribunals often cite decisions taken by tribunals in other investment disputes to support their understanding of the law or to clarify or explain a concept or a point, or to illustrate how similar issues have been previously dealt with.[9] However, there is no doctrine of precedent in international law, i.e., a rule of the binding effect of a single decision. There is also a lack of hierarchy of international tribunals and each tribunal is sovereign for the issues that arise for its consideration.[10] An investment tribunal is not required to sit in review or in judgment of the opinion given by other tribunals, and the sole expectation is that it shall decide the dispute before it in light of the specific facts and law concerning the dispute.[11]

In view of the above, over time, there have been several cases which have brought the debated questions of interpretative inconsistencies in ISDS to

9. *Garanti Koza LLP v Turkmenistan* ICSID Case No. ARB/11/20, Award (December 19 2016) para 149.
10. *SGS Société Générale de Surveillance SA v Philippines* ICSID Case No. ARB/02/6, Decision on Jurisdiction (24 January 2004) (2005) 8 ICSID Rep 518 para 97.
11. *Joy Mining Machinery Ltd v Arab Republic of Egypt* ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August, 2004), 19 ICSID Rev-FILJ 486.

light. A prominent example in this regard was the incoherent application of the necessity defence in the ICSID decisions arising out of the investment disputes pertaining to the economic crisis in Argentina in the early 2000s. Different investment tribunals were constituted to deal with a similar issue, namely whether it was possible to invoke necessity in situations of economic crisis. These disputes included *CMS Gas Transmission Co v Republic of Argentina*,[12] *Sempra v Argentine Republic*,[13] *Enron Corpn and Ponderosa Assets, LP v Argentine Republic*,[14] and *LG&E Energy Corpn, LG&E Capital Corpn, LG&E International Inc v Argentine Republic*.[15] Notably, all these disputes arose out of the USA-Argentina BIT, and also related to the same cause of action, namely, disconnection of the value of the Argentinean Peso from the value of the US Dollar which led to the deprivation of the economic value of the interests of foreign investors.[16] Notwithstanding almost identical circumstances, these investment tribunals decided the disputes in irreconcilable ways, and reached contradictory conclusions.[17] While these tribunals found that it was possible to invoke the doctrine of necessity in cases of economic crisis, they reached contradictory conclusions on several points, in particular the interpretation of Article XI of the treaty, which dealt with non-precluded measures ("**NPM Clause**") and limited the liability of the host state in exceptional circumstances.[18] In these arbitrations, Argentina had invoked Article XI as a defence in view of the prevailing economic crisis in the state. In *CMS*, *Enron*, and *Sempra*, the

12. *CMS Gas* (n 6). The decision has then been subject to (unsuccessful) annulment proceedings; see *CMS Gas Transmission Co v Republic of Argentina* ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (25 September 2007).
13. *Sempra Energy International v Argentine Republic* ICSID Case No. ARB/02/16, Award (28 September 2007); *Sempra Energy International v Argentina Republic* ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award (29 June 2010).
14. *Enron Corpn and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007); *Enron Creditors Recovery Corpn and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3, Decision for the Application for Annulment of the Argentine Republic (30 July 2010).
15. *LG&E Energy Corpn, LG&E Capital Corpn, LG&E International Inc v Argentine Republic* ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006).
16. Zarra (n 5).
17. José E Alvarez & Kathryn Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime' (2008) IILJ Working Paper 2008/5 <https://www.iilj.org/publications/the-argentine-crisis-and-foreign-investors-a-glimpse-into-the-heart-of-the-investment-regime/ > accessed 11 November 2023.
18. August Reinisch, 'Necessity in International Investment Arbitration—An Unnecessary Split of Opinions in Recent ICSID Cases?' (2007) 8(2) The Journal of World Investment & Trade 191.

tribunals concluded that the NPM Clause was inapplicable, and Argentina was therefore liable to pay damages to the investors for breach of the treaty. While reaching this conclusion the tribunals simply equated the treaty's exception clause with that of the necessity defence under the customary international law as incorporated under Article 25 of the International Law Commission's Draft Articles on State Responsibility. To the contrary, and in express disregard of these decisions, in *LG&E*, the tribunal allowed Argentina to take the defence of the NPM Clause and excused Argentina from its liability under the treaty. While doing so the tribunal made reference to customary international law only at a subsequent stage and did not ground its decision on the standards of the necessity defence under the customary international law.

Further, the tribunal in *Continental Casualty* conducted a detailed examination of the measures adopted by Argentina to conclude that the NPM Clause was applicable.[19] Thus, despite the tribunals reaching the same conclusions in *Continental Casualty* and *LG&E*, the reasoning and approach to interpretation remains vastly in conflict in these decisions. Thus, notwithstanding the merits of these differential decisions, they highlighted fragmentation in ISDS, and were criticised for producing horizontal jurisprudence in international investment law.[20]

Concerns in regard to interpretative inconsistencies are further heightened by the decisions of the ad hoc committee in the annulment decisions of *CMS*, *Enron*, and *Sempra*.[21] The decision of the ad hoc committee in *CMS* refused annulment even while adopting a similar rationale as in the *LG&E* decision. However, the ad hoc committee in the *Sempra* case annulled the decision by holding that by failing to apply Article XI of the U.S. Argentina BIT, the tribunal was in excess of power. Ironically, the ad hoc committees in *CMS* and *Sempra* reached different conclusions even while identifying the same errors of law and adopting a similar manner of interpretation. With an entirely different approach, the *Enron* ad hoc committee held

19. *Continental Casualty Corpn v Argentine Republic* ICSID Case No. ARB/03/9, Award, Continental Casualty Award (5 September 2008).
20. N Jansen Calamita, 'The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' (2017) 18(4) The Journal of World Investment & Trade 585, 586-587.
21. *CMS Gas* Annulment Decision (n 12); *Enron Corpn and Ponderosa Assets, LP v Argentine Republic* ICSID Case No. ARB/01/3, Annulment Decision (30 June 2010) (Enron Annulment Decision); *Sempra Energy International v Argentina Republic* ICSID Case No. ARB/02/16, Annulment Decision (29 June 2010) (Sempra Annulment Decision).

that the issues within Article XI and the necessity defence were beyond consideration by the committee as it fell within the scope of the tribunal.

Interpretative inconsistency is also visible in the way investment tribunals have interpreted substantive treaty provisions and investment standards, often similarly worded, in contrasting manners. The differential interpretation of the 'Full Protection and Security' ("**FPS**") clause, which is a standard treaty provision found in most investment treaties, is a good example in this regard. For instance, in *BG Group Plc v Republic of Argentina* and *National Grid Plc v Argentine Republic*, the tribunals reached contrasting interpretations of the same FPS clause found in the UK-Argentina BIT.[22] In these cases, the tribunals were required to examine whether the FPS clause covered only the physical security of the investors or also extended to their economic security. In doing so, in *National Grid*, the tribunal accorded an expansive interpretation to the FPS clause, holding that regulatory changes could also trigger the FPS clause. On the contrary, the tribunal in *BG Group* adopted a restrictive interpretation and observed that it would not be proper to depart from the understanding that the FPS clause is limited to the physical security of the investors. The standard of care required by the FPS clause has also similarly been subject to interpretative inconsistency.[23]

Interpretative inconsistency has also been worrisome with respect to the treatment of the fair and equitable treatment ("**FET**") clause in investment treaties. Historically, the standard of the FET clause has been subject to substantial scrutiny and deliberation. One of the most widely referred definitions of the FET clause has been provided by the tribunal in *Tecnicas Medioambientales Tecmed, SA v United Mexican States*, wherein it was stated that the FET standard was granted a very wide interpretation to include providing investments protection against violation of "*the basic expectations that were taken into account by the foreign investor to make*

22. Agreement between the Government of the UK of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (adopted 11 December 1990, entered into force 19 February 1993) art 2(2); *BG Group Plc v Republic of Argentina*, UNCITRAL Award (24 December 2007) paras 325-326.; *National Grid Plc v Argentine Republic*, UNCITRAL Award IIC 361 (2008) (3 November 2008) paras 187-189.
23. *Ronald S Lauder v Czech Republic*, UNCITRAL, Final Award, IIC 205 (2001) (3 September 2001) para 308*; CME Czech Republic BV v Czech Republic*, UNCITRAL, Partial Award (13 September 2001) para 613.

the investment."[24] While this interpretation did receive acceptance by future tribunals,[25] several tribunals have departed from this broader construction of the FET clause and narrowly or moderately construed the treaty standard. For instance, in *Alex Genin v Estonia*, the tribunal limited the scope of the FET standard to only include such acts which pertain to wilful negligence or bad faith on part of the host state.[26] Similarly, in *Waste Management Inc v United Mexican States*, the tribunal construed FET clause to be triggered "*if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process*."[27]

'Most favoured nation' clauses have also seen a similar inconsistent trajectory with respect to their scope and standard.[28] Inconsistent and incoherent reading and interpretation of substantive treaty provisions is problematic for the legitimacy of the ISDS mechanism. It is also detrimental to the interests of the investors as well as the states as they cannot with certainty believe that their actions would fall within or beyond the scope of the treaty provisions. This is demonstrated by the particularly more inconsistent approach towards applicability of the MFN Clause that would enable access to ISDS. Consequently, this gives rise to pertinent questions relating to the jurisdiction of tribunals.[29] In such circumstances, host states may find their regulatory actions being made subject to surprise treaty claims or investors being denied their legitimate treaty claims. This is evidenced by the inconsistent approach adopted by tribunals in

24. *Tecnicas Medioambientales Tecmed, SA v United Mexican States* ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) para 154.
25. See for instance *MTD Equity Sdn Bhd and MTD Chile v Republic of Chile* ICSID Case No. ARB/01/7, Award (25 May 2004) paras 113-115; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan* ICSID Case No. ARB/03/29, Award (27 August 2009) para 179: *LG&E Energy Corpn, LG&E Capital Corpn, LG&E International Inc v Argentine Republic* ICSID Case No. ARB/02/1, Decision on Liability, (3 October 2006) para 127.
26. *Alex Genin, Eastern Credit Ltd, Inc and AS Baltoil v Republic of Estonia* ICSID Case No. ARB/99/2, Award (25 June 2001) para 367.
27. *Waste Management Inc v United Mexican States* ICSID Case No. ARB (AF)/00/3, Award (30 April 2004) para 367.
28. Julian Arato and others, 'Parsing and Managing Inconsistency in Investor-State Dispute Settlement' (2020) 21 The Journal of World Investment & Trade.
29. ibid.

Emillio Agustin Maffezini v Kingdom of Spain.[30] In *Maffezini,* the tribunal allowed the extension of the MFN provision to the dispute settlement arrangements enabling the claimant to avoid the local litigation processes and access to arbitration. Herein, it was observed that "dispute settlement arrangements are inextricably related to the protection of foreign investors, essential to the protection of the rights envisaged under the pertinent treaties". However, a subsequent tribunal in *Wintershall Aktiengesellschaft v Argentine Republic* adopted a contrary view and disallowed extension of the MFN clause to the dispute settlement arrangement.[31] Inarguably, dispute settlement arrangement herein forms a fundamental part of the treaty and its interpretation. Thus, the above illustration of the extent of interpretative inconsistency also highlights that this concern is not restricted to circumstances culminated from a unique sequence of events. Rather, the concerns of inconsistency affect attempts of interpretation at a significantly basic level, independent of any factual variations.

Therefore, it is undisputable that consistency in interpretation is essential and desirable as it ensures that the ISDS community remains vigilant, and ensures the growth and refining of the substantive and procedural treaty standards.

3. THE PROPOSED FRONT-END AND BACK-END SOLUTIONS

There is no gainsaying that the ISDS mechanism is critical in settling international investment disputes between investors and host States. However, the fragmented nature of the ISDS mechanism has been chastised for its inconsistent interpretations of investment treaties, which have resulted in unforeseen consequences. This part considers and analyses various front-end and back-end solutions proposed to overcome these interpretative gaps. Each solution has its own set of advantages and disadvantages in terms of promoting a more cohesive and efficient ISDS mechanism. The authors investigate these solutions and their potential use, keeping in mind the goal of illuminating alternative approaches to a fair and predictable system to ensure settlement of investment disputes.

30. *Emillio Agustin Maffezini v Kingdom of Spain* ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 January 2000).
31. *Wintershall Aktiengesellschaft v Argentine Republic* ICSID Case No. ARB/04/14, Award (8 December 2008) para 172.

A. Establishment of the Multilateral Investment Court

The European Union ("**EU**") has proposed the establishment of a fully integrated Multilateral Investment Court ("**MIC**"), a two-tiered standing Court, which would comprise a Court of Instance and a Court of Appeal. The MIC has been proposed as a systemic reform to reduce interpretive inconsistencies and promote predictability in ISDS. The creation of MIC was introduced in the context of the UNCITRAL Working Group III discussions on ISDS reform.[32]

This proposal acts as an alternative to the current ISDS system, which permits individual investors to sue host states directly before international tribunals.[33] There are two key characteristics of the MIC. First, it involves a two-tiered court system - a court of first instance and a court of appeal. This is intended to provide more judicial scrutiny, consistency, and uniformity in decision-making. Second, judges would be appointed for a fixed-term, ensuring formal continuity in adjudication. The judges' decisions would be based on recognised and standard principles of law, aiming to improve uniformity in the interpretation of investment treaties. There are several ways the establishment of the MIC aims to address interpretive inconsistencies.

Firstly, the MIC would operate on the existing investment treaties between member States. While this method maintains treaty variety, the MIC would create a uniform approach to interpreting common treaty clauses. Effectively, this would lead to piggybacking pre-existing treaties. This uniformity may result in more predictable outcomes and fewer inconsistencies in cases wherein interpretation of similar treaty provisions is at play. *Secondly*, the MIC's rulings would set precedents and ensure consistency in jurisprudence. These precedents would give direction to both States and investors, and assist them in understanding their respective treaty obligations and comprehending the potential consequences of their conduct. This would increase uniformity and coherence in the interpretation and execution of investment treaties.

32. UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union and its Member States' (2 October 2019) UN Doc A/CN.9/WG III/WP.182.
33. Malcolm Langford and others, 'UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions' (2020) 21(2-3) The Journal of World Investment & Trade 167.

Furthermore, the MIC would also aid in developing clarity on contracting around treaty norms. Thus, MIC's participation in defining the circumstances or methods by which States and investors might contract around treaty norms would provide additional assurance and direction in interpretating treaty provisions. This clarification would assist to avoid inconsistencies in the interpretation.

Lastly, the MIC's uniform methodology/approach to assess the impact of diverse drafting choices in investment treaties would allow States and investors understand the manner in which certain provisions would be construed. This would allow parties to draft wordings of the treaty provisions with more certainty. This would in turn lower the likelihood of conflicts originating from ambiguously or imprecisely drafted treaty provisions.

The MIC hopes to establish a more stable, predictable, and uniform environment for addressing investment disputes by adding these qualities. It also aims to resolve concerns about interpretation inconsistencies in the present ISDS mechanism, and lower the likelihood of inconsistent conclusions in varied investment cases.[34]

In this regard, it must also be noted that achieving consistency is not a value in vacuum. An alternative as such the aforementioned system may allow a high level of consistency, coherence and predictability. However, it must be weighed against the risks and implications of the consequent concentration of judicial power, sacrifice of quality and correctness.[35] Therefore, it is imperative that such mechanisms are thoroughly contemplated to ensure that the values of flexibility and neutrality enabled by the current system is not compromised.

B. Creation of an Appellate Mechanism

The establishment of an appellate body to supplement the traditional *ad hoc* ISDS would mean establishment of a higher-level judicial body with the jurisdiction to review and perhaps reverse judgments issued by investment tribunals in specific circumstances.[36] The appellate procedures in domestic legal systems, where higher courts review decisions made by subordinate courts to ensure consistency, coherence, and justice in

34. Julian Arato and others (n 28).
35. Julian Arato and others (n 28).
36. Zarra G, 'The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?' (2018) 17 Chinese Journal of International Law 137.

the application of the law, can serve as the inspiration for this concept.[37] The proposal to create an appellate mechanism firstly targets the issue of coherence and consistency. The appellate body could assist in ensuring that similar cases are decided in a consistent and coherent manner. It would offer direction and set precedents, resulting in more predictable results for foreign investors and host States.

Secondly, the appellate body's rulings would be persuasive or binding precedents, providing direction to tribunals at the lowermost level. This would decrease the possibility of contradictory interpretations and provide a more robust and credible body of jurisprudence. Furthermore, the appellate body could re-examine and review awards for probable legal or logical flaws. This assessment would improve the quality of decision making, and verify that tribunals adhere to established legal standards and best practices. Consequently, the appellate body could also assist in harmonising the interpretation of treaty clauses and investment standards across different cases. This would help to create a more cohesive and comprehensive understanding of international investment law.

Lastly, the creation of an appellate body would strengthen the ISDS mechanism's legitimacy by providing a channel for review and appeal. This would ensure that rulings are subject to checks and balances.

Having said that, establishing an appellate mechanism within the ISDS system would need an extensive agreement among states and other stakeholders. There are several obstacles to this process, including sovereignty concerns, worries about potential delays in the process, limited role of investors in appointments, and doubts concerning the composition of the appellate body. The ongoing World Trade Organisation's ("**WTO**") appellate body crisis serves as a crucial warning. In the WTO experience, on account of judicial activism, appointment of judges to the appellate body has been blocked by the U.S., which had led to the stagnation of the WTO appellate process. This coupled with inconsistent interpretations on questions revolving around anti-dumping and zeroing measures is a clear example of how institutional reform can lead to problems at a different level.[38] Nonetheless, supporters claim that an appellate process might

37. David A. Gantz, 'An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes' (2021) 39 Vanderbilt Law Review.

38. Jennifer Hillman, 'Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad, and the Ugly?' (2023) Institute of International Economic Law <https://www.law.georgetown.edu/wpcontent/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf.> accessed 24 July 2023.

considerably improve the overall fairness and efficacy of ISDS system, and also address some of the interpretive inconsistencies encountered in investor-state arbitrations.[39]

C. Enhanced Cooperation and Coordination

Another potential medicine to the problem of interpretive inconsistencies in the ISDS mechanism is better collaboration and coordination among different tribunals.[40] This aims to increase conversation, information exchange, dialogue, and collaboration among tribunals in order to decrease inconsistencies in their interpretations of investment agreements.[41] This will tend to improve the overall legitimacy and efficacy of the ISDS mechanism by encouraging a more coherent approach to decision-making.[42] Such cooperation and coordination between tribunals could aid in resolving the issues of *consistency in decision-making* if Tribunals could build a concrete standard of review, encompassing standard principles by participating in regular discourse and information exchange. This would lead to uniformity in decision making across multiple jurisdictions and help avoid contradictory interpretations.

It could also effectively prevent forum shopping attempts as different interpretations adopted by tribunals particularly in regard to jurisdiction and maintainability issues, may encourage forum shopping. This occurs when parties seek out certain tribunals based on perceived biases or favourable assessments. Improved collaboration might reduce the recourse to forum shopping by encouraging consistent decision-making across different forums. Moreover, greater collaboration and coordination between tribunals would improve the ISDS mechanism's credibility and legitimacy. Stakeholders would have more faith in the mechanism's fairness and predictability. This would produce a more conducive dispute resolution framework.

In view of the above, increased collaboration and coordination across tribunals hold promise in reducing interpretive inconsistencies. However,

39. Zarra G (n 36).
40. De Luca A and others, 'Responding to Incorrect Decision-Making in Investor-State Dispute Settlement: Policy Options' (2020) 21 The Journal of World Investment & Trade.
41. Statute of the International Court of Justice (adopted on 26 June 1946) UNTS 993 art 59; the Agreement on the Unified Patent Court (adopted in 2017) 56 Official Journal of the European Union 2013/C 175/01 art 22.
42. Malcolm N Shaw, *International Law* (7th edn, Cambridge University Press 2014).

accomplishing this aim may need active engagement and willingness to collaborate from both host states as well as tribunals. In addition, key stakeholders would need to create and agree on the system for information exchange and coordination. Nonetheless, by encouraging a more collaborative approach, the ISDS mechanism can get closer to its goal of providing fair and effective settlement of investment disputes.[43]

D. Issuance of Guidance and Recommendations

Another potential option to overcome interpretive inconsistencies in the ISDS mechanism is for concerned international organisations and agencies to issue guidelines and recommendations.[44] This approach entails presenting authoritative interpretations or explanations of specific legal problems in order to encourage tribunals to make more consistent and coherent decisions.[45] International organisations, such as the ICSID, and arbitral institutions, could publish guidance notes or suggestions on specific treaty clauses that have received contradictory interpretations. This would assist tribunals in getting a better understanding of the intended scope and purpose of these clauses in order to apply them uniformly.

Furthermore, guidance could be provided on the means to interpret investment protection standards, such as the fair and equal treatment, full protection and security, and other non-discrimination standards. This would provide tribunals with a fair view of the threshold, allowing for more consistent and predictable interpretations.

Such guidance could be further be enhanced by supplementing them with summaries of past decisions or hypothetical situations to demonstrate how specific standards and clauses could be interpreted in different factual settings. This would assist tribunals in navigating complicated legal problems, while also reducing inconsistent and differing opinions. *Furthermore,* the Guidance could emphasise the significance of making transparent and reasoned decisions. Clear and well-reasoned awards would help parties grasp the foundations of legal interpretation and encourage consistent outcomes.

An additional manner to make the guidelines most effective is to ensure stakeholder engagement. When issuing guidelines, relevant stakeholders,

43. De Luca A and others (n 40).
44. De Luca A and others (n 40).
45. Julian Arato and others (n 28).

such as States, investors, and legal experts may be consulted. This would ensure that the guidelines represent a variety of perspectives and outlooks. This would make it more thorough and relevant. Moreover, as international investment law continues to evolve, guidelines would need to be updated on a regular basis to reflect alterations in principles and standards throughout different sectors. This would ensure that the guidance remains current, up to date and effective.

There is no gainsaying that such guidelines and recommendations might be valuable. However, the nature of such guidance must be considered. The guidelines should be balanced, and ought to avoid rigid measures that might impede the flexibility accorded to tribunals. Furthermore, acceptance and implementation of guidelines/recommendations may be contingent on State's and tribunal's voluntary participation. Nonetheless, professional guidance may make a major contribution to eliminating interpretive inconsistencies and improving the predictability and efficacy of the ISDS mechanism.[46]

E. Codification of Treaty Interpretation Principles

In the context of ISDS, the codification of treaty interpretation principles refers to the formalisation of certain principles and norms that govern how investment treaties should be construed.[47] This method tries to give tribunals clear rules and a standard of review to follow when interpreting treaty clauses and investment protection standards. The goal of codifying these principles is to decrease ambiguity and encourage more uniform and predictable outcomes in investment disputes.[48] Codifying the principles of treaty interpretation will enable clear and consistent interpretation as Tribunals would have a well-defined framework to analyse treaty clauses as well as a set standard of review. This would improve consistency and coherence in decision making. Tribunals often face complicated legal questions with no clear precedents. Thus, codified principles can serve as a foundation for addressing such challenging issues, reducing uncertainty, and the possibility of inconsistent conclusions. Furthermore, this could ensure predictability for both foreign investors and host states by setting

46. De Luca A and others (n 40).
47. Giorgetti C, 'The Transformation of International Organizations— Specialization, New Initiatives, and Working Methods— Some Observations on the Work of UNCITRAL Working Group III' (2023) 26 Journal of International Economic Law 40.
48. Giorgetti C (n 47).

unequivocal and unambiguous rules for treaty interpretation. Consequently, this can also establish limitations and guidelines to prevent tribunals from unreasonably according expansive interpretations to treaty provisions. This would lead to a more balanced and controlled decision-making.

Nonetheless, the practical realities of such codification remain a huge but looming obstacle in this regard. Geopolitics and its possible implications present a convincing downside of undertaking the establishment of such mechanisms. The compromise of independence and neutrality would render the ISDS in the same boat as that of other such institutional bodies including the WTO Appellate Body.[49] Although this does not undervalue the underlying benefits of such codification, it warrants a serious deliberation and contemplation of ways to balance each value that must be upheld and maintained within the system.

Like other suggestions, codifying treaty interpretation rules would also require a collective effort and agreement amongst all stakeholders. Developing such standards would need significant deliberations, agreements, and concessions in order to achieve proper balance between investor protection and host-state regulatory space. Furthermore, such principles should be adaptable enough to accommodate changing norms and situations, while still providing a solid foundation for consistent and logical interpretation. That said, codifying treaty interpretation standards may eliminate interpretive anomalies and improve the overall fairness and efficacy of the ISDS mechanism.[50]

4. FINDING A CONCRETE STANDARD OF REVIEW

Treaty interpretation is an infamously difficult subject and a hard nut to crack. Inconsistent interpretations can be troublesome, subject to treaty norms in question. It is therefore essential to narrow down a concrete and consistent standard of review for tribunals to implement. To preserve contracting parties' control, it is essential, that this standard of review must be carried out during these four stages: IIA Negotiation, IIA Implementation, ISDS Proceedings and Post ISDS Proceedings.

The IIA negotiation stage, being the stage of clarity should involve identifying clear policy goals, ensuring consistency and coherence in texts

49. Jennifer (n 38).
50. Giorgetti C (n 47).

by capturing the desired terms and interpretations 'in' and 'outside' the treaty text, stipulating exceptions and carve-outs.

The IIA implementation stage, must involve constant engagement with treaty partners, joint declarations, text review including clarifications on regular basis by Joint Committees with a view to better manage the dispute at hand.

In the course of the dispute, the ISDS proceedings stage should focus on active participation through joint interpretive statements and/or binding interpretations from treaty parties including Non-Disputing Party ("**NDP**") submissions.

Upon the conclusion of the dispute, the post ISDS proceedings stage being the era of reflection must involve policy adjustment through amendments and joint ex-post general declarations and/or agreements between State parties in order to balance party autonomy and the rule of law.

The following suggestions can also help illuminate priorities for reform of the system.

A. Unequivocal Treaty Language

The problem of interpretative inconsistency is more heavily layered than what is readily apparent on face. The interpretation of provisions, whether consistent or inconsistent, fundamentally revolves around the text of the treaty provisions. In the absence of clear and unambiguous drafting, tribunals may apply a *sui generis* interpretative methodology relying on the principles of justice, equity, good conscience, as well as policy and practical implications, to interpret treaties. It is therefore of paramount importance that treaty drafters use unequivocal language, which clearly expresses their intent, to avoid the counterintuitive interpretations being given by the tribunals.

B. Collective, Joint and Authentic Interpretations

Instead of tribunals, parties can explore sharing 'collective and joint interpretations' of provisions. This could indicate mutually agreed interpretations of treaty provisions, and avoid divergent, disputed or conflicting views between the parties. The parties can also exclude certain claims from the ambit of arbitration. This would preclude the tribunal from overreaching its jurisdiction. This proposal is not easy and poses serious practical implications. However, when host states update their treaties, they

must keep in mind that parties to the treaty have a duty and obligation to cooperate under international law. This obligation exists even in the absence of specific treaty provisions, is also fundamentally integral to the principle of *pacta sunt servanda*.

However, an inherent challenge with respect to state obligations is that it is seldom that countries truly oblige with their international duties, particularly when geopolitical influences and are involved. Although a system independent of such influence would be exceedingly unattainable, enabling true representation and preventing politically motivated representations in this regard would to a great extent aid in overcoming such challenges.

C. Replacing ISDS with SSDS

Eliminating the ISDS mechanism completely from investment treaties is another option which may be explored. This can be followed by replacing the ISDS with mandatory State to State investment treaty arbitration. While this approach could eliminate interpretive inconsistency in international dispute settlement at a certain level, giving control of the final outcome at the hands of the domestic courts may be counterproductive. Different court systems across jurisdictions would give no guarantee about consistency in interpretation of investment treaty norms. This would further increase the risk of discriminatory treatment.

D. NDP Submissions

Involving NDP participation by way of amici curiae submissions after consulting both parties is a suitable vehicle to derive authentic interpretations on the meaning of key standards, procedural and similarly worded provisions. State parties to a treaty may have a right to make submissions as to the questions of interpretation or application of that specific treaty, even otherwise, to assist the tribunal in deciding the dispute by providing an outlook different from that of the parties, NDPs can request the tribunal to file written submissions in the case. While the participation of NDPs within ICSID is minimal, over time, greater coherence and predictability can be witnessed by repeated and concordant positions on the meaning of key standards and procedural provisions by involving NDPs. However, the extent to which NDP participation may affect the final outcome of the case is at the sole discretion of the tribunal.

E. Teleological Interpretive Methodology

Interpreting investment agreements by asking yourself "what is that thing for the sake of?" can go a long way. Tribunals often perceive the object and purpose of treaties by relying on the preamble. Giving precedence to the preamble, which expresses goals and policies of the parties, over express terms of the treaty, is a question that deserves attention. A functional interpretational link between the aims and objective of the treaty, the corresponding jurisdictional requirement, and the procedural outcome as intended by the tribunal, can be created. This would provide an integrated standard of review, which can be explored as a solitary manoeuvre of interpreting investment treaties through the teleological lens. Of course, one would claim that a preamble to the treaty comprises a cluster of goals, which are sometimes even at variance. However, one needs to keep in mind that these goals, as envisaged under the preamble to the treaty, are not unavoidably mutually exclusive but only require a cohesive and integrated approach to interpretation.

5. CONCLUSION

It is alarmingly clear that inconsistent decision making within the ISDS mechanism requires careful attention. There is a need to find a solution to inconsistency, incoherence, unpredictability and incorrectness of decisions in the ISDS mechanism. The UNCITRAL Working Group III has been deliberating reforms to the ISDS mechanism for several years but stakeholders are yet to reach a consensus on the most suitable path to rectify the legitimacy concerns plaguing the ISDS mechanism.

As discussed above, each potential reform has its own advantages and disadvantages. For instance, a transition from party-appointed arbitration in the ISDS mechanism to a multilateral investment court with state-appointed judges would likely lead to greater consistency in decision making, but at the perceived cost of increasing the duration of proceedings as well as eliminating participation of investors in the appointment process.

Substantive reforms to the ISDS mechanism, such as creation of an appellate body or a standalone court, would require large scale agreement between the stakeholders. Given the existence of thousands of investment agreements, such extreme measures would also face several practical challenges. Moreover, the stakeholders would have to agree on various nuances of these reforms such as the scope of appeal, appointment process, cost and duration of proceedings, among others. Discussions

in the UNCITRAL Working Group III till date do not reveal a majority inclined towards any of the choices, and has seen a significant variance among countries' approaches. Such differences are further amplified by the existing legal system of each country. It is therefore unclear whether extreme reforms such as creation of a multilateral court or an appellate mechanism would become a reality at least in the near future.

On the other hand, reforms within the ISDS mechanism may be a viable option to reduce if not eliminate interpretative inconsistency in toto. As discussed in this paper, reforms such as issuance of guidance, greater cooperation between tribunals as well as codifying treaty norms may provide a channel to reduce interpretative inconsistency and enhance the legitimacy of ISDS mechanism. A collective and collaborative effort of the States coupled with the UNCITRAL Working Group III would be required to implement such reforms.

There is hope that the UNCITRAL Working Group III will be able to agree on a solution to the problem of interpretative inconsistency. This is particularly so as the UNCITRAL Working Group III recently agreed to a code of conduct for arbitrators in ISDS to address concerns relating to ethics and conduct of arbitrators. Any reform to the ISDS mechanism would require all stakeholders to carefully consider the issue, as well as the scope, nature, and reasonableness of each potential reform. Each potential reform, as discussed in the paper, has its own advantages and disadvantages, which need to be considered before proceeding with any substantive changes to the ISDS mechanism.

STAMPING FOR APPROVAL: CRITIQUING THE LEGAL CONUNDRUM OF UNSTAMPED ARBITRATION CLAUSES IN INDIA*

—Ishaan Saraswat and Shourya Mitra

(The authors are undergraduate students at Jindal Global Law School, Sonipat)

ABSTRACT

On April 25th, 2023, the Constitutional Bench of the Supreme Court of India rendered a pivotal decision on the issue of unstamped arbitration agreements. While resolving a long-standing legal ambiguity, the decision has ignited considerable controversy due to its perceived adverse implications for the Indian arbitration landscape. This paper critically examines the ramifications of the Court's ruling, particularly its expansion beyond a mere "prima facie" assessment during arbitrator appointment. Our study delves into the resultant procedural complexities and delays introduced by the Court's intervention, especially concerning the re-examination of stamp duty by the arbitral tribunal, extending the application process and impeding parties' substantive rights. We argue for a streamlined process, proposing either the court or the arbitral tribunal to conclusively determine stamp duty, eliminating the need for further re-evaluation. Additionally, the ruling's use of the term "void" establishes a new dimension in contract and arbitration law, potentially reshaping the legal landscape significantly. Ultimately, the authors scrutinise the impacts of the Court's decision, which was aimed to address concerns related to unstamped arbitration agreements, but has inadvertently introduced complexities that obstruct the smooth functioning of arbitration process.

* [This piece was written in anticipation of *Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899, In re* 2023 SCC OnLine SC 1666, Supreme Court of India, and its findings were affirmed by the said judgment].

1. INTRODUCTION

On April 25, 2023, the Supreme Court's Constitutional Bench in *N.N. Global Mercantile (P) Ltd v Indo Unique Flame Ltd*[1] ***('NN Global')*** deliberated upon a disputed question of law in arbitration– whether an arbitration agreement in an unstamped substantive contract would render it as unenforceable. The disagreement arises from differing views on whether the arbitration agreement must be duly stamped to be considered as 'existing' in law.

According to the majority, when a contract exigible to stamp duty is not stamped, then an arbitration clause within such contract would be unenforceable and would be rendered invalid in law. In stipulating so, the authors argue that the Court intrudes upon the tribunal's competence by looking at the arbitration agreement beyond a prima facie review. Further, the authors also demonstrate that this intrusion causes practical hurdles and delays since the Apex Court additionally envisages that the stamp duty may be re-examined by the tribunal. These hurdles are exacerbated due to a need for a separate stamp for the arbitration agreement itself. The authors also raise concerns regarding the use of the term "void" and argue that the judgment has resulted in creation of a new species of "void" in contract law which can have far-reaching contract law implications.

2. A TIMELINE OF THE ISSUE

The Supreme Court in *SMS Tea Estates (P) Ltd v Chandmari Tea Co (P) Ltd*[2] ***('SMS Tea')*** had to engage with an application for appointing an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 ***('*Arbitration Act'*)***. Here, the arbitration agreement was not duly stamped as per the provisions of the Indian Stamp Act, 1899 **('Stamp Act').** The Court ruled that an unstamped arbitration agreement cannot be acted upon for the purposes of appointing an arbitrator. This was founded on the argument that under Section 35 of the Stamp Act, an agreement that is compulsorily registrable or subject to stamp duty cannot be used as evidence or as a basis for any other purpose, if it is not stamped.

1. *N.N. Global Mercantile (P) Ltd v Indo Unique Flame Ltd* (2023) 7 SCC 1 : 2023 SCC OnLine SC 495.
2. *SMS Tea Estates (P) Ltd v Chandmari Tea Co (P) Ltd* (2011) 14 SCC 66.

In *Garware Wall Ropes Ltd v Coastal Marine Constructions and Engineering Ltd*[3] ***('Garware')***, the question was regarding the then added Section 11(6A) in the Arbitration Act. This provision limited the court's scope of examination of an arbitration agreement solely to its 'existence', when an application for appointment of arbitrator is received. The Supreme Court here applied and reaffirmed SMS Tea. The Court opined that the position of law as stated in SMS Tea has not changed as a result of the addition of Section 11(6A). In *Vidya Drolia v Durga Trading Corpn*[4] ***('Vidya Drolia')***, a three-judge bench of the Supreme Court, approved the holdings in SMS Tea and Garware that were decided by benches of two judges.

In the three-judge bench ruling by the Supreme Court in the case that ultimately resulted in NN Global, *N.N. Global Mercantile (P) Ltd v Indo Unique Flame Ltd (2020)*[5] ***('Old Case')***, the Court had an appointment of arbitrator application before it. The Court determined that the insufficiency or lack of stamping did not render the substantive or principal contract void. The Court relied on the doctrine of separability to determine that the Arbitration Agreement, contained within the substantive contract, would be a separate and independent contract. The Court hence observed that, since the arbitration agreement is an independent agreement between the parties, it would not be subject to the non-payment of stamp duty on the principal contract. In this regard, the Court concluded that, despite the lack of stamping of the principal contract where the arbitration agreement was situated, the arbitration agreement itself would not be considered invalid, unenforceable, or non-existent, hence, deeming the arbitration agreement to be in 'existence' under Section 11(6A).

The Court here overruled their decision in *SMS Tea Estate* with respect to the issue that an arbitration agreement in an unstamped commercial contract cannot be acted upon, or is rendered un-enforceable in law. The Court further observed that the three Judge Coordinate Bench in *Vidya Drolia* was incorrect in approving the findings in *Garware*, wherein it was held that an arbitration agreement can only be considered to 'exist' in law if it is valid and legal. Due to this dichotomy in interpreting 'existence' under Section 11(6A), the Supreme Court in the Old Case deemed it fit to refer the difference in opinions to the Constitution Bench, in *NN Global*.

3. *Garware Wall Ropes Ltd v Coastal Marine Constructions and Engineering Ltd* (2019) 9 SCC 209.
4. *Vidya Drolia v Durga Trading Corpn* (2019) 20 SCC 406.
5. *N.N. Global Mercantile (P) Ltd v Indo Unique Flame Ltd* (2021) 4 SCC 379.

NN Global pertained to appointment of arbitrators in the pre-referral stage of arbitration under Section 11(6A) of the Arbitration Act. The Court opined that at this stage the examination was confined to the 'existence' of the arbitration agreement. Accordingly, the Court stated that 'existence' is intertwined with the concept of 'validity'. Hence, the Court observed if the arbitration agreement satisfied the statutory requirements of both the Arbitration Act and the Indian Contract Act, 1872 **('Contract Act')** and when it is enforceable in law, it would be 'existing' to satisfy Section 11(6A).

The Court then connected the Contract Act and Stamp Act by drawing the fact that only on an agreement being stamped, would it become enforceable under the Contract Act. Here, the Court stated that upon a contract ceasing to be enforceable, it becomes *invalid* and *void*.

The Court relied on the Doctrine of Separability to determine that the arbitration agreement would have an independent existence. In line with this understanding, the Court proposed that the arbitration agreement must undergo separate stamping, the lack of which would render the arbitration agreement non-existent in law. Accordingly, only on the agreement being *validated would it become enforceable, but until then, it will not exist in law* and cannot be acted upon.

3. JURISPRUDENTIAL LANDSCAPE OF SECTION 11(6A) OF THE ARBITRATION ACT

When it comes to Section 11(6A), a central issue circling it has been the use of the term '*prima facie* existence' in the provision. Before *NN Global*, courts have debated whether at this pre-referral stage, existence only related to mechanically finding the arbitration agreement on paper, *i.e., prima facie* existence, or diving into and looking at enforceability of such an agreement, *i.e.,* existence.

As per the Supreme Court in *Duro Felguera SA v Gangavaram Port Ltd,*[6] the role of the judicial authorities at the Section 11(6A) stage is to see whether an arbitration agreement exists, *"nothing more, nothing less"*. The Court here had opined that the legislative intent behind Section 11(6A) is to reduce the Court's involvement during arbitrator appointments, a principle that should be upheld and honoured. Further, in *Vidya Drolia*, which again pertained to appointment of arbitrators in the pre-referral stage of arbitration

6. *Duro Felguera SA v Gangavaram Port Ltd* (2017) 9 SCC 729.

under Section 11(6A), the Court stated that a court's conclusions must be founded on and be restricted to a concise presentation of documents rather than a thorough evaluation of the available evidence, hence, a *'prima facie existence*'. *Vidya Drolia* established, *"when in doubt, do refer"*.

The Law Commission of India,[7] when recommending the insertion of Section 11(6A), as even quoted in *NN Global*, stipulated that courts should leave the determination of 'existence' of the arbitration agreement to the arbitration tribunal under Section 16 of the Act, after finding existence at a *prima facie* level. Further, if the judicial authority, after a *prima facie* assessment *concludes* that the agreement does not exist at the stage of Section 11(6A), then this conclusion would entail finality. Courts here only assess the question of existence, while the arbitral tribunal decides all other initial and preliminary matters.[8]

4. INTRUDING INTO THE TRIBUNAL'S COMPETENCE

Coming to *NN Global*, it is unambiguous that in cases where the agreement is not stamped at all, the Court under Section 33 of the Stamp Act would impound the agreement, till it is validated. This is of course, is a *prima facie* observation. However, the Majority has also made it clear that courts have the power at Section 11(6A)'s stage, apart from seeing whether the agreement is stamped, to delve into whether the value and description of the stamp follows Section 33 of the Stamp Act.

In certain situations, even if the stamp is present, the value of the stamp may be a matter of dispute between parties. This does not leave the issue as a *prima facie* examination, rather enters the scope of merits-based examination. Drawing from *Vidya Drolia*, this would require an examination of evidence, and in such situations, where there is an element of doubt, the court must refer the matter to arbitration. However, the Apex Court in NN Global regarding a '*prima facie*' check, only seems to opine that,

> *"...in view of the power of the Court under Section 11, to find only prima facie, the existence of the Arbitration Agreement, it would enable the Court to make a Reference and appointment*

7. Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1946* (Law Com No 246, 2014).
8. Constantine Partasides QC and Manish Aggarwal, 'Jurisdiction of the Arbitral Tribunal' in Dushyant Dave and others (eds), *Arbitration in India* (Wolters Kluwer 2021) 96.

> *and relegate the issue of impounding of the document to the Arbitrator...the view that cases under Section 11 of the Act would consume more time and hinder the timely progress of arbitration and that the matter must be postponed so that the Arbitrator will more suitably deal with it, does not appeal to us ...this would hardly furnish justification for the Court to ignore the voice of the Legislature couched in unambiguous terms."*

In essence, the Court acknowledges that examining the specifics under the Stamp Act may not be a *prima facie* check, but since it is a statutory mandate, they must honour it. This line of argumentation, however, breaches the other statutory mandate placed by the Arbitration Act, i.e., to have minimal judicial interference and respect the competence of the arbitral tribunal, which is competent to hear such a claim.

The Supreme Court has taken away the arbitral tribunal's ability to determine its own jurisdiction and the existence of the arbitration agreement by requiring a mini-trial regarding stamping prior to the selection of arbitrators.[9] As per the jurisprudence discussed above, there should be no substantive proceeding pending before the court during the appointment of arbitrators or the granting of temporary relief before the formation of the arbitration tribunal. The court's actions should be merely supportive, intended to assist the arbitral tribunal's early formation or safeguard the dispute's substance in the actual arbitration proceedings.

5. DUTY UNDER STAMP ACT: DELEGATION OR REPETITION?

As is aforesaid, the Court stated that the mandate under the Stamp Act to impound an instrument is reconcilable with Section 11(6A). Consequently, the rule of law is that the court is duty-bound to impound an arbitration agreement at the pre-referral stage if it sees a deficiency in stamp duty. It cannot pass over this duty to the arbitral tribunal.

The Court draws a caveat wherein it distinguishes between an agreement with 'no visible stamp duty' and one 'that is not duly stamped'. In the former case, the court states the need for an unambiguous duty under Section 33 and Section 35 of the Act. However, in the latter, the Court acknowledges that when a party raises such a claim and the court 'on the

9. Vivekanandh SM, 'Setting the Clock Back: Judicial Interference in the Appointment of Arbitrators in India (NN Global Decision and its Implications)' (The American Review of International Arbitration, 5 June 2023) <https://aria.law.columbia.edu/setting-the-clock-back/> accessed on 30th November 2023.

face of it' observes that claim to be baseless, it will pass its 'mandate' under the Stamp Act to the tribunal. This is stated to as harmonious construction of the two acts.

If finding the claim of the party contesting to be baseless is a pre-requisite for the Court to pass on this statutory mandate to the tribunal, it creates practical and logical hurdles. The Stamp Act envisages an 'examination' of the instrument according to Section 33. It entails an examination of 'whether it is stamped with a stamp of the value and description required by the law', and passing this duty onto the tribunal will entail another such 'examination' of the stamp.

The Stamp Act makes no distinction between an unambiguously unstamped agreement and an unduly stamped one. The duty is uniform, and the court has to 'examine' it as required. The Court can exhaust the duty under Section 33 entirely at this stage, without making a distinction in the nature of deficiency with respect to the stamp duty.

Effectively, the practical burden is that the court, under its 'statutory duty', examines the agreement to see whether it is duly stamped and then subsequently leaves it to the arbitrator to 'examine' it again. The exercise of examination under Section 33 ends up being repeated if not extended, and the judiciary, on top of interfering itself, also adds another duty on the Tribunal to examine it under the same provision in the same manner as the Stamp Act prescribes. The authors believe that either the court or the tribunal should be able to discharge the duty altogether and not both consecutively.

The Supreme Court in the Old Case proposed a counterfactual at the stage of Section 11 and stated that the court should *"impound the substantive contract which is either unstamped or inadequately stamped and direct the parties to cure the defect, before the arbitrator/tribunal can adjudicate upon the contract"*. The mandate under the Stamp Act was restricted to the court,[10] and once extinguished, the tribunal does not have to concern itself with the Stamp Act at all. According to the authors, this is the apposite view.

6. A NEW "VOID" IN CONTRACT LAW

The Court, in its reasoning, has stated that an arbitration agreement that is not stamped cannot be enforceable for any purpose, including Section 11 of the Arbitration Act. According to the majority, the agreement cannot 'exist'

in law, and the same would be *void* as per Section 2(j) of Contract Act as something that 'ceases to be unenforceable' becomes *void* and *invalid*. To quote, the Court enunciated that:

> *"Our view in this regard that voidness is conflated to unenforceability receives fortification from Section 2(j) of the Contract Act which renders a contract which ceases to be enforceable void... an agreement which is unstamped or insufficiently stamped is not enforceable, as long as it remains in the said condition. Such an instrument would be void as being not enforceable."*

The Court has elaborated further on the nature of this 'void', as something that *"is not invalid or void in the sense of it being still born or null and void,"* and that life can be poured into it. The Court attempted to emphasize that the 'void' in the present context is a void that can be rectified or cured. Such curable interpretation of the word 'void' seems to deviate from the traditional meaning of 'void'.

In *Anukampa Avas Vikas (P) Ltd v State of Rajasthan,*[11] the Rajasthan High Court defined 'void' as an instrument or transaction that is *"so nugatory and ineffectual that nothing can cure it"*. This is as against 'voidable', where a defect *"can be cured by the act or confirmation of him or who could take advantage of it"*. Furthermore, the Supreme Court in *Kalawati v Bisheshwar*[12] distinguished between something that is 'void' and something that is not recognised by statute. The Court held that a property transaction was not recognised for the purposes of UP-Zamindari and Land Reforms Act, 1951 but that lack of recognition does not affect the transfer under the Contract Act, and the transaction under the Contract Act was not void. Effectively, the legislature therein intended to bar recognition and not allow certain rights to vest and such implication should be extended to the stamp act as well. Therefore, it can be argued that, the Stamp Act merely denies recognition to the impugned instrument for the purposes envisaged under Section 35 of the Stamp Act. It does not make it completely *void* for the purposes of the Contract Act. The court in the present case presumably did not recognise this distinction.

Rather, in *NN Global*, we have a species of 'void' that can be cured and acted upon. It does not negate the agreement completely, which is the usual effect of 'void'. However, the authors believe that this goes against the

11. *Anukampa Avas Vikas (P) Ltd v State of Rajasthan* 2008 SCC OnLine Raj 427.
12. *Kalawati v Bisheshwar* AIR 1968 SC 261.

essence of what a 'void' contract entails. Therefore, the deviation in NN Global may muddle the difference between 'void' and 'voidable' contracts.

In certain instances, such as the Supreme Court's holding in *State of Kerala v M.K. Kunhikannan Nambiar Manjeri Manikoth*,[13] 'void' may not entirely be determinative of the legal impact, and it has a relative meaning, not an absolute one. The Court herein opined that the term '*void'* may not mean that the said order or decision is *'non-existent'* in all cases. Applying this principle, if the court in NN Global deems an unstamped agreement to be this *curable* void, then it cannot deem it to be '*non-existent'* as well. The implication of the agreement being *curable* void is that it must be existing. This would negate the Court's ultimate conclusion.

Moving on, the Court in NN Global ruled that non-compliance with Section 33 of the Stamp Act invalidates the agreement; therefore, the agreement does not exist in the eyes of the law. However, the Stamp Act does not mention validity, and lack of proper stamping only leads to inadmissibility as evidence and inability to act upon it. This is temporary and curable under Section 35, 36, and 42 of the Stamp Act.

The deficiency in stamp duty should not defeat a party's substantive rights and cause injustice. The Apex Court[14] has held that curable defects and irregularities should not be allowed to defeat substantive rights or cause injustice.

Further, according to the Supreme Court in *Hindustan Steel v Dilip Construction Co*,[15] the Stamp Act's intent concerns revenue generation. Once that is achieved, the instrument and transaction cannot be nullified based on the primary defect. An unstamped agreement will still exist in the eyes of the law. The Court in NN Global, however, did not address this precedent in its ruling that the unstamped agreement would exist in the eyes of the law.

Therefore, either the court should have called the agreement 'void' in the typical fashion, which is not curable, or should not have used 'void' to determine existence. Creating a 'void' qualifier that is curable and yet somehow invalidates the 'existence' in law is an inconsistent position and muddles contract law jurisprudence with respect to the term 'void'.

13. *State of Kerala v M.K. Kunhikannan Nambiar Manjeri Manikoth* (1996) 1 SCC 435 : AIR 1996 SC 906.
14. *Uday Shankar Triyar v Ram Kalewar Prasad Singh* (2006) 1 SCC 75.
15. *Hindustan Steel v Dilip Construction Co* (1969) 1 SCC 597 : AIR 1969 SC 1238.

Furthermore, the practical implications of this ruling might have a greater impact on standard contracts than on arbitration agreements. In the past, if an agreement was deemed to be 'void' at the Section 11 stage, the only way to correct it would be through novation, as the previous arbitration agreement would not be considered legal. However, now that we have a 'void' agreement that can be cured and enforced without novation, the implications may be different for future cases surrounding contracts.

7. PROMULGATING FURTHER COMPLIANCES

The Court acknowledged the *Doctrine of Separability*, and that the arbitration agreement forms a distinct and separable agreement from the substantive contract. In the Old Case, the Supreme Court had stated that since the arbitration agreement is separable from the main contract, the main contract being unstamped does not make the arbitration agreement invalid.

In NN Global, however, while the Apex Court agreed with the fact that the arbitration agreement is separate from the substantive contract, in an unexpected development, they added a fresh requirement to the arbitration agreement of being stamped as well. Accordingly, it leads to the implication that the arbitration agreement requires to be stamped along with the main agreement, otherwise any arbitration proceedings would also be invalid.

There are two perspectives here. From the practitioner's perspective, and as suggested by the slew of preceding case laws of *SMS Tea*, *Garware*, *Vidya Drolia*, and the Old Case, none of them presented a situation where the arbitration agreement independently is exigible to stamp duty. Secondly, from the Stamp Act legislation's perspective, the only stamp specific to arbitration is stamping of the award, with no mention of stamping the arbitration agreement itself.[16] The legislature providing for stamping an arbitration award highlights their knowledge of arbitration, and no mention of stamping the arbitration agreement independently implies a cognizant necessary exclusion of the same.

Hence, the Court in NN Global may have overreached their judicial powers by taking on the role of the legislature by adding an additional requirement of stamping arbitration agreements, for which the legislation is inadequately equipped to govern its specifics.

16. The Indian Stamp Act 1899 (2 of 1899) sch I, Item 12.

8. WHAT DOES THE FUTURE ENTAIL?

The 2019 amendment[17] proposes to transfer many of the court's current responsibilities to various arbitration institutions and to entirely repeal Section 11(6A). In conclusion, the planned legislative omission of judicial intervention in combination with the judgment's major influence on the arbitration regime is likely to uproot the foundation of the current arbitration system. Whether the transfer of responsibilities to arbitration institutions will be sufficient to prevent the probable knock-on effects of widening *'prima facie'* and while the contempt of *kompetenz-kompetenz* is still up in the air.

There are other principles of law emerging from the ruling which concern Contract law and the Stamp Act, which may alter certain basic principles. The new species of 'void', and the potential division of 'examination' under Section 33 of the Stamp Act are principles that the amendment does not impact and may be problematic in the future. Because of this, this historic change may mark the beginning of a new era for arbitration, with repercussions for years to come for the practise of law and the resolution of disputes.

17. The Arbitration and Conciliation (Amendment) Act 2019 (33 of 2019) s 3(v).

NAVIGATING THE CAPACITY CONUNDRUM: UNRAVELLING STATE SUCCESSION'S IMPACT ON INVESTOR-STATE DISPUTE SETTLEMENT

—*Sai Srijan Neti*

(The author is an undergraduate student at Symbiosis Law School, Pune)

ABSTRACT

State succession in investment arbitration has been a relatively unexplored topic until recently. A few tribunals faced such issues in the context of cession, secession, accession, dissolution, and other forms of state succession. The approaches followed by these tribunals can be expressed on a spectrum which, on one side, favours automatic succession and, on the other, considers a clean slate to apply for all successors. In the middle lies the contemporary practice of treaty negotiations on succession issues. However, no approach on this spectrum has been proven to be flawless. The result is a fragmented field of law with complexities involving controversial questions such as sovereign competence and statehood gained upon independence. Its jurisprudence has undergone constant evolution, and the issues finally came to a head when the tribunals of a few landmark cases dealt with these issues comprehensively. Only upon a closer examination of the history and the context of these cases can one fully understand the scale of addressing these nuanced problems. The present article delves into the issues of state succession in the context of investment arbitration, including any inadequacies in the approaches followed by tribunals while balancing conflicting considerations. It analyses these differing approaches in cases with a background of state succession instances to understand the corresponding theories and concepts that tribunals may apply. Brief comments are made on the contemporary practice of states, along with a hypothetical case being examined for a possible solution.

1. INTRODUCTION

In public international law, questions of state succession have often been controversial. Cropping up in the context of wars, disputed territories, or internationally wrongful acts, they often have public interest involved.

In cases where states that are involved in instances of succession have contracted Bilateral Investment Treaties (hereinafter, **"BITs"**) or entered into agreements of Investor Protection, the questions are even more complicated.

The broader international regime governing state succession is the Vienna Convention on Succession of States in respect of Treaties, 1978[1] (hereinafter, **"VCST"**); however, this Convention does not have universal application, nor does it allow for application to non-state actors. Except for a few provisions considered to be codifying customary international law, the VCST does not bind non-parties.[2] Moreover, a state that is not even a party to the dispute may have an interest in succession issues, as they might be future respondents in arbitrations involving the BITs, whose interpretation is in question. These states are generally the treaty partners, i.e., contracting parties to the BIT along with the respondent-predecessor, and may make submissions as a non-disputing state party or a non-disputing treaty party. These interpretative submissions have grown significantly, given the recent amendments to the ICSID Arbitration Rules and the existing UNCITRAL rules on Transparency in Treaty Based Investor State Arbitration.[3] One could say such complications are a factor, *inter alia*, contributing to the exodus of States from Investor-State Dispute Settlement (**"ISDS"**).[4]

In such circumstances, what happens when states party to BITs have not signed or ratified the VCST? What happens if the VCST does apply, but the entities concerned are not deemed 'states' under International Law? What is the capacity of such non-state entities in the ISDS regime? Do these new entities succeed to their predecessors' BITs, or do they have international capacity for some other reason? What happens if the Contracting Parties

1. 'Vienna Convention on Succession of States in Respect of Treaties' (adopted 23 August 1978, entered into force 6 November 1996) ('Convention on State Succession') 1946 UNTS 3.
2. Patrick Dumberry, *A Guide to State Succession in International Investment Law*, (Elgar Online 2018), citing Andreas Zimmermann and James G Devaney, 'Succession to Treaties and the Inherent Limits of International Law' in Christian J Tams, Antonios Tzanakopoulos, and Andreas Zimmermann (eds), *Research Handbook on the Law of Treaties*, (Edward Elgar 2014) 517.
3. ICSID Rules of Procedure for Arbitration Proceedings ('ICSID Arbitration Rules') (July 2022) r 68; Uncitral Rules on Transparency in Treaty-Based Investor-State Arbitration ('UNCITRAL Rules on Transparency') (April 2014) art 5.
4. Kendra Magraw, 'Trends and ISDS Backlash Related to Non-Disputing Treaty Party Submissions' in Catharine Titi (ed), *Public Actors in International Investment Law* (European Yearbook of International Economic Law 2021) 86-89.

have made interpretative statements on such issues? These are questions addressed in this article.

State succession issues are rare but highly complex in the context of the legal consequences that they entail. The VCST envisaged a process of codification during a time when several newly independent states (**"NIS"**) were created. In it, 'State Succession' is defined as "the replacement of one state by another in the responsibility for the international relations of a territory".[5] However, unlike the more successful Vienna Convention on the Law of Treaties, 1969 (hereinafter, **"VCLT"**),[6] the VCST only has 23 parties.[7] With a diverse range of state succession instances, debates revolve around two conflicting approaches. Firstly, whether successor states automatically continue their predecessor's treaties (the Continuity Principle) or whether they start with a clean slate (the Tabula Rasa Principle). The former favours stability in international legal relations and obligations as successor states inherit their predecessors' treaties' rights and obligations. However, it may not always be in the interests of such successors to favour continuity, much rather preferring complete independence and a '*clean slate*' to apply in specific circumstances such as decolonisation. Authors have held the view that neither of these approaches is appropriate, but rather, a balance needs to be achieved.[8] Diplomatic negotiations have played a significant role in achieving this balance.[9] States often negotiate on state succession questions and determine how the BITs may apply to successor states. Few tribunals faced these questions, and this complexity remained unaddressed until certain landmark cases which are analysed in this article.

The author will provide a brief description of the types of issues that Tribunals in these cases face in Part I. Subsequently, different theories and concepts of state succession and the consequences of their application in the investment arbitration regime are examined in Part II. In Part III, the varied approaches different Tribunals took to address these questions and their answers are analysed. Further, the contemporary practice of states

5. Convention on State Succession, art 2(1)(a).
6. 'Vienna Convention on the Law of Treaties' (adopted 22 May 1969, entered into force 27 January 1980) ('Vienna Convention') 1155 UNTS 331.
7. Details on 'Vienna Convention on Succession of States in Respect of Treaties' (United Nations Treaty Collection) <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280044a0e&clang=_en> accessed 29 September 2023.
8. Christian J Tams, 'State Succession to Investment Treaties: Mapping the Issues' (2017) 31 ICSID Rev 314, 325-8; Also *cf* Dumberry (n 2) 138-42.
9. Raúl Pereira Fleury, 'State Succession and BITs: Challenges for Investment Arbitration' (2016) 27 Am Rev Int'l Arb, 451, 471-72.

to address these questions is analysed in Part IV. In Part V, the author will analyse the hypothetical situation of constituent subdivisions gaining independence and the legal capacity of such disputed entities formed through the state succession instances. Specifically, the capacity to be a party to investment arbitration proceedings based upon prior treaties will be analysed.

2. STATE SUCCESSION ISSUES IN ISDS

Questions of State Succession have an impact on not only the dispute submitted before the tribunal but also the international relations of the states and entities involved. Particularly, successor states may be subject to the predecessor's BIT, making future disputes based upon the predecessor's treaty obligations a possible liability to such successors. In that case, the successor should ideally negotiate treaty application questions with the predecessor's treaty partner at the earliest instance. Through such negotiations, the successor and the previous treaty partner may come up with adequate solutions, such as the continuation of the pre-existing BIT, the conclusion of a new BIT replacing the previous one, or the complete termination of the previous BIT without a new one. However, even in the presence of treaty negotiations, evidence of such negotiations is difficult to obtain in most arbitral proceedings as the BITs, at the time of their conclusion, are often based on some model and are rarely subject to negotiation on succession issues.[10] On the other hand, the investor, in most cases, wants the BIT to automatically apply, regardless of its consequences, in order to preserve the jurisdiction of the tribunal over the claims made.

In a few cases, parties are in agreement regarding the answer to state succession issues.[11] This may provide simplicity as the tribunals need not answer how the newly independent respondent state succeeds to the predecessor's BIT. Further, in a few such cases, no reference is made to the fact that the predecessor's treaty partner may have accepted the treaty succeeding to the NIS. The result is an inadequate explanation, if any, provided by tribunals to establish a concrete regime. More specifically, it has led to diverse approaches to the problem when succession issues are introduced to the tribunal as a challenge to jurisdiction by the successor-respondent. Being a highly political and controversial question,

10. Ibid; *cf Wintershall Aktiengesellschaft v Argentine Republic* ICSID Case No ARB/04/14, Award (8 December 2008), para 85.
11. Patrick Dumberry, 'State Succession to BITs: Analysis of Case Law in the Context of Dissolution and Secession' (2018) 34 Arb Int'l, 445, 452-53.

investment tribunals may not delve into the legality of these questions in the international adjudication of disputes. The only reason they need to answer these questions is to determine the investor's standing and their own jurisdiction based on the predecessor's treaty. Tribunals must carefully delineate what questions they are faced with and not go beyond their mandate, even when such international succession issues arise. To do otherwise is to undermine the rule of law and consent of the parties involved. Even consent of the predecessor's treaty partner may play a vital role in the state succession instance as they have a justifiable interest in such questions being answered. However, no adequate explanation of what role they play is given so far, especially when the new states object to the BIT's application and automatic succession.

How the tribunals approach these issues is evident in the case of *Stabil LLC v Russia*.[12] In *Stabil,* without indulging the question of the legal status of the Crimean Peninsula, the tribunal addressed the succession question as a matter of fact. Doing so, it held that the Russian Federation established effective control over the Crimean Peninsula and that the term 'territory' referred to the areas over which the Contracting States exercised *de facto control* and sovereignty despite not holding any lawful title under international law.[13] Interestingly, it referred to Article 29 of the VCLT to determine that a treaty applies to the state's "entire territory" unless the Contracting Parties have expressed a "different intention" with regard to the treaty's territorial scope.[14] Despite Article 73, by which state succession questions are not prejudged by the VCLT, the tribunal's application of Article 29 of the VCLT may be attributed to the Moving Treaty Frontiers (**"MTF"**) Rule recognised as customary international law. The MTF rule is examined in further detail below. A few of the other rules that several tribunals and courts followed in different types of State Succession Instances are also analysed below.

3. THEORIES AND CONCEPTS

A. MTF Rule

As previously stated, the Moving Treaty Frontier Rule is generally applied not through VCST but through Article 29 of VCLT, which is considered to be reflective of customary international law. More importantly, Tribunals

12. *Stabil v Russia* PCA Case No 2015-35, Award on Jurisdiction (26 June 2017).
13. ibid 146.
14. ibid; *cf* 'Vienna Convention', art 29.

have held the view that succession in cases of cession, secession, or accession demands a *de facto* effective control approach rather than commenting on the *de jure* nature of the succession. Effectively recognising the jurisdictional status quo post succession but possibly going against the principles of non-recognition.

B. Automatic Continuity

Whenever state succession occurs, the question often posed is whether the successor should be bound by treaties signed by its predecessor. As previously stated, the VCST under Article 34 envisages the principle of automatic succession. Simply put, all successors are presumed to continue their predecessor's rights and obligations under bilateral and/or multilateral agreements. The only exceptions are (1) the Article 34(2)(b) rule of incompatibility and radical change, as per which a treaty does not apply to successors if its application is incompatible with the treaty's object and purpose or would radically change the conditions for its operations; and (2) the clean slate rule applicable to successions in the colonial context.[15] However, the automaticity principle has been criticised as being overly broad and one of the reasons for a lack of acceptance of the VCST.[16] In fact, the VCST distinction made between newly independent states and successors in the non-colonial contexts is alleged to be discriminatory and unjust.[17]

C. Clean Slate (Tabula Rasa)

In the context of decolonisation, the succession of newly independent states is considered distinct from other forms of (traditional) succession.[18] This is because the nature of the NIS post succession is much different than that of any traditional successor.[19] Specifically, they start from a weaker standpoint and are still developing; hence, acquired rights of the colonial power (even those under investment arrangements) must not be recognised. Instead, the new state starts with a '*clean slate*' with no rights and obligations of the predecessor. Arguments may be made that in certain circumstances, such as unjust enrichment, the NIS must respect acquired rights. However, in contemporary colonial successor state practice, non-succession has been the rule.

15. Convention on State Succession, arts 16, 24.
16. Tams, 'State Succession to Investment Treaties' (n 8) 326.
17. ibid.
18. Dumberry (n 2) para 13.77.
19. ibid paras 13.78-13.84.

D. Consent of Parties (Including the Treaty Partner)

As seen in the post-2014 Crimean Cases examined below, state parties may effectively consent to a certain position on state succession issues in investment cases. Such consent may manifest in the interpretative statements made by the contracting parties to the BIT. Tribunals may pay regard to such statements so long as they are not made for the benefit of the states.[20]

E. Rebus Sic Stantibus or Fundamental Change in Circumstances

The principle of *rebus sic stantibus,* or fundamental change in circumstances, may be contrasted with the principle of *pacta sunt servanda,* meaning 'treaties must be complied with'. In the context of the present discussion, a crucial question that tribunals may have to answer is whether the instance of state succession is a fundamental change in circumstances for non-application of the BIT. The changing socioeconomic and political factors, coupled with the fact that neither the parties to the BIT nor the circumstances of its conclusion are the same, prove to be valid arguments for the principle to apply.[21] However, the principle must still apply only in exceptional circumstances on a case-to-case basis.[22] Whenever it does apply, tribunals have to consider whether (1) such change in circumstances was unforeseen, (2) the existence of circumstances during the treaty's conclusion constituted the essential basis of the parties' consent, and (3) the change in circumstances radically transforms the extent of obligations still to be performed.[23] In any case, the effect of *pacta sunt servanda* in the present context is such that, subject to other considerations, theories, and concepts, succession should favour continuity.

F. The Principle of Self-Determination

Recognised both in the UN Charter and the UN Covenants of 1966, the principle of self-determination is also something that future tribunals may choose to consider in their analysis of state succession issues. More specifically, the 'right to be a state' in the context of state succession in ISDS also includes the right to decide the socioeconomic and political

20. *cf* Sanum Investments v. Laos (I), PCA Case No 2013-13, Award on Jurisdiction (13 December 2013).
21. Fleury, 'State Succession and BITs' (n 9) 471.
22. ibid.
23. ibid.

relations (or even the investment treaties or agreements) the new state may enter.[24]

4. INSTANCES OF STATE SUCCESSION

Given the varied approaches that are possible, a few examples analysis of succession issues is provided to highlight the broad spectrum of decisions on this issue.

A. People's Republic of China and Laos BIT – Sanum v. Laos

Sanum v. Laos[25] is a case where the tribunal was faced with the issue of determining whether the China-Laos BIT applied to Macau, which was transferred to the People's Republic of China from the Portuguese. The Macau-based investor, Sanum Investments Ltd., commenced investment arbitration against Laos based on the 1993 BIT between China and Laos. The arbitration was seated in Singapore, and the question was first dealt with by the tribunal, which upheld its jurisdiction and passed an interim award holding that the BIT applied to Macau. Subsequently, when faced with challenge proceedings, the Singapore High Court considered diplomatic notes between China and Laos post-dating the award to deny jurisdiction.[26] The Singapore Court of Appeal (**SGCA**) reversed the High Court's decision and held that the BIT did apply to Macau applying the MTF Rule.[27] It referred to Article 29 of the VCLT and determined that no different intention was expressed by the Contracting Parties as the treaty was silent on such issue. The SGCA also relied crucially on the Critical Date doctrine, as per which any state conduct or evidence after the 'critical date', i.e., the date on which the dispute crystallises, cannot be used to improve legal titles. It held, considering the date of commencement of the arbitration as the 'critical date', that the post-critical date Diplomatic Notes could not be accorded any weight since they contradicted the pre-critical date position. Interestingly, it distinguished the case of *ADF Group Inc v United States of America,*[28] where the Contracting Parties' interpretative statements that were made after the notice of arbitration were considered

24. ibid 472.
25. *Sanum* (n 20).
26. *Govt. of the Lao People's Democratic Republic v Sanum Investments Ltd* 2015 SGHC 15.
27. *Sanum Investments Ltd v Govt. of the Lao People's Democratic Republic* 2016 SGCA 57.
28. *ADF Group Inc v United States of America* ICSID Case No ARB(AF)/00/1, Award (9 January 2003).

relevant by a NAFTA Tribunal. This was based on Articles 1105(1) and 1132, which provide for such interpretations to be made. No such provisions existed in the China-Laos BIT. The case is one of the most prominent and landmark cases on this issue, as it provided a comprehensive analysis of state succession in the context of investment arbitration.

B. Breakup of SFRY into Serbia and Montenegro – MNSS B.V. and Ors v. Montenegro

The case of *MNSS BV v Montenegro*[29] was related to Montenegro's succession to the ICSID Convention from its predecessor state, the Socialist Federal Republic of Yugoslavia (SFRY). There were two distinct issues in this case– (1) Succession to the ICSID Convention as Montenegro had not ratified the Convention at the time the request for arbitration was made, while SFRY had ratified the Convention; and (2) Succession to the predecessor's BIT as the claimant had based its claim on the Netherlands–Federal Republic of Yugoslavia (FRY) BIT to which Montenegro is clearly not a party. In the proceedings, the claimant, realising Montenegro was not a 'Contracting State' within the meaning of Article 25 of the ICSID Convention, resorted to the Additional Facility Rules to make its claim.[30] This was possible as it was provided for under the BIT in Article 9(2)(b). This article enabled submission of disputes to the Centre even when a contracting party is not a 'Contracting State' to the ICSID Convention. Any analysis of how Montenegro is a contracting party to the BIT signed between the Netherlands and FRY is notably absent from the tribunal's award. At least in ICSID Practice, a suitable substitute for dealing with issues relating to the ICSID Convention membership may be resorting to the Additional Facility Rules itself instead of proving succession of membership.

C. Breakup of Czech and Slovak Federal Republic (CSFR) – Agreement between Parties

In cases against the successors of the Czech and Slovak Federal Republic (CSFR), the newly independent Czech Republic and the Slovak Republic, the Tribunals barely addressed state succession issues. As Tams notes,[31] tribunals record in a single phrase that 'succession occurred under the

29. *MNSS BV v Montenegro* ICSID Case No ARB(AF)/12/8.
30. Tams, 'State Succession to Investment Treaties' (n 8) 324.
31. ibid 331.

predecessor's treaty'.[32] Continuity was favoured by both the Czech Republic and Slovak Republic, and the parties were not in dispute that the Czech Republic and Slovak Republic succeeded to CSFR's BIT.[33] The result is tribunals treating succession issues *en passant* and no development of the law in question.

D. Breakup of USSR – World Wide Minerals v. Kazakhstan

The case of *World Wide Minerals Ltd and Paul A Carroll v Republic of Kazakhstan*[34] concerned Kazakhstan's succession to the Canada– USSR BIT. As Kohen and Dumberry note,[35] the issue of tacit consent was central to the award. The tribunal considered both Canada's and Kazakhstan's conduct and if they impliedly agreed to the BIT's succession. Unfortunately, the award is confidential; hence, the tribunal's reasoning and analysis of both states' conduct are not available. Interestingly, Kohen and Dumberry[36] also note the case of *Gold Pool Ltd Partnership v Republic of Kazakhstan,*[37] which reached the exact opposite conclusion in a dispute based upon the same BIT.

E. Russia and Ukraine – The De Facto Controversy

Like the *Stabil* case, several tribunals have followed the de facto approach in the Crimean Cases post-2014, such as *PJSC CB Privat Bank and Finance Company Finilon LLC v Russian Federation,*[38] *Everest Estate LLC v Russian Federation,*[39] and *Aeroport Belbek LLC and and Igor Valerievich*

32. *CME Czech Republic BV v Czech Republic*, UNCITRAL, Partial Award (13 September 2001) para 3.
33. Tams, 'State Succession to Investment Treaties' (n 8) 334; See also *ECE Projektmanagement & Kommanditgesellschaft PANTA Achtundsechzigste Grundstu ̈cksgesellschaft mbH & Co v Czech Republic*, UNCITRAL, PCA Case No 2010-5, Award (19 September 2013) para 3.139; See also *Hicee BV v Slovak Republic*, UNCITRAL, PCA Case No 2009-11, Partial Award (23 May 2011) para 3, n 2: 'It is not in dispute that, after the dissolution of the Czech and Slovak Federal Republic on 31 December 1992, the Slovak Republic succeeded to the [CSFR–Netherlands BIT]'.
34. *World Wide Minerals Ltd and Paul A Carroll v Republic of Kazakhstan*, UNCITRAL, Award (19 October 2015).
35. Marcelo G Kohen and Patrick Dumberry, 'State Succession and State Responsibility in the Context of Investor-State Dispute Settlement' (2022) 37 ICSID Rev 85, 91.
36. ibid.
37. *Gold Pool Ltd Partnership v Republic of Kazakhstan*, PCA Case No 2016–23, Award (30 July 2020).
38. *PJSC CB PrivatBank and Finance Company Finilon LLC v Russian Federation*, UNCITRAL, PCA Case No 2015-21, Partial Award (4 February 2019) para 23.
39. *Everest Estate LLC v Russian Federation*, UNCITRAL, PCA Case No 2015-36, Judgement of the Hague Court of Appeal (19 July 2022) para 5.4.2.1.

Kolomoisk y v Russian Federation.[40] This approach, however, has not been universally accepted. Arguments have been made that adopting a de facto approach violates the principles of non-recognition of illegally annexed territories under international law, a jus cogens norm.[41] Adoption of the MTF Rule as customary law, following the *Sanum v. Laos* reasoning, is considered by such arguments to be inappropriate given that the rule must only apply to de jure successions and transfer of territory in conformity with international law. It is argued that a contrary view results in the implicit recognition by other States of the *effectivité* of an illegal action under international law.[42] In fact, analogies are made between investment protection and humanitarian law such that investors may be protected, not through the de facto approach but the non-recognition (de jure) approach. Under this non-recognition approach, investments in illegally annexed territories are given protection not under the BITs but under the minimum standards of treatment obligation imposed on the occupier, customarily under international law.[43] This essentially means the legality of the succession or annexation must be determined, and the de facto status quo is irrelevant. Arguably, however, the minimum standards of treatment obligations observed in customary international law are lower than the standards of protection provided for in the BIT. Hence, following a non-recognition approach may be detrimental to investors' claims for protection.

On the other side, some authors[44] also argue that adopting the de facto approach is consistent with customary law and the principle of non-recognition. Such arguments refer to the objectives and purposes of BITs, i.e., reciprocal protection of investments, to broadly interpret the definition of 'entire territory' as stated in Article 29, reflecting the customary MTF Rule.[45] Accordingly, a strict interpretation of the term and a strict application of the MTF rule defeats such a purpose of investor protection. Reference is also made to US and UK State Practices to hold that a broad interpretation of Article 29 in annexation cases entails recognising effective control and

40. *Aeroport Belbek LLC and Igor Valerievich Kolomoisky v Russian Federation*, UNCITRAL, PCA Case No 2015-07, Judgement of the Hague Court of Appeal (19 July 2022) para 5.6.1.
41. Patrick Dumberry, 'Requiem for Crimea: Why Tribunals Should have Declined Jurisdiction Over the Claims of Ukrainian Investors Against Russian Under the Ukraine-Russia BIT' (2018) 9 J Int'l Disput Settl 506-33.
42. ibid 515.
43. ibid 518, 519.
44. R Happ and S Wuschka, 'Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories' (2016) 33 J Int'l Arb 255.
45. ibid 258-60.

not legal status.[46] This is in conformity with the tribunal's and SGCA's reasoning in *Sanum v. Laos,* as well as the approach of the Tribunals in the Crimean Cases.

Notably, Russia did not participate in any of the proceedings in the Crimean Cases, and Ukraine made submissions as a non-disputing party recognising, at least for the purposes of the BIT's application, that Crimea is de facto part of Russian territory.[47] Hence, both treaty parties (Russia and Ukraine) effectively consented to Crimea being considered part of Russian territory. Dealing with the more difficult question of what happens in the absence of such consent on the part of the states, tribunals must achieve a balance between two conflicting aspects – (1) non-violation of international law and/or non-recognition of illegally annexed territory through indirect means, and (2) providing adequate remedies to foreign investors left in a legal vacuum such that the annexing state benefits from its illegal annexation.[48] Hence, the observable trend is moving towards considering non-recognition not as an absolute rule upon which other sanctions are imposed but as a sanction in itself when it is to the detriment of the annexing state.[49]

5. CONTEMPORARY PRACTICE

As can be seen from the aforementioned state succession examples, theories, and concepts, much will depend on the state interactions made through diplomatic means. They can prove to be important factors for the tribunal in its interpretation of the bilateral treaties and state succession issues. The negotiations between the successor state and its predecessor's treaty partner, more often than not, solve the muddled position of law. The natural question is whether states could incorporate clauses that deal with state succession issues into their BITs. Even if such clauses were incorporated, Article 10 of the VCST provides that treaties providing for the participation of successor states will require notification of such successors (in case the option is given to become a party) or their consent (in case it mandates the participation of the successor). No BITs have such a clause so far. Rather,

46. ibid 259, 260.
47. Aeroport Belbek (n 40), PCA Press Release, <https://www.pcacases.com/web/sendAttach/1865> accessed 29 September 2023.
48. Athina Fouchard Papaefstratiou, 'Crimea as Russian Territory for the Purposes of the Russia-Ukraine BIT: Consent v. International Law?', Kluwer Arbitration Blog, 5 February 2023.
49. ibid.

they incorporate territorial scope of application clauses that refer generally to the Contracting Parties' territory during the treaty's conclusion.[50]

In any event, the successor's intent to uphold its predecessor's agreements determines the succession to the BITs in question. The consent that they may give rests on broader socioeconomic and political factors, including the need for recognition in the international community. As some authors note,[51] unilateral declarations may be made by the putative treaty partners, forming expectations that the prior treaties will stay in force. Such expectations formed in exchange for formal recognition may prove to be vital tools for navigating state succession issues despite their inconsistent effectiveness. In summary, contemporary practice suggests that state succession in Investment Arbitration depends primarily on treaty negotiations, amongst other factors. Tribunals must carefully decide on a case-to-case basis whether to pay deference to the new contracting state's intention, considering the impact of their interpretation.

6. LEGAL CAPACITY OF DISPUTED NON-STATED ENTITIES

The discussion above primarily focused on the succession of states and the various ways tribunals have dealt with its issues. In most cases, the answer is found in public international law, and it requires the application of principles developed beyond the investment arbitration regime. Given this context, the author poses the hypothetical that territorial entities whose statehood is in dispute could still be parties to investment arbitration proceedings. At least in ICSID practice, there may be circumstances where states notify and designate constituent subdivisions to the Centre that act as the Respondent in their own right.[52] These constituent subdivisions are

50. Office of the United States Trade Representative, '2012 US Model BIT– Article 2' <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed 29 September 2023; UNCTAD Investment Policy Hub, 'UK Model BIT– Article 13' <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2847/download> accessed 29 September 2023.
51. Tams, 'State Succession to Investment Treaties' (n 8) 333; See also, ibid fn 125 (Williams refers to letters sent by US President Bush to the Prime Ministers of the Czech and Slovak Republics on 1 December, proposing 'that the United States and the respective States ''conduct full diplomatic relations'', based on the affirmation of the Republics to fulfil a number of commitments, including the ''commitment to fulfil the treaty and other obligations of the former Czechoslovakia'').
52. *cf* 'Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 25(1), (3).

listed as competent to become parties to disputes submitted to the Centre.[53] Interestingly, the legal capacity of such constituent subdivisions has been attributed to non-state actors in International Law.[54] As per one writer, the theories of consent and sovereign competence suggest that designated constituent subdivisions can be legally (and internationally) responsible for acts violating investor protection under international instruments such as BITs.[55]

So far, to the best of the author's knowledge, there have been no cases where constituent subdivisions have seceded or have become independent of their designating state. In such an instance, statehood itself may be in question. For the sake of the argument, assuming the territory in dispute has not achieved statehood, one could say none of the state succession rules apply. As Schreuer notes,[56] designation as a constituent subdivision strengthens the argument that a new state emerging from dependant status shall be bound by treaties specifically extended to it, including the ICSID Convention. The argument is also advanced in case of consent to the Centre's jurisdiction under different investment agreements. The essential factors are the territorial nexus of the investment to the new state and consent to be bound by the succession to treaties (generally through a unilateral declaration).[57]

It is an accepted principle that states cannot unilaterally withdraw consent.[58] In the context of subdivisions, the consent given, once effective, may not be vitiated by a repeal of the designation or restructuring of the constituent subdivision.[59] In fact, the idea that the designating state should succeed to the obligations of the abolished subdivision was considered during the ICSID Convention's drafting but not incorporated.[60] More specifically, it is suggested that the host state be nominated in the consent agreement at the outset so that it may succeed to its designated subdivision's obligations.[61]

53. See Form ICSID 8/C, 'Designations by Contracting States Regarding Constituent Subdivisions or Agencies' <https://icsid.worldbank.org/sites/default/files/documents/2022_Oct%2028_ICSID.ENG.pdf#page=9> accessed 29 September 2023.
54. Douglas Pavnichny, 'Treaty-Based Claims Against Subdivisions of ICSID Contracting States' (2017) 16 Wash U Global S L Rev 125, 128.
55. ibid 162-71.
56. Christoph Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) art 25, para 308.
57. ibid para 309.
58. See ICSID Convention, art 25(1).
59. Schreuer (n 56) para 613.
60. ibid para 313.
61. ibid para 316.

In any event, suggestions that the designating state must succeed to its designated subdivision's obligations may equally be valid even in cases of state succession. Ideally, in such cases, the disputed territory may be designated as a subdivision by the predecessor prior to the state succession instance, and the designating state may nominate itself as a successor in case of abolition of the subdivision. In the event that succession occurs, the subdivision may become an independent state, but it abolishes its status as a subdivision initially. This means, by virtue of the above hypotheticals, the designating state itself succeeds to the subdivision's obligations. Article 10 of VCST does not prohibit such clauses in the treaty as they do not relate to a successor state but rather a constituent subdivision. The only drawbacks to this approach are that (1) it does not apply in cases where the predecessor ceases to exist and (2) states may not want to designate disputed territories as subdivisions. At least in non-extinction cases, if negotiations between states incorporate such an approach in their treaties, investors are not left in a legal vacuum, nor are there any violations of international legal norms.

7. CONCLUSION

In conclusion, state succession is a complex and fragmented field that interacts with the ISDS regime in different and unpredictable ways. Common theories and concepts of state succession may be observed by exploring different scenarios and approaches that tribunals may take when dealing with state succession instances in the context of investment arbitration. These theories and concepts, like automatic continuity, clean slate, the Moving Treaty Frontier Rule, consent of parties, rebus sic stantibus, and the principle of self-determination, are potential factors for tribunals' decision-making. Additionally, the importance of diplomatic negotiations and state interactions in resolving state succession issues in investment arbitration cannot be overemphasised. State intentions and consent play a significant role in determining the application of treaties to succession cases. However, these negotiations and expressions of consent are not without their drawbacks. The hypothetical situation of designated constituent subdivisions gaining independence and the legal capacity of such entities transferring to the nominated predecessor may be an approach that future tribunals (and states in their practice) could follow. In any event, at the heart of these complex issues lie the fundamental principles of sovereignty, consent, and the pursuit of justice: a pursuit that continues to shape the ever-evolving landscape of international legal discourse on state succession in investment arbitration.

FORM IV

STATEMENT ABOUT OWNERSHIP AND OTHER PARTICULARS

(See Rule 8)

1.	Place of Publication :	:	New Delhi
2.	Periodicity of Publication	:	Yearly
3.	Printer's Name	:	EBC Publishing (P) Ltd.
	Nationality	:	Indian
	Address	:	34-A, Lalbagh, Lucknow – 226 001
4.	Publisher's Name	:	Mr. Prashant Mishra as the Patron of the IALR.
	Nationality	:	Indian
	Address	:	Defence Colony, New Delhi – 110024.
5.	Editor's Name	:	Student Editorial Body of the Indian Arbitration Law Review
	Nationality	:	Indian
	Address	:	The National Law Institute University Kerwa Dam Road, Bhopal, India – 462044
6.	Ownership	:	Mr. Prashant Mishra, Patron of the Indian Arbitration Law Review.

We, Siddharth Sisodia and Arushi Bhagotra, the Editor-in-Chief and Managing Editor of Indian Arbitration Law Review, hereby declare that the particulars given above are true to the best of our knowledge and belief.

Sd/-
Siddharth Sisodia and Arushi Bhagotra

Submission Guidelines

- Submissions revolving around arbitration are welcome from law students, whether at undergraduate or postgraduate level, academicians and practitioners. However, the submissions must be in English language.

- All submissions must be accompanied by an abstract not exceeding 300 words. Case Comments and Book Reviews do not need abstracts. The abstract must expressly include the novelty and usefulness of the idea that the author wishes to put forth and must categorically mention the specific contribution of the article beyond the existing available literature.

- Furthermore, the submission must also be accompanied with a covering letter indicating the name of the author(s), contact details (Phone number, Email ID & Address), title of the submission, institutional affiliations (if any) and academic qualifications of the author. The submissions will be reviewed and edited by the Editorial Board under the supervision of the Editor-in-Chief.

- Submission must be sent in the MS Word (.docx) format to ialr@nliu.ac.in with the subject "Submission – <Title of the manuscript>".

- For more details, visit our website - https://www.indianarbitrationlawreview.com/submission-guidelines.

Ordering Copies

Price (inclusive of shipping) of the IALR is as follows:

Hard Copy for 2024	Rs 950
Hard Copy for 2023	Rs 750
Hard Copy for 2022	Rs 550
Hard Copy for 2021	Rs 500

Order online: www.ebcwebstore.com

Order by post: send a cheque/draft of the requisite amount in favour of 'Eastern Book Company' payable at Lucknow, to:

Eastern Book Company,

34, Lalbagh, Lucknow-226001, India

Tel.: +91 9935096000, +91 522 4033600 (30 lines)