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FOREWORD

– Mr. Darius J. Khambata[1]

I am delighted to see this fifth edition of the Indian Arbitration Law Review. I have previously bemoaned the lack of good legal writing in India. Hence I am enthused by the high standard of scholarship of the articles.

We live in an era where India is finally being accorded its rightful place on the world stage, both in international affairs as well as one of the world's largest and fastest growing economies. This is but part of a natural progression of the growth and vibrancy of the Indian economy over the last three decades. It all started from the economic revolution of 1991. That revolution was not only one of finance and economics. It was also one of the mind. India set itself on a path of competitiveness and improvement in standards across all fields of human development. Restructuring the very way in which it worked as a nation, monumental changes were introduced in India in technology, education, governance and the very fabric of society. Hundreds of millions of people have been lifted above the poverty line and the tears of so many have been wiped from their eyes subserving the dream of Mahatma Gandhi. Yet the task is far from complete. The beckoning goal is one of an India that is libertarian, entrepreneurial and egalitarian, free from the shackles of discrimination, poverty and inequality.

Sustaining a free economy in the long run will inevitably require not only continued reform to unburden it of excessive regulation, but also the creation of a vibrant and diverse market place of thoughts, ideas and expression. India's goals are anchored upon the idea of India aspired to by our founding fathers who fought for our freedom and the dreams which are reposed in the Constitution of India.

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1. LLM (Harvard); Mr. Khambata is a Senior Advocate, Supreme Court of India; former Advocate General of Maharashtra; former Additional Solicitor General of India; former Vice-President, LCIA Court; and member, SIAC Court.

With a growing economy inevitably comes growing commercial litigation. It is clear that Indian Courts, overburdened as they are with massive social, service and administrative law litigation, will not find the resources nor the time, to resolve the exponential increase in commercial disputes. Hence the emergence of arbitration in India as the preferred means of commercial dispute resolution.

Arbitration in India stands on a cusp. No doubt we have moved far from the Arbitration Act 1940 which had caused the Supreme Court to lament that the state of Indian arbitration had made "…. lawyers laugh and legal philosophers weep….". The Arbitration and Commercial Act 1996, particularly after its major amendments in 2015, is now an effective instrument to facilitate speedy and fair arbitration, party autonomy and effective enforcement of awards.

Where do we go from here? The Covid pandemic and the subsequent resurgence of our economy bring into sharper focus the challenges to arbitration in the years to come. But challenges often underpin opportunities. The areas to focus on in the future can be categorised under four heads: Technology, Cost, Efficiency and Accessibility.

To tap into the advantages that arbitration enjoys over traditional litigation in Court, technology can be a game changer. In that sense the compulsions of the pandemic must be seen as an opportunity rather than a calamity. Virtual hearings are here to stay and can become the default model. It is trite that physical hearing offers advantages that are irreplaceable in terms of eye-contact, immediacy of response and greater concentration. But increasingly these are luxuries in a world where speedy and cost effective arbitration is the need of the hour. I look forward therefore to a University or arbitral institution developing and publishing a detailed virtual hearing protocol both for interlocutory as well as for evidentiary and closing hearings. I would also welcome the wide spread use of real time transcription in arbitration. I call it the conscience keeper of arbitration since it provides an accurate and complete record of every word that is uttered during the hearing. Consequently every participant is more careful of what is said. Transcription vastly improves the accuracy and integrity of the process.

The second, and an area of concern, is cost. Clients will have more constraints in their financial capacity and will demand greater mileage from their Rupee of spending. It is for lawyers to make that possible. Here too technology can provide a solution. Fewer physical gatherings and greater virtual functioning is the order of the day.

But that is not all. Efficiency of practice is now the imperative. The elephant in the room is the manner in which, generally speaking, arbitration has been practised in India. An aspiration that India became a popular seat for international commercial arbitration will require an overhauling of the way we lawyers practice arbitration. Strict time limits for pleadings and argument, memorialisation of pleadings (by including citation of legal authorities) detailed yet page limited opening written submissions, strictly no "ambushing" of opponents and chess clock time sharing. The idea of marshalling and disclosing your whole case in detail by reference to documents, evidence and law, prior to the evidentiary hearing is anathema to most Indian lawyers. Yet it is the most efficient manner for a lawyer to structure his/her argument, prune it of the inessential and capture the attention of the Tribunal. It also focusses the core issues that differentiate the respective cases. Both sides will have notice of the points and cases they will have to meet. I was once asked, in a seminar, whether such a course of action was "wise". The young student who did so was extremely sceptical of my suggestion and I don't think was convinced when I tried to explain the advantages of a more transparent way of arguing a case. In the years to come I hope that more lawyers and students will be persuaded to restructure their practice and orient it to greater reliance on the written, rather than the oral, word.

Finally, accessibility. This is not only geographical but also social and cultural. An arbitration and its procedures must be transparent and easy to understand for arbitrants. We must encourage diversity not only of arbitrators but also of lawyers. It is possible to do so without impairing merit or party autonomy. Diversity can range across gender, caste, culture and language.

We must lead by example and not insist on setting better standards only in tandem with our opponents. Arbitration has boundless strengths; it

can be cheap where litigation is expensive; swift where Courts are slow; innovative where litigation is bound by procedure and simple where litigation is technical and complex.

India has several advantages that should have made it a popular international seat of arbitration: an intellectual, innovative, and independent judiciary, a strong and experienced commercial Bar for which English is the lingua franca, a long tradition of recorded common law judgements and increasingly good infrastructural support. Yet to an extent these advantages have been squandered.

We must collectively ensure that the practice of arbitration in India is raised to the highest standards. That is why legal writing and intellectual curiosity, encouraged by law reviews such as the Indian Arbitration Law Review of the National University of Law Institute of Bhopal are so important.

The future of India is ours to seek. Change will come, perhaps not from my generation but from young and aspirational Indians who dream of a golden future. It will come from seats of learning such as the National Law Institute University Bhopal.

I truly believe that, given the vibrancy of our court driven jurisprudence, the strong impetus being given to arbitration by the Government and the evident talent of our young lawyers and graduates, India will evolve into an international arbitration power house.

PATRON'S NOTE

-Mr. Prashant Mishra

I am writing to express my sincere appreciation and gratitude for the excellent work that the entire team has put into producing the 5th volume of the Indian Arbitration Law Review. I am also thrilled to see the level of scholarship and critical analysis on display in this edition.

If arbitration is to work as intended, it needs robust critique, and scholars need robust platforms where their critique would be heard. The IALR is such a platform created to contribute in shaping the direction of arbitration's future, and I am delighted to see that it continues to play an important role in promoting academic excellence in arbitration. The articles published in the IALR provide insightful analysis focusing particularly on the importance of transparency, accountability, and party autonomy, to enrich the reader's understanding of arbitration law and practice.

As a patron of the IALR, I am committed to supporting the continued growth and development of this vital publication. Once again, congratulations to the writers, editors, and team of the IALR on another outstanding issue.

INDIAN ARBITRATION LAW REVIEW

Volume V | 2023

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

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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.

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CONTENTS

Editorial Note

—Aadya Bansal & Navya Saxena

The Indian Arbitration Law Review (IALR) was instituted with the aim of encouraging scholarship and research in the field of arbitration law in India. To further this vision, the editorial board of IALR has, since its inception in 2018, strived to publish the most illuminating submissions received for the periodical. We are indebted to Mr. Udyan Arya Srivastava, Mr. Prabal De, Mr. Pranjal Agarwal, and Mr. Syamantak Sen, the Editor-in-Chief of the previous volumes, and their colleagues, for their efforts in helping the Journal reach new heights with each successive volume. We are also thankful to Mr. Prashant Mishra, our Patron, for whose guidance and support towards the Journal we are eternally grateful.

We are supported in our editorial endeavour by some of the most esteemed legal luminaries in the Indian as well as international arbitration landscape, as our Board of Advisors. The invaluable inputs and direction offered by these internationally recognized jurists, practitioners, and academicians, from around the world have consistently benefitted us and our predecessors immensely. We are also sincerely grateful to Mr. Darius Khambata, for taking time out from his busy schedule to author the foreword for this volume.

Arbitration is a dynamic subject that continues to evolve and adapt to the changing contours of international commercial transactions. In the past years, significant developments and landmark changes have occurred in the field of arbitration, which have had a profound impact on its practice. For instance, in India, the recent Amazon v. Future Retail case has reaffirmed the country's pro-arbitration stance, while the Hindustan Construction Company v. Union of India case has improved the efficiency of arbitration proceedings. Furthermore, foreign lawyers and law firms can now practise international arbitration matters in India per the recently notified Bar Council of India Rules, thus taking another

step towards making India a hub of international commercial arbitration. These developments demonstrate India's growing commitment to the development of a modern and efficient arbitration regime and paint an optimistic view of the arbitration landscape moving forward. Globally, the pandemic has accelerated the shift towards virtual arbitration hearings, with institutions such as the ICC adapting by launching new virtual platforms to facilitate proceedings. These recent cases and changes underscore the importance of staying up-to-date with developments in the field of arbitration, and demonstrate the ongoing evolution of arbitration as a dynamic and essential mechanism for the resolution of international commercial disputes.

The authors in this edition have critically analysed various contemporary issues. The Amazon judgment, as referenced above, has been carefully evaluated by the authors in "*An Emergency Arbitrator is an Arbitrator.... Is There A Need For Statutory Recognition Post-Amazon*?", wherein they have a discerningly for analysed the aftereffects of the judgment on Indian arbitration. Further, the unanswered query of whether emergency arbitration is viable and efficacious in India has been thoroughly examined by the authors in "*Emergency Arbitrations in India: Viability and Enforceability*". Next, in "*The India-Brazil BIT: Step forward, Two Steps Back*", the authors have engaged in a harm-versus-benefit assessment of the India-Brazil BIT and presented a well-reasoned critique of the treaty. Additionally, in "*Reconceptualising Consent in Arbitration Agreements - Chloro Controls Revisited*", the author has devised potential ways to remedy the deviation from arbitration's consent based approach, by the Supreme Court in the Chloro Controls case. Further, in "*Ensuring Fairness in Appointment of Arbitrators: Journey So Far*", the author posits that the challenging procedure of arbitrator is rife with subjectivity of the courts and presents an in-depth analysis of Section 12(5) of the Arbitration and Conciliation Act, 1996.

On top of that, in "*The ICSID Amendments: Analysing the Changes to the Arbitration Rules and what They Entail for Capital Importers and Developing Countries*", the author has delved into the recent amendments to the ICSID Rules and juxtaposed them with ICSID's historic bias

towards developed countries. Furthermore, in "*Revisiting Third-Party Funding – An Analysis of the New ICSID Arbitration Rules*", the authors have thoroughly scrutinised Rule 14 and Rule 53, pertaining to disclosure and security for cost respectively. Next, in "*Disclosures in Third Party Funding in Arbitration: An Indian Perspective*", the author conducts a comprehensive cross jurisdictional analysis of disclosure obligations and puts forth his preferred approach to the same.

Thus, as evidenced, multiple facets of these developments of import have been thoroughly investigated and comprehensively analysed by the authors in the present volume. The diverse form of academic writings that constitute the Journal ensure that it is able to chart the vast expanse of the field of arbitration, providing a meaningful insight into the field to the reader. In navigating through the pieces that explain the intricacies that underpin this area of law, the dedication and unrelenting hard work put in by the members of the Peer Review Board must not go amiss. Furthermore, the student editorial board of the IALR has 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. With this, we present to you the fifth volume of Indian Arbitration Law Review. We look forward to receiving feedback for this volume from our readers.

ENSURING FAIRNESS IN APPOINTMENT OF ARBITRATORS: JOURNEY SO FAR

—Sameer Jain and Anu Sura

(Mr. Sameer Jain is the founder and managing partner at PSL Advocates and Solicitors. Ms. Anu Sura is a counsel at PSL Advocates and Solicitors)

ABSTRACT

*The Indian arbitration space has shown a great deal of progress in making the arbitration procedure fair as well as efficacious through legislative reforms. The Arbitration and Conciliation (Amendment) Act, 2015 brought in several reforms to the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "**the Act**"), including crucial amendments to Chapter III of Part I of the Act, which deals with "appointment of arbitrators". Fifth and seventh schedules have been introduced to objectively assess the independence and impartiality of arbitrators. However, a perusal of the judicial decisions post the 2015 Amendment, most notably in Perkins Eastman, Central Organization Railway Electrification, and most recently in Tantia Construction reveal that the there is a fair amount of subjectivity shown by courts in interpreting the rigor of section 12(5) of the Act read with the seventh schedule. Through this article, we seek to trace the legislative journey and shift in judicial trends vis-à-vis "appointment of arbitrators", and ascertain whether the legal position as it stands today, is sufficient to ensure fairness in appointment process.*

1. INTRODUCTION

Neutrality of arbitrators i.e. their independence and impartiality is *sine qua non* to ensure adherence to principles of natural justice.[1] For a dispute resolution process to be effective, the parties ought to have confidence in the judges or arbitrators adjudicating their disputes. The questions of independence and impartiality assume special importance in the context of arbitrations, where parties themselves appoint the adjudicators of their

1. Law Commission of India, *Amendments to the Arbitration & Conciliation Act, 1996* (Report No. 246, 2014) para 53; Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd. (2017) 4 SCC 665.

disputes. The traditional court system ensures neutrality through numerous institutional and procedural safeguards. However,the Indian arbitration space, in a bid to uphold "*binding nature of contracts*" and "*party autonomy*", for the longest time ignored the unfairness in appointment procedures, particularly arising out of contracts with State entities providing for a unilateral right of appointment in their favour. In the absence of any objective criteria to ascertain independence and impartiality, clauses naming a particular person/ designation (associated with the State entity) as arbitrator(s), clauses naming or appointing a serving employee as an arbitrator were considered to be valid and binding under the (now repealed) Arbitration and Conciliation Act, 1940[2] (hereinafter referred to as the "**1940 Act**"), and subsequently under the Arbitration and Conciliation Act, 1996(hereinafter referred to as "**the Act**").[3]

The 20th Law Commission, in 2014, was entrusted with the task of reviewing the provisions of the Act in view of the several inadequacies observed in the functioning of the Act. The Law Commission submitted its Report on 'Amendment to the Arbitration and Conciliation Act, 1996' (hereinafter referred to as the "**246th Report**"), on the basis of which the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to the "**2015 Amendment**") was passed. The 2015 Amendment brought in several reforms to the Act, including crucial amendments to Chapter III of the Part I of the Act, which deals with "appointment of arbitrators". Through this article, we seek to trace the legislative journey and shift in judicial trends *vis-à-vis* the appointment of arbitrators, and ascertain whether the legal position as it stands today, is sufficient to ensure fairness in appointment process. We begin by reviewing the position pre-2015 Amendments and the Law Commission's recommendations in its 246th Report (**Section B**). The subsequent section will be dedicated to the normative framework as it stands today (**Section C**), followed by an overview of the judicial trends post the 2015 Amendment (**Sections D and E**).

2. Executive Engineer v. Gangaram Chhapolia (1984) 3 SCC 627; Govt. of T.N. v Munusamy Mudaliar 1988 Supp SCC 651; International Airports Authority of India v. K.D. Bali (1988) 2 SCC 360; S. Rajan v. State of Kerala (1992) 3 SCC 608; Indian Drugs & Pharmaceuticals Ltd. v. Indo-Swiss Synthetics Germ Mfg Co. Ltd. (1996) 1 SCC 54.
3. Union of India v. M. P. Gupta (2004) 10 SCC 504; ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. (2007) 5 SCC 304.

2. PARTY AUTONOMY V/S PROCEDURAL FAIRNESS: POSITION PRE-2015 AMENDMENT

The fact that one of the parties' own employee could act as an arbitrator seems overtly unfair and against the principles of natural justice, specially the principle of: *Nemo judex in causa sua ("no one should be a judge in their own cause").* However the Indian arbitration space is replete with cases where such clauses were upheld as valid and enforceable, until the 2015 Amendment.[4] The normative framework, as it stood prior to the 2015 Amendment, did not provide for any explicit disqualification or criteria to judge the independence or impartiality of arbitrators. The lacuna was exploited by most parties in better bargaining power to thrust their own choice of arbitrator on the other party.

The judiciary consistently upheld the validity of such clauses, on the basis of "party autonomy", without factoring in the unequal bargaining power of parties and boilerplate nature of contracts.[5] The only exception carved out in such cases was that if the arbitrator was the controlling or dealing authority in regard to the subject of the contract, or a direct subordinate to the officer whose decision was the subject matter of the dispute, such an appointment was held as invalid in terms of Section 12 of the Act by virtue of the decision of the Hon'ble Supreme Court in *Indian Oil Corpn. Ltd.* v. *Raja Transport (P) Ltd.*[6] However, as rightly observed in the 246th Law Commission of India's Report:[7] this exception was simply "***not enough***".[8] Given the constraints of judicial activism in a field occupied by legislation, the legislative lacuna surrounding the issue had to be addressed.

4. *Ibid.*
5. Executive Engineer v. Gangaram Chhapolia (1984) 3 SCC 627; Govt. of T.N. v. Munusamy Mudaliar 1988 Supp SCC 651; International Airports Authority of India v. K. D. Bali (1988) 2 SCC 360; S. Rajan v. State of Kerala (1992) 3 SCC 608; Indian Drugs & Pharmaceuticals Ltd. v. Indo-Swiss Synthetics Germ Mfg. Co. Ltd. (1996) 1 SCC 54; Union of India v. M.P. Gupta (2004) 10 SCC 504; ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. (2007) 5 SCC 304.
6. (2009) 8 SCC 520; See Denel Pty. Ltd. v. Ministry of Defence (2012) 2 SCC 759 : AIR 2012 SC 817; and Bipromasz Bipron Trading SA v. Bharat Electronics Ltd. (2012) 6 SCC 384.
7. Law Commission of India, *Amendments to the Arbitration & Conciliation Act, 1996* (Report No. 246, 2014).
8. *Id*., para 56.

3. LAW COMMISSION'S 246TH REPORT

The 246th Report of the Law Commission which recommended several crucial amendments to the Act, and expressed its dissatisfaction with the judicial position *vis-à-vis* the appointment of arbitrators as it stood then. The Commission noted that in a bid to uphold "party autonomy" or binding nature of contracts, the aspect of "procedural fairness" was being lost sight of. The Commission emphasised on maintaining "*minimum levels of independence and impartiality*" regardless of parties' prior agreement under the arbitration clause. Contrary to the view expressed by the Supreme Court while upholding the appointment of arbitrator related to one of the parties, The Commission observed that the right to natural justice cannot be waived merely based on a prior agreement at the time of formation of contract but before the dispute have arisen between the parties. The Commission also noted that if the appointing authority is the State itself, then the duty to appoint an impartial and independent arbitrator is much more onerous.[9]

The Law Commission then proposed several critical amendments to Sections 11, 12, and 14 of the Act. The recommendations paved way for introduction of "*de jure*" ineligibility of arbitrators in case the relationship of the arbitrator with any of the parties or counsel or subject matter of the dispute fell within the categories specified in the schedule, as opposed to a mere "*de facto*" disqualification as provided under Section 12(3) of the unamended act. In other words, the Law Commission recommended introduction of certain categories of relationship between the arbitrator and the party, counsel or subject matter, which would render such arbitrator *de jure* ineligible by the operation of law. The Commission recommended introduction of the Red and Orange lists of the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration ("hereinafter referred to as "**IBA Guidelines**"), to serve as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts as to the independence and impartiality of the arbitrator.

4. 2015 AMENDMENTS AND THE CURRENT NORMATIVE FRAMEWORK

Following the Law Commission's recommendations, the Act was accordingly amended in 2015 through the 2015 Amendment. Sections 11, 12 and 14 of the act were specifically amended to ensure fairness in

9. *Id*., para 57.

appointment procedure. Some salient features of the amendments impacting the independence and impartiality of arbitrators are as follows:

a. **Disclosure:** The amended Section 12 of the Act now requires an arbitrator to give **specific** disclosures when she/he is approached for appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts regarding their independence or impartiality. Disclosure is required to be made in terms of form provided in the Sixth Schedule.[10]

b. **Incorporation of Fifth and Seventh schedules:** The amendment incorporated certain criteria to assess whether justifiable doubts exist regarding the independence or impartiality of an arbitrator based on the Red and Orange lists of the IBA Guidelines.

   i. **Fifth Schedule**: The Fifth schedule read with Section 12(1)(b) acts as guideline to ascertains whether circumstances giving rise to justifiable doubts as to the independence or impartiality of arbitrators exist. It is based on the Orange List of the IBA Guidelines, and lists down less serious circumstances, which constitute "*de facto*" ineligibility. The situations mentioned under the fifth schedule broadly cover the following:

   - Arbitrator's relationship with the parties or the counsel.
   - Relationship of arbitrator with the dispute.
   - Arbitrator's direct or indirect interest in the dispute.
   - Previous services for one of the parties or other involvement in the case.
   - Relationship between an arbitrator or another arbitrator or counsel.
   - Relationship between arbitrator and party and others involved in the arbitration.

   ii. **Seventh Schedule:** It incorporates disqualification categories akin to the Red List of the IBA Guidelines, which lead to *de jure* inability to act as an arbitrator. The disqualification stems out of the arbitrator's relationship with the parties, or the counsels or her direct or indirect interest in the dispute. If the case falls within any of the categories specified in the Seventh Schedule,

10. Arbitration and Conciliation Act 1996, s. 12(1)(*b*).

such an appointment is invalid by the operation of law and the arbitrator's mandate stands terminated under Section 14(1)(a) of the Act. This disqualification operates notwithstanding any *prior* agreement to the contrary.[11]

So, while the disclosure is required with respect to a broader list of categories set out in the Fifth Schedule, the *ineligibility* to be appointed as an arbitrator and the consequent *de jure* inability to so act follows from a smaller and more serious sub-set of situations as set out in the Seventh Schedule.

c. Waiver: Section 12 (5) now carries a clause that allows waiver of applicability of Section 12 (5). However, such a waiver can only be: *subsequent* to the dispute having arisen; and by an express agreement in writing (as opposed to deemed waiver by conduct as stipulated under Section 4 of the Act) of the parties. Courts have been strict to interpret the condition of '*agreement in writing'* to ensure fairness in appointments and the conduct of arbitration.[12]

d. Forum of Challenge: If the appointment clause or appointment falls foul of the Fifth Schedule, the challenge lies before the arbitral tribunal under Section 13(2) read with Section 12(3) of the Act. If such a challenge is unsuccessful, the decision is non-appealable.[13] The only recourse available to the aggrieved party in such a scenario is to file an application for setting aside the award under Section 34 of the Act on this ground.[14] On the other hand, if the appointed arbitrator is *ineligible* in terms of Seventh Schedule, s/he would lack inherent jurisdiction to proceed any further, and hence an application for termination of mandate may be filed under Section 14(2) of the Act, *directly* before the court.[15] If the appointment clause itself suffers from the ill of *de jure* ineligibility, the parties may approach the court under Section 11 of the Act, and seek an appointment by the court.[16]

11. Arbitration and Conciliation Act 1996, s. 12(5).
12. See Bharat Broadband Network Ltd. v United Telecoms Ltd. (2019) 5 SCC 755.
13. Arbitration and Conciliation Act 1996, s. 13(3).
14. Arbitration and Conciliation Act 1996, s. 13(5).
15. HRD Corpn. v. GAIL (India) Ltd. (2018) 12 SCC 471; Bharat Broadband Network Ltd. v. United Telecoms Ltd. (2019) 5 SCC 755; Government of Haryana PWD Haryana (B and R) Branch v. G.F. Toll Road (P) Ltd. (2019) 3 SCC 505.
16. TRF Ltd. v. Energo Engg. Projects Ltd. (2017) 8 SCC 377.

e. Applicability: In terms of Section 26 of the 2015 Amendment,[17] the amended provisions are only applicable to arbitrations which commenced post the 2015 Amendment coming into effect, i.e. on or after 23 October, 2015, unless the parties agree otherwise.[18] The date of the arbitration agreement is immaterial.

5. SHIFT IN JUDICIAL TREND: THE CURIOUS CASE OF UNILATERAL APPOINTMENTS

The 2015 Amendment paved the way for a shift in judicial trend (in contrast to what has been discussed in Section B above), and equipped the parties with effective recourse to challenge the unfair appointment procedures in their arbitration agreements. Further, the specific disclosure requirements and the categories of grounds and disqualifications given under the Fifth and Seventh schedules enabled an *objective* test for independence and impartiality of potential arbitrators. As a result of the 2015 Amendment, the parties can now no longer appoint their existing employees, consultants or advisors as arbitrators. However, the *de jure* disqualification does not cover former or retired employees who have retired beyond three years of their nomination, and who may still be appointed as arbitrators.[19]

What is interesting to note is that post-2015 Amendment, the inquiry in judicial decisions has not merely been limited to "who may be appointed" but also been extended to"who may appoint". Unilateral appointment clauses, which give the power of nomination or appointment of an arbitrator to only one of the parties, have since been constantly under judicial scanner. Though the Seventh Schedule provides the criteria for ineligibility of the "appointed arbitrator", the listed grounds do not apply to the "appointing authority". So, there is no direct bar on unilateral appointments under the Act. In other words, if the appointed arbitrator does not otherwise fall under any of the disqualifications specified under the Seventh Schedule, a strict and narrow interpretation of the provisions of the Act would lead to the conclusion that such an appointment is valid even if the arbitrator

17. *26. **Act not to apply to pending arbitral proceedings** - Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.*
18. Aravali Power Co. (P) Ltd. v. Era Infrastructure Engg. Ltd. (2017) 15 SCC 32; Union of India v. Parmar Construction Co. AIR 2019 SC 5522.
19. Voestalpine Schienen Gmbh v. Delhi Metro Rail Corpn. Ltd. (2017) 4 SCC 665; State of Haryana v. G.F. Toll Road (P) Ltd. (2019) 3 SCC 505.

is unilaterally appointed by one of the parties. Several High Courts even post the 2015 Amendment continued to hold this view,[20] until the Supreme Court's ruling in *TRF Ltd.* v. *Energo Engg. Projects Ltd.*[21] ("**TRF Ltd. Case**") in 2017, which finally led to the decision in *Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.*[22] ("***Perkins Eastman Case***"). These are discussed next.

In the context of unilateral appointments, the judicial decisions post-2015 Amendment dealt with three broad categories of appointment clauses:

i. Appointment of disqualified person or nominee of disqualified person as the sole arbitrator ("**TRF Category**"); and

ii. Appointment of nominee of one of the parties as the sole arbitrator; and

iii. Appointment of arbitrator(s) only from the panel maintained or proposed by one of the parties

The first significant decision that dealt with this issue was the *TRF Ltd.* Case. A three-judge bench of the Supreme Court was seized of a matter where the arbitration clause stipulated arbitration before the Managing Director ("**MD**") or a nominee of the MD of EEPL. The Court relied on the principle embedded in the maxim *Qui Facit Per Alium Facit Per Se* (What one does through another is done by oneself)[23] to hold that once the arbitrator (the MD in this case) becomes ineligible by operation of law under Section 12(5) of the Act as amended by the 2015 amendment, his power to nominate someone else is also lost.

The ruling in *TRF Ltd. Case* was followed by the Supreme Court in *Bharat Broadband Network Ltd.* v. *United Telecoms Ltd.*[24] (*the* "**BBNL Case**"), where the arbitration agreement had a similar appointment clause as in the *TRF Ltd. Case*. Curiously, in the *BBNL Case*, the appointment was challenged by the party who had itself nominated the arbitrator, in light of the ruling in *TRF Ltd. Case*. An argument was raised that the party was estopped from challenging the appointment owing to its conduct of going

20. Divyendu Bose v South Eastern Rly. 2018 SCC OnLine Cal 13253; C.P. Rama Rao v. National Highways Authority of India 2017 SCC OnLine Del 9029.
21. (2017) 8 SCC 377.
22. (2020) 20 SCC 760 : 2019 SCC Online SC 1517.
23. See Firm of Pratapchand Nopaji v. Firm of Kotrike Venkata Setty & Sons (1975) 2 SCC 208.
24. (2019) 5 SCC 755.

ahead with the appointment. The Court held that since the appointment was *void ab initio* owing to the arbitrator's *de jure* ineligibility, there was no question of estoppel by conduct, and thus, the appointment was set aside. The Court also emphasised that a waiver of the applicability of Section 12(5) can only be done through an *express agreement in writing* and cannot be an implied waiver as envisaged under Section 4 of the Act.

Both, the *TRF Case* and the *BBNL Case*, dealt with the category of arbitration clauses where the disqualified party had twin capacities: that of an "arbitrator" and the "appointing authority". The courts continued to draw a distinction between the "*TRF category*" of clauses from the clauses where there was no such "twin capacity"[25] and kept upholding unilateral right of appointment of a sole arbitrator until the law was settled by a two-judge bench of the Supreme Court in *Perkins Eastman Case.*

A. *Perkins Eastman*: One Step Forward

The appointment clause in the *Perkins Eastman Case*[26] stipulated arbitration by a person nominated by the Managing Director of one of the parties (the MD here had only one capacity: that of the "appointing authority"). The Supreme Court analysed the ratio in the *TRF Case* and noted that the MD therein was found ineligible owing to the interest he would have in the outcome of the dispute. The Court further noted that if the interest in the outcome of the dispute is taken to be the basis for the possibility of bias, then it will always be present if one of the parties is given a unilateral right of appointing a sole arbitrator. The Supreme Court thus held that"***the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator***".[27]

Hence, the Supreme Court in *Perkins Eastman Case* conclusively ruled that arbitration agreements that grant the right of "*unilateral appointment of sole arbitrator*" to one of the parties, are invalid. However, the judgement in *Perkins Case* was closely followed by a three-judge bench decision of the Supreme Court in *Central Organisation for Railway Electrification* v. *ECI-SPIC-SMO-MCML (JV)*[28] ("**Central Organisation Case**"), which

25. Worlds Window Infrastructure and Logistics (P) Ltd. v. Central Warehousing Corpn. 2018 SCC Online Del 10600; Kadimi International (P) Ltd. v. Emaar MGF Land Ltd. 2019 SCC OnLine Del 9857 : (2019) 4 ArbLR 233; Sriram Electrical Works v. Power Grid Corpn. of India Ltd. 2019 SCC Online Del 9778.
26. Perkins Eastman Architects Dpc v. HSCC (India) Ltd. 2019 SCC OnLine SC 1517.
27. *Id*., para 21.
28. (2020) 14 SCC 712.

has effectively given parties a route to *indirectly* enforce unilateral appointments. The Court in *Central Organisation Case* held valid the appointment of arbitrators out of a panel unilaterally suggested by the one of the parties.

B. *Central Organisation for Railway Electrification*: Two Steps Back

Before delving into the facts and decision rendered in the *Central Organization Case*, it will be apposite to first refer to the Supreme Court's ruling in *Voestalpine Schienen GmbH* v. *Delhi Metro Rail Corpn. Ltd.*[29] ("**Voestalpine Case**"). The arbitration clause in this case envisaged a three-member tribunal, who were to be nominated from the panel of 31 arbitrators maintained by Delhi Metro Rail Corporation Ltd ("**DMRC**") consisting of ex-Government and Railway employees. Under the appointment clause, DMRC was empowered to shortlist five names from the panel and the parties were to nominate one arbitrator each from such list, and such nominated arbitrators were to nominate the presiding arbitrator. Pertinently, DMRC forwarded the entire list to the petitioner/counter party, *excluding* the serving and retired officers of DMRC for nomination. However, the petitioner challenged the clause as being in violation of Section 12(5) of the Act. The Court opined that the discretion given to DMRC to shortlist five persons from the panel gave very limited choice to the petitioner and further left room for the suspicion that DMRC may pick its own favourites, and thus suggested deletion of the said clause. The Court, after noting that if DMRC had given a wider list to the petitioner, which excluded the serving and retired employees of DMRC, upheld the procedure of selection from the wider list so provided. The Court in this case also emphasised on the need for "***broad based panels***", consisting of people from various fields, both technical and legal.

We now turn to the *Central Organisation Case*. Here, the arbitration clause contemplated appointment of three arbitrators by Indian Railways from a panel comprising of four of its retired employees. The other party was given an option to select two out those four names; and the MD of Indian Railways was empowered to choose the nominee of the other party from the two shortlisted names. The MD also had the power to appoint the rest of the two arbitrators from the recommended panel, or outside it. The Court, after discussing the law laid down in *Voestalpine Case* and

29. (2017) 4 SCC 665.

Perkins Eastman upheld the validity of the appointment clause. The court expressed the opinion that Indian Railways had given a "*wide option*" to the counter party by proposing four of its retired employees as nominees. The court further held that the power of the MD to nominate the arbitrator is counter-balanced by the power of the counter party to select any of the two nominees from out of the four names suggested from the panel of the retired officers.

This observation by the Court appears to be in face of the rationale of *Voestalpine Case*, where the Court invalidated the appointment clause (which restricted the choice of arbitrators from merely five names out of an entire panel of thirty-one. Further, the Court in *Voestalpine Case* specifically noted that the proposed list did not have retired employees from DMRC, which was not the case in *Central Organisation Case*, where all the four names in the proposed list were retired employees of Indian Railway.

More importantly, the Court in *Central Organisation Case*, seems to have completely misread the rationale in *TRF Ltd.* and *Perkins Eastman*. The courts in *TRF Ltd* and *Perkins Eastman* had expressed the opinion that the situation where both parties nominate their respective arbitrators, their authority to nominate cannot be questioned,[30] as any advantage that a party may derive from nominating an arbitrator of its choice would be counterbalanced by equal power by the other party.[31]

The Court in *Central Organization* failed to appreciate that, the court in *Central Organization* failed to appreciate that, the court in *TRF Ltd.* and *Perkins Eastman* was referring to a situation where parties could **nominate respective arbitrators of their choice** and that it would get counter-balanced by equal power with the other party; and not a situation where the panel out which nomination is to be made, is controlled by only one of the two parties. In the latter situation, the advantage does not get counter balanced. Applying the *TRF Ltd.* and *Perkins Eastman* logic, if a party having interest in the outcome of the dispute or an ineligible person does not have the unilateral right to appoint the sole arbitrator, by the same logic, such a party should not have the right to unilaterally decide on the panel out of which the arbitrator is finally appointed.

30. TRF Ltd. v. Energo Engg. Projects Ltd. (2017) 8 SCC 377, para 50.
31. *Supra* note 26 para 20.

The decision in *Central Organization Case* is not merely contradictory to *Perkins Eastman* with respect to unilateral appointments, but has also diluted the principle of neutrality of panels discussed in the *Voestalpine Case,* where the Court had ruled against giving *limited options* to the other party while making appointments from a panel, and had further recommended the parties, particularly PSU's and government authorities, to maintain "*broad based*" panels.

In context of appointments from panel maintained by one of the parties, the decision by a single judge of Delhi High Court in ***Larson & Turbo Construction Ltd.* v. *Public Works Department***[32] is worth discussing. The arbitration clause in this case contemplated the appointment of a sole arbitrator from a panel of arbitrators maintained by PWD, and accordingly a retired director of PWD was appointed as the sole arbitrator. The judgement in this case seems to have been reserved before *Perkins Eastman Case*, and hence no reliance has been placed on it to strike down the unilateral appointment. The High Court in this case, noted that the appointed arbitrator was otherwise qualified under the Seventh Schedule. However, the Court looked into the *procedure of empanelment* of arbitrators by the PWC to ascertain their independence and impartiality. Under the empanelment procedure, certain conditions for empanelment were specified by the PWD, such as:

> *'That the applicant has not appeared for private party and against the government interest before any Arbitrator of PWD/CPWD or DDA'.*
>
> *'The Officer to be empanelled should not have taken any commercial employment and have not appeared before any Arbitrator for CPWD/PWD Delhi or DDA in favour of any party and against the Government'.*

The Court after taking note of the conditions observed that the empanelled persons were required to display a certain kind of trait or attributes that are antithetical to the appointment of an impartial and an independent arbitrator, and terminated the mandate under of the arbitrator under Section 14(1)(a) of the Act. This case is another example of purposive interpretation of the Act.

32. 2020 SCC OnLine Del 33.

6. TANTIA CONSTRUCTION: THE REMEDIAL STEP?

The conundrum arising out of the decision in *Central Organization Case* did not escape the Supreme Court's attention for long. In a similarly placed case, a three-judge bench of the Supreme Court in *Union of India* v. *Tantia Constructions Ltd. ("**Tantia Construction Case**")* prima facie disagreed with the view taken in *Central Organisation Case* and sought reference of the said decision to a larger bench.[33] The position as it stands today is that the larger bench is yet to be constituted and thus, the decision in *Central Organisation Case* still holds the field. In view of the divergence of opinions, while some courts are still deciding similarly placed matters on the basis of decision in *Central Organisation,*[34] others have proceeded to appoint independent arbitrators,[35] in view of the order passed in *Tantia Construction Case*. The order in *Tantia Construction Case* has further been relied upon by parties to obtain interim stay on arbitral awards where the tribunal comprised of arbitrators appointed from a unilaterally decided panel.[36]

7. CONCLUSION

The Indian arbitration space has shown a great deal of progress in making the arbitration procedure fair as well as efficacious through legislative reforms. The criteria under the Fifth and Seventh Schedules have brought in a fair amount of objectivity in judging the independence and impartiality of arbitrators. Most of the PSUs and government authorities have amended the dispute resolution clauses in their contracts to do away with clauses that prescribed appointment of their existing employees, consultants or advisors as arbitrators. In a country like India, where ad-hoc arbitrations are a norm, these reforms are a welcome step in ensuring confidence of parties in the arbitral process. To bring about long term and systematic changes, institutionalized arbitration in India needs to be encouraged and strengthened. Further, judicial decisions post-2015 Amendment reveal that the there is a fair amount of subjectivity shown by Indian courts in interpreting Section 12(5) of the Act read with the Seventh Schedule in a

33. 2021 SCC OnLine SC 271.
34. Iworld Business Solutions (P) Ltd. v. Delhi Metro Rail Corpn. Ltd. 2021 SCC Online Del 2730.
35. Singh Associates v. Union of India 2022 SCC OnLine Del 3419; Proddatur Cable TV Digi Services v. Siti Cable Network Ltd. 2020 SCC OnLine Del 350 : (2020) 267 DLT 51.
36. JSW Steel Ltd. v. South Western Railway Order dated 16.08.2022 passed in SLP (c) No. 9462/ 2022.

purposeful manner. The contradictory position arising out decisions in *TRF Case and Perkins Eastman Case,* on one hand, and *Central Organisation Case*, on the other, has rightly been referred to a larger bench. In the meanwhile, parties, especially PSUs and government authorities, should voluntarily do away with unilateral arbitrator appointment clauses—or at least strive to maintain "*broad based*" panels, with people from diverse backgrounds acting as arbitrators. This would be in line with the spirit of Supreme Court's ruling in *Voestapaline Case* and maintain overall fairness in the process of arbitration.[37] In other words, the appointment process must be such that: "*Justice must not only be done, but must also be seen to be done*".[38]

37. *See* L&T Hydrocarbon Engg. Ltd. v. Indian Oil Corpn. Ltd. 2022/DHC/004531.
38. Lord Hewart CJ, R. v. Sussex Justices [1924] 1 KB 256.

EMERGENCY ARBITRATIONS IN INDIA: VIABILITY AND ENFORCEABILITY

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ABSTRACT

Interim measures are often required at early stages in an arbitration to protect the parties' respective positions for the duration of the arbitration proceedings, including by way of orders to preserve evidence, prevent dissipation of assets and secure the amount in dispute (including costs of the arbitration). Emergency arbitration has gained popularity in the past decade, as it offers a disputing party an avenue to obtain urgent interim relief from an arbitrator appointed exclusively for the purpose, on an expedited basis before the arbitral tribunal is constituted and without having to resort to court proceedings for interim relief. This article discusses the efficacy of relief granted in an emergency arbitration in disputes involving Indian parties or where such relief is required to be enforced in India.

1. INTRODUCTION

Interim measures are often required at the early stages of an arbitration to protect the parties' respective positions for the duration of the arbitration proceedings. This includes orders to preserve evidence, prevent the dissipation of assets and secure the amount in dispute (including costs of the arbitration).

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Before the advent of emergency arbitration, the primary options available to the parties to obtain interim measures early were to either approach a jurisdictional court or await the constitution of the arbitral tribunal. In practice, accounting for procedural timelines and any case-specific delays, obtaining interim relief through these processes could take several weeks or longer, amplifying the risk of a party successfully alienating assets or compromising evidence.

Emergency arbitration, as the name suggests, is a procedure offering a disputing party an avenue to obtain urgent interim relief from an arbitrator appointed exclusively for the purpose. It is done on an expedited basis before the arbitral tribunal is constituted and without having to resort to court proceedings for interim relief. Much like a regular arbitral tribunal, the foundation for emergency arbitration is the principle of party autonomy, with the jurisdiction of the emergency arbitrator founded in the contract between the parties. Many arbitral institutions have separate panels of arbitrators for appointments in emergency arbitration and appointments are often made within one to three days of a request for the emergency arbitration.[2] Ordinarily, the proceedings are completed and the award on the relief requested is delivered in a short time frame which ranges from five (5) to fifteen (15) days from the appointment of the emergency arbitrator, depending on the rules under which the emergency arbitration is conducted.[3]

The roots of emergency arbitration can be traced to the International Chamber of Commerce (the "**ICC**") Rules for Pre-Arbitral Referee Procedure adopted in 1990, which provided for the appointment (subject to a prior agreement between the parties) of a referee who had the power to grant certain interim orders prior to the constitution of an arbitral tribunal.[4] Further, in 1999, the American Arbitration Association adopted Optional

2. Rules of Arbitration of the International Chamber of Commerce (ICC) (the "**ICC Rules**") (1 January 2021), appx V, art. 6.4; London Court of International Arbitration (LCIA) Arbitration Rules (the "**LCIA Rules**") (1 October 2020), art. 9.6; Arbitration Rules of the Singapore International Arbitration Centre (SIAC) (the "**SIAC Rules**") (1 August 2016), sch. 1, art. 3.
3. Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) (the "**SCC Rules**") (1 January 2023), appx. II, art. 8.1; Arbitration Rules of the Mumbai Centre for International Arbitration (MCIA), (the "**MCIA Rules**") (15 January 2017), art. 14.6; The Delhi International Arbitration Centre (DIAC) Arbitration Proceedings Rules (the "**DIAC Rules**") (1 July 2018), art. 14.9; ICC Rules (1 January 2021), appx. V, art. 2.1; LCIA Rules (1 October 2020), art. 9.4; SIAC Rules (1 August 2016), sch. 1, art. 9.
4. ICC Rules for a Pre-Arbitral Referee Procedure (1 January 1990), art. 3.1.

Rules for Emergency Measures of Protection as part of its commercial arbitration rules.[5] While the World Intellectual Property Organisation proposed an amendment to its arbitration rules to incorporate an emergency relief mechanism in the mid-1990s, the amendment was not made until 2014.[6]

In the next two decades, several arbitral institutions incorporated emergency arbitration mechanisms in their respective rules. The Singapore International Arbitration Centre ("**SIAC**")[7] and the Stockholm Chamber of Commerce ("**SCC**")[8] revised their rules in 2010, while the ICC[9] and the Swiss Arbitration Centre ("**SAC**")[10] included provisions for emergency arbitration in the 2012 versions of their arbitral rules. The Hong Kong International Arbitration Centre ("**HKIAC**"),[11] the London Court of International Arbitration ("**LCIA**"),[12] and the China International Economic and Trade Arbitration Commission ("**CIETAC**")[13] followed suit in 2013, 2014 and 2015 respectively. Several arbitral institutions based in India (such

5. Optional Rules for Emergency Measures, The American Arbitration Association Commercial Arbitration Rules and Mediation Procedures (1 April 1999).
6. World Intellectual Property Organisation (WIPO) Arbitration Rules (1 June 2014), art 49(a).
7. SIAC Rules (1 July 2010), sch. 1. See SIAC Rules (1 August 2016), for the latest version https://siac.org.sg/siac-rules-2016 accessed 6 February 2023.
8. SCC Rules (1 January 2010), appx. II. See SCC Rules (1 January 2023), for the latest version https://sccarbitrationinstitute.se/sites/default/files/2023-01/scc_arbitration_rules_2023_eng.pdf accessed 6 February 2023.
9. ICC Rules (1 January 2012), appx. V. See ICC Rules (1 January 2021), for the latest version https://iccwbo.org/content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf accessed 6 February 2023.
10. Rules of Arbitration of the Swiss Arbitration Centre (SAC) (the "**Swiss Rules**") (1 June 2012), art 43. See Swiss Rules (1 June 2021), for the latest version https://www.swissarbitration.org/wp-content/uploads/2022/07/Swiss-Rules-2021-EN.pdf accessed 6 February 2023.
11. Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules (the "**HKIAC Rules**") (1 November 2013), sch. 4. See HKIAC Rules (1 November 2018), for the latest version https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018%20Rules%20book/2018%20AA%20Rules_English.pdf accessed 6 February 2023.
12. LCIA Rules (1 October 2014), art. 9-B. See LCIA Rules (1 October 2020), for the latest version https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx accessed 6 February 2023.
13. CEITAC Arbitration Rules (1 January 2015), appx. III https://www.cietac-eu.org/download/china-international-economic-and-trade-arbitration-commission-cietac-arbitration-rules/ accessed 6 February 2023.

as the Mumbai Centre for International Arbitration (the "**MCIA**"),[14] Delhi International Arbitration Centre (the "**DIAC**"),[15] and the Indian Council of Arbitration (the "**ICA**"),[16] also provide for emergency arbitration in their rules.

Emergency arbitration has gained popularity in the past decade. Since the introduction of provisions on emergency arbitrations in its rules in 2010, SIAC reportedly received 129 applications for the appointment of an emergency arbitrator (all of which were accepted by SIAC),[17] several of which involved Indian parties either as claimants[18] or respondents.[19] The ICC had received a total of 95 requests until 2019.[20] Relief is not, however, granted in every case, as it is only in exceptional cases that urgent interim relief is justified.[21] A majority of requests have been made in relation to disputes in the commercial, construction, maritime and trade sectors.[22]

This article discusses the efficacy of relief granted in an emergency arbitration in disputes involving Indian parties or where such relief is required to be enforced in India.

14. MCIA Rules (15 January 2017), art. 14 https://mcia.org.in/mcia-rules/english-pdf/#mcia_rule14 accessed 6 February 2023.
15. DIAC Rules (1 July 2018), art. 14 http://dhcdiac.nic.in/wp-content/uploads/2020/01/DIAC-Arbitration-Proceedings-Rules-2018.pdf accessed 6 February 2023.
16. ICA Rules of International Commercial Arbitration (the "**ICA Rules**") (1 April 2016), art. 33 https://www.icaindia.co.in/International.pdf accessed 6 February 2023.
17. Singapore International Arbitration Centre, SIAC Year in Review (2021), pp. 9 and 10 https://siac.org.sg/wp-content/uploads/2022/06/SIAC-AR2021-FinalFA.pdf accessed 6 February 2023.
18. A total of 15 applications for appointment of emergency arbitrator has been filed by Indian parties. Singapore International Arbitration Centre, SIAC Year in Review (2021), p. 10 https://siac.org.sg/wp-content/uploads/2022/06/SIAC-AR2021-FinalFA.pdf accessed 6 February 2023.
19. A total of 61 applications for appointments of emergency arbitrator has been filed with Indian parties as Respondents to such arbitrations. Singapore International Arbitration Centre, SIAC Year in Review (2021), p. 10 https://siac.org.sg/wp-content/uploads/2022/06/SIAC-AR2021-FinalFA.pdf accessed 6 February 2023.
20. ICC Commission Report on Emergency Arbitrator Proceedings (April 2019), p. 37 https://iccwbo.org/content/uploads/sites/3/2019/03/icc-arbitration-adr-commission-report-on-emergency-arbitrator-proceedings.pdf accessed 6 February 2023.
21. ICC Commission Report on Emergency Arbitrator Proceedings (April 2019), p. 4 https://iccwbo.org/content/uploads/sites/3/2019/03/icc-arbitration-adr-commission-report-on-emergency-arbitrator-proceedings.pdf accessed 6 February 2023.
22. Singapore International Arbitration Centre, SIAC Year in Review (2021), p. 10 https://siac.org.sg/wp-content/uploads/2022/06/SIAC-AR2021-FinalFA.pdf accessed 6 February 2023.

2. BROAD FRAMEWORK OF EMERGENCY ARBITRATION

The appointment of an emergency arbitrator is typically requested when a notice of arbitration is issued, or shortly thereafter, and before the arbitral tribunal is constituted. The emergency arbitrator is entitled to set the procedure which will apply to the emergency arbitration, including the schedule for evidence and submissions to be adduced and for hearing (if any).

An emergency arbitrator has the power to order or award any interim relief deemed to be appropriate. Their powers are typically similar to those vested in the properly constituted tribunal, including to rule on its own jurisdiction and the procedure to be applied to the emergency arbitration proceedings.

While the legal standard for grant of interim relief may vary across jurisdictions, emergency arbitrators make their determination on the request for interim relief based on a very preliminary view of the merits of the case. The applicant is typically required to establish that: (a) there is a risk of serious or irreparable harm to the party seeking relief; (b) the urgency is such that the request for relief cannot await the constitution of the arbitral tribunal; (c) the grant of interim relief requested does not pose the risk of a prejudgment on the merits of the case; and (d) the balance of convenience is in favour of the grant of relief. The emergency arbitrator is required to record reasons for his/her decision.[23]

Orders or awards issued by the emergency arbitrator are usually finite in time – either to survive until the arbitral tribunal is constituted or until such order/award is reconsidered by that tribunal or until the final award is made by that tribunal (or if the claim is withdrawn or the arbitral tribunal is not constituted within a specified time frame).

The emergency arbitrator has no power to act once the arbitral tribunal is constituted under the applicable procedure. Any orders and/or awards issued by the emergency arbitrator may be reconsidered, modified, or vacated by the properly constituted tribunal. The orders or awards of the

23. ICC Rules (1 January 2021), appx. V, art. 6.3; LCIA Rules (1 October 2020), art. 9.9; SIAC Rules (1 August 2016), sch. 1, art. 8; SCC Rules (1 January 2023), appx. II, art. 8.2(*ii*); HKIAC Rules (1 November 2018), sch. 4, art. 14(b); MCIA Rules (15 January 2017), art. 14.7.

emergency arbitrator are not binding on the arbitral tribunal and the arbitral tribunal may either confirm, modify, or vacate such order or award.[24]

The entire process, from the time an application for emergency arbitration is made until the award on the emergency relief requested, is rendered, is usually completed within five (5) to fifteen (15) days from the date of the appointment of the emergency arbitrator.[25]

3. THE INDIAN POSITION ON EMERGENCY ARBITRATION

The Arbitration and Conciliation Act, 1996, as amended (the "**Arbitration Act**") does not expressly provide for emergency arbitration or the enforcement of an emergency arbitrator's orders or awards. Following the developments in the rules of arbitral institutions, some jurisdictions have revised their national legislation to recognise emergency arbitration.[26] For instance, the Hong Kong Arbitration Ordinance of 2013 allows courts in Hong Kong to enforce relief granted by emergency arbitrators, whether the order is issued in an arbitration seated in Hong Kong or abroad.[27]

That is not to say that efforts to introduce the concept in Indian law have been non-existent. The Law Commission of India, in its 246th report, recommended that an emergency arbitrator be included within the definition of the term "*arbitral tribunal*" under Section 2(1)(d) of the Arbitration Act,[28] in order to align the arbitral practice in India with the various institutional rules providing for emergency arbitration.[29] A similar

24. ICC Rules (1 January 2021), appx. V, art. 6.6; LCIA Rules (1 October 2020), art. 9.11; SIAC Rules (1 August 2016), sch. 1, art. 10; SCC (1 January 2023), appx. II, art. 9.4(*i*); HKIAC Rules (1 November 2018), sch. 4, art. 17(*a*); MCIA Rules (15 January 2017), art. 14.9.
25. SCC Rules (1 January 2023), appx. II, art. 8.1; the MCIA Rules (15 January 2017), art. 14.6; DIAC Rules (1 July 2018), art. 14.9; ICC Rules (1 January 2021), appx. V, art. 6.4; LCIA Rules (1 October 2020), art. 9.4; SIAC Rules (1 August 2016), sch. 1, art. 9.
26. See, for instance, International Arbitration (Amendment) Act, No. 12 of 2012 (Singapore), s. 2; Arbitration Amendment Act, 2016 (New Zealand), s. 4; Arbitration (Amendment) Act, No. 2 of 2018 (Malaysia), s. 2; International Arbitration Act, No. 44 of 2017 (Fiji), s. 2; Arbitration (Amendment) Ordinance, No. 7 of 2013 (Hong Kong), ss. 22-A and 22-B; Conciliation and Arbitration Law, No. 708 of 2015 (Bolivia), ss. 67-71.
27. Arbitration (Amendment) Ordinance, No. 7 of 2013 (Hong Kong), ss. 22-A and 22-B.
28. Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act, 1996 (August 2014), p. 37 https://lawcommissionofindia.nic.in/reports/report246.pdf accessed 6 February 2023.
29. Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act, 1996 (August 2014), p. 37 https://lawcommissionofindia.nic.in/

recommendation was made by the committee set up by the Government of India in 2017 headed by Justice (Retd.) B.N. Srikrishna to review the institutionalisation of the arbitration mechanism in India (the "**Srikrishna Committee**"), which also suggested that the definition of "*arbitral award*" in Section 2(1)(c) of the Arbitration Act be amended to include the decision of an emergency arbitrator.[30] The Srikrishna Committee noted that these recommendations were significant since emergency decisions issued in a foreign-seated arbitration may not otherwise be enforceable in India.[31] However, even though the Arbitration Act has been amended in 2015, 2019 and 2021, the recommendations of the Law Commission and the Srikrishna Committee have not been reflected in the Arbitration Act.

The Arbitration Act, therefore, does not expressly recognise emergency arbitration or the relief granted by an emergency arbitrator. More particularly, the Arbitration Act is silent on whether a decision of the emergency arbitrator would be treated as an order or an award. This is significant in foreign-seated arbitrations as an interim order issued in such proceedings may not be enforceable under Part II of the Arbitration Act unless it is in the nature of an award (as opposed to an order).[32] In India-seated arbitrations, the mechanism for challenge and enforcement would also depend on whether the decision of the emergency arbitrator had the trappings of an order or an award.

Indian courts have, however, attempted to resolve the controversy. In 2021, the Supreme Court of India ("**Supreme Court**") considered the enforceability in India of a decision issued in an emergency arbitration conducted under the SIAC Rules in an India-seated arbitration between 'Amazon.com NV Investment Holdings LLC' and 'Future Retail Limited' and its affiliates ("**Amazon**").[33] The Supreme Court held that in cases

reports/report246.pdf accessed 6 February 2023.

30. Ministry of Law and Justice, Government of India, *Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (30 July 2017), pages 76-77 https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf accessed 6 February 2023.
31. Ministry of Law and Justice, Government of India, *Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (30 July 2017), p. 76 https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf accessed 6 February 2023.
32. Part II of the Arbitration Act only deals with enforcement of arbitral awards rendered in foreign-seated arbitrations, including interim awards, and does not provide for enforcement of orders issued by arbitral tribunals in foreign-seated arbitrations.
33. Amazon.com NV Investment Holdings LLC v. Future Retail Ltd. (2022) 1 SCC 209.

where institutional rules applied, the definition of an "arbitral tribunal" in Section 2(1)(d) of the Arbitration Act would include emergency arbitrators, and accordingly, decisions issued by emergency arbitrators under those rules would be an order of the "arbitral tribunal" under Section 17(1) of the Arbitration Act.[34] The Supreme Court held that the emergency arbitrator's decision was an order under Section 17(1) of the Arbitration Act, and accordingly enforceable under Section 17(2) of the Arbitration Act.[35]

This decision does not squarely apply to foreign-seated arbitrations governed by Part II of the Arbitration Act (to which Section 17 of the Arbitration Act does not apply). In two earlier cases involving decisions of an emergency arbitrator in foreign-seated arbitrations, the party seeking relief approached the Indian courts under Section 9 of the Arbitration Act requesting an order in the same terms as those granted by the emergency arbitrator.[36] In each of these cases, the courts considered that the petitioner could not seek enforcement of the decision of the emergency arbitrator in a foreign-seated arbitration under Section 17 of the Arbitration Act, and relief was granted under Section 9 of the Arbitration Act after conducting an independent analysis of the merits of the relief requested. As such, the emergency arbitration proceedings may have been unnecessary to the obtaining of interim relief.[37]

4. VIABILITY OF THE EMERGENCY ARBITRATION OPTION

Whether or not emergency arbitration is the appropriate avenue for urgent interim relief will inevitably require a case-to-case analysis. The option for emergency arbitration is, of course, only available when the arbitration agreement incorporates (expressly or by reference) provisions for emergency arbitration, and where so available, can be invoked only in scenarios of necessity and urgency, and where the grant of relief cannot await the constitution of the arbitral tribunal in the ordinary way.

One significant factor to consider when evaluating whether or not to invoke emergency arbitration is whether the restricted time frame in which the emergency arbitration is to be conducted and concluded allows for the merits of the case for interim relief to be fully addressed and appreciated by

34. Amazon, para 35.
35. Amazon, paras 12 and 40.
36. HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd. 2014 SCC OnLine Bom 102 ("**Avitel**"); Raffles Design International India (P) Ltd. v. Educomp Professional Education Ltd. 2016 SCC OnLine Del 5521 : (2016) 6 Arb LR 426 ("**Raffles Design**").
37. Avitel, para 89; Raffles Design, paras 103-105.

the emergency arbitrator. The disputing parties work within a significant time constraint to prepare their case and present any relevant evidence. Likewise, the emergency arbitrator has limited opportunity to consider and evaluate the case, often also simultaneously being required to devote time and attention to procedural issues arising in relation to the emergency arbitration, including challenges to jurisdiction (for instance, for by passing pre-arbitration requirements stipulated in the arbitration agreement). Such circumstances may pose a hurdle in complex and high-value arbitrations and may challenge the emergency arbitrator's ability to render a decision within the stipulated timeline. A case-specific analysis of the effectiveness of an emergency arbitration is critical in deciding whether to expend time and resources in invoking the mechanism.

In the Indian context, where the option of emergency arbitration is available, its suitability should be weighed against two primary considerations (in addition to any case-specific factors): (i) the enforceability of the emergency relief granted (the enforcement consideration); and (ii) whether an alternative remedy is likely to be more efficacious (such as approaching the jurisdictional court for interim relief under Section 9 of the Arbitration Act) (the efficacious alternative consideration).[38] Where institutional rules or procedures agreed by the parties include a provision for the expedited formation of the arbitral tribunal or an expediated arbitration procedure, that would be a third alternative to consider when a party is evaluating which forum is appropriate to obtain the urgent interim relief required.

A. The Enforcement Consideration

The enforceability in India of a decision of an emergency arbitrator has now received greater clarity through the judicial pronouncements discussed above. Briefly put, in India-seated arbitrations, following the Supreme Court's decision in *Amazon*, the decisions in an emergency arbitration are enforceable as orders of the court under Section 17(2) of the Arbitration Act. Accordingly, from an enforcement perspective, there is no legal distinction between a decision of the arbitral tribunal under Section 17(1) of

38. See Bhatia International v. Bulk Trading SA (2002) 4 SCC 105; Videocon Industries Ltd. v. Union of India, (2011) 6 SCC 161; Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, (2012) 9 SCC 552; and Union of India v. Reliance Industries Ltd. (2015) 10 SCC 213 for whether such relief would be available in foreign seated arbitrations commenced prior to the amendment to the Arbitration Act in 2015.

the Arbitration Act and a decision issued by an emergency arbitrator in an India seated arbitration.

The position is, however, different in foreign-seated arbitrations. Part II of the Arbitration Act provides for the enforcement of awards issued in foreign seated arbitrations (to which the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 or the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 apply) but does not provide for the enforcement of interim orders issued in such arbitrations. For that reason, as was the case in *Avitel* and *Raffles Design*, the beneficiary of an emergency arbitrator's decision in a foreign seated arbitration has no means to enforce such order of the tribunal and is compelled to take recourse to Section 9 of the Arbitration Act (where it has not been excluded by the parties). The interim relief must be granted by a jurisdictional court in the same terms as those granted by the emergency arbitrator.

The time and cost implications of approaching separate forums for interim relief (i.e., the emergency arbitrator, followed by an Indian court) play an important role in determining whether the emergency arbitration option is feasible in the circumstances of the case. There may be justification for undertaking the exercise in some cases such as, for instance, where enforcement of the emergency arbitrator's decision is contemplated in multiple jurisdictions (of which India may be one). The decision is either enforceable *per se* in those jurisdictions or the courts in such jurisdictions would show deference to the emergency arbitrator's decision or the defendant is likely to comply with the emergency award without an enforcement action.

B. The Efficacious Alternatives Consideration

Another important consideration is whether a more efficacious alternative is available including whether such alternative is less time-consuming or if it is less expensive.

From an Indian perspective, the principal alternatives to emergency arbitration are court granted relief under Section 9 of the Arbitration Act or, where the arbitration agreement or any applicable institutional rules or arbitration procedures permit, options for the expedited formation of the arbitral tribunal so that the urgent relief can be requested from the properly constituted tribunal.

Emergency arbitration ceases to be an option once the arbitral tribunal is constituted.[39] Since emergency arbitration is typically invoked only when the urgency in obtaining interim relief is such that it cannot await the constitution of the arbitral tribunal, waiting for interim measures until the arbitral tribunal is constituted may not be feasible. Equally, in an India seated arbitration which contemplates a fast track arbitration procedure under Section 29B of the Arbitration Act, awaiting the appointment of the sole arbitrator may not be a practical alternative where emergency relief is required – since the sole arbitrator under Section 29B(2) of the Arbitration Act is to be appointed by agreement of the parties, and such agreement may not be forthcoming.

In each case, the time taken in the formation of an arbitral tribunal may defeat the purpose if a party requires emergency relief.

Where the option is available, with an overall timeframe of less than three weeks (i.e., approximately one (1) to three (3) days for the appointment of an emergency arbitrator,[40] and from that time, to five (5) to fifteen (15) days to obtain the decision on the request for interim relief),[41] emergency arbitration is very likely to be more expedient in terms of time taken to obtain a decision on the request for interim relief. Following the *Amazon* ruling, an emergency arbitrator's decision is enforceable in the same way as an order of the arbitral tribunal and there no distinction between the two alternatives in foreign seated arbitrations as interim orders of either the emergency arbitrator or the arbitral tribunal are not *per se* enforceable under Part II of the Arbitration Act.

Under Section 9 of the Arbitration Act, courts have wide powers to grant interim relief at any time before, during or after the making of a final award and until such award is enforced.[42] This remedy is available even in foreign-seated arbitrations unless parties exclude the application of Section 9.[43]

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39. ICC Rules (1 January 2021), appx. V, art. 6.6; LCIA Rules (1 October 2020), art. 9.11; SIAC Rules (1 August 2016), sch. 1, art. 10; SCC (1 January 2023), appx. II, art. 9.4(*i*); HKIAC Rules (1 November 2018), sch. 4, art. 17(*a*); MCIA Rules (15 January 2017), art. 14.9.
40. ICC Rules (1 January 2021), appx. V, art. 2.1; LCIA Rules (1 October 2020), art. 9.6; SIAC Rules (1 August 2016), sch. 1, art. 3.
41. SCC Rules (1 January 2023), art. 8.1; MCIA Rules (15 January 2017), art. 14.6; DIAC Rules (1 July 2018), art. 14.9; ICC Rules (1 January 2021), appx. V, art. 2.1; LCIA Rules (1 October 2020), art. 9.4; SIAC Rules (1 August 2016), sch. 1, art. 9.
42. Arbitration and Conciliation Act 1996, s. 9(1).
43. Arbitration and Conciliation Act 1996, s. 2(2).

Approaching an Indian court under Section 9 of the Arbitration Act is often a useful mechanism to obtain interim relief for several reasons. For instance, Section 9 proceedings can be instituted even before the arbitration agreement has been invoked.[44] By contrast, emergency arbitration can only be instituted after arbitration has been invoked and reference has been made to the designated arbitral institution. Often urgent interim relief is required at short notice when the requesting party may not be in a position to draw up a detailed notice of dispute or notice of arbitration. In such cases, Section 9 proceedings may afford quick and effective relief and allow for the requesting party to prepare its notice of arbitration and claim thoughtfully.

Subject to the procedural rules of the jurisdictional court, Section 9 proceedings also allow for the possibility of obtaining relief on an *ad interim* or even an *ex parte* basis. In such cases, relief may be available through Section 9 proceedings on a shorter timeline than the emergency arbitration. The ability to obtain *ex parte* and/or *ad interim* relief, of course, is subject to the rules and practices of the jurisdictional court, which may require advance notice of such proceedings to be served on an opposite party.

Further, the requesting party has no enforcement concerns to contend with in relation to orders of a court under Section 9 of the Arbitration Act. Given the experience in *Avitel* and *Raffles Design* where, in foreign seated arbitrations, Section 9 proceedings were required to be instituted in the Indian courts to effectively enforce emergency arbitration decisions, Section 9 proceedings may be a more time and cost-efficient mechanism in ordinary scenarios (see also discussion on other factors such as potential enforcement of emergency arbitrator's decision in multiple jurisdictions).

These factors in favour of obtaining interim relief under Section 9 of the Arbitration Act should be counterbalanced against the advantages offered by an emergency arbitration and any party preferences to approach a neutral and private forum (such as the emergency arbitration) to adjudicate the request for interim relief. For instance, emergency arbitration proceedings are confidential, whereas court proceedings in India are typically public proceedings. The availability of skilled and experienced arbitrators for appointment as emergency arbitrators is another significant advantage, particularly where any sector-specific experience (such as construction, commodities or shipping) is of particular value.

44. Sundaram Finance Ltd. v. NEPC India Ltd. (1999) 2 SCC 479, para 13.

Finally, where enforcement of the interim relief being requested may be required in multiple jurisdictions, obtaining such relief through emergency arbitration that can be enforced in all the relevant jurisdictions (assuming it is so enforceable in those jurisdictions, and without significant time or cost implications) eliminates the risk of conflicting decisions of the courts of those jurisdictions and is likely to be more time and cost effective than approaching each of the courts in those jurisdictions for the relief.

5. CONCLUSION

Emergency arbitration has developed over the past several years to offer a workable mechanism to parties requiring urgent relief to obtain such relief before the arbitral tribunal is formed and without resort to a jurisdictional court. Whether emergency arbitration is a suitable option inevitably involves a case-specific analysis, much of which rests on the seat of the arbitration, the time and cost efficiency emergency arbitration is able to offer, and the legislative and judicial support for emergency arbitrations in jurisdictions worldwide in terms of enforceability of the decision rendered.

DISCLOSURE OF THIRD PARTY FUNDING IN ARBITRATION: AN INDIAN PERSPECTIVE

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ABSTRACT

This paper focuses on the interaction of Third Party Funding (TPF) and disclosure requirements in arbitration, specifically in Indian context. Impartiality and independence of arbitrators are key elements of effectiveness and due process in non-state actors resolving disputes between parties. With TPF emerging as a potent tool for pursuit of claims by Indian parties, it becomes essential to understand and explore this key element of arbitration - privity of contract between parties to Arbitral reference and the impact of TPF by an undisclosed party. The paper contends, that amongst the various stages at which such disclosure requirement can be imposed at, it is best to impose such disclosure requirement as early as possible. The paper then discusses the potential threat to confidentiality posed by TPF to the arbitration itself and the threat the disclosure requirement poses to the confidentiality of the funder. The paper posits robust Non-disclosure agreements between the funder and the funded party as a way to protect the confidentiality of the process. The paper concludes, by noting the need of amending Section 42A and Section 12 of the Arbitration and Conciliation Act, 1996, along with having a well-balanced and holistic code with regard to disclosures in TPF in India.

1. SCOPE OF THIRD-PARTY FUNDING IN INDIAN ARBITRATION:

The past few years have witnessed a steady rise in the costs of pursuing international arbitration, thereby imposing a deterrent of sorts in pursuance of even perceivably meritorious claims. Third-party funding (**"TPF"**) arrangements, as an asset class, have risen to the occasion and have made possible effective pursuance of such claims. While there exist a few varieties in TPF arrangements, a traditional TPF agreement involves a

funder paying the expenses incurred by a claimant during the arbitration process, and recovering such costs from the sum recovered by the claimant through the arbitration, if successful.[1]

While modern TPF arrangements have largely been popular in the global West and even in a few Asian countries, its recent rise in India may be owed to India's sustained efforts to promote the arbitration of disputes and India's fast economic development. Like their international counterparts, Indian companies are also looking at lever aging their balance sheets while pursuing their legitimate claims in arbitration. Publicly known for this are Indian companies, like Hindustan Construction Company Limited and Patel Engineering Limited, who have opted for certain models of TPF arrangements to fund their disputes.[2] Apart from these portfolio arrangements, there are also instances of TPF arrangements by Indian parties in arbitrations seated outside India.[3]

2. EVOLUTION OF THIRD-PARTY FUNDING IN INDIA:

TPF has historically faced resistance in common law jurisdictions. It has been considered illegal under common law in view of doctrines of maintenance and champerty.[4] However, over a period of time with shift in economic forces and public policy ethos, many countries have fairly watered down the extent of applicability of doctrines of maintenance and champerty on their legal systems and created exceptions or declared clarifications. For instance, the case of *Arkin* v. *Borchard Lines Ltd.* (Arkin) in the United Kingdom diluted the doctrines of maintenance and

1. Amita Katragadda, Bipin Aspatwar, Shruti Khanijow, Ayushi Singhal, 'Third Party Funding in India' https://www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf (February 2019) accessed 09 February 2023 (Amita Katragadda).
2. Swaraj Singh Dhanjal, Tanya Thomas, *HCC Raises ₹1750 Crore in Litigation Funding Deal* https://www.livemint.com/companies/news/hcc-raises-rs-1-750-crore-in-litigation-funding-deal-1553651279600.html (27 March 2019) accessed 09 February 2023; Athanasios Papadas, Kshitij Pandey, 'The Prospects of Third Party Funding in Indian Infrastructure Construction and Energy Disputes: An Overview' https://ijpiel.com/index.php/2021/11/04/the-prospects-of-third-party-funding-in-indian-infrastructure-construction-and-energy-disputes-an-soverview/ (4 November 2021) accessed 9 February 2023.
3. Norscot Rig Management Private Ltd v. Essar Oilfields Private Ltd. Commercial Arbitration Petition (L) No. 1062 of 2018 (Bombay High Court).
4. Practical Law Dispute Resolution, 'Champerty, Maintenance, and Funding' https://uk.practicallaw.thomsonreuters.com/03766749?transitionType=Default&contextData=(sc.Default)&firstPage=true accessed 9 February 2023.

champerty with respect to TPF, stating that TPF" *provide(s) help to those seeking access to justice which they could not otherwise afford*".[5] Further, to boost TPF, the Civil Justice Council published the Code of Conduct for Litigation Funders in 2011, administered by the Association of Litigation Funders (ALF). Moreover, in the *Master card* case,[6] the Supreme Court of the United Kingdom has acknowledged the fact that TPF has become *sine qua non* for access to justice. Similarly, the Australian landmark case of *Campbell's Cash and Carry Pty. Ltd.* v. *Fostif Ltd.*[7] held that TPF did not sacrilege due process and is not against the spirit of public policy.

More recently, in Singapore, the Civil Law Amendment Act 2017[8] paved way for TPF in arbitrations, and further amendments opened up TPF for related court proceedings as well.[9] Hong Kong has also allowed TPF through the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016.[10] It is interesting to note that both Singapore and Hong Kong permitted TPF only in relation to arbitration (or related) proceedings.

In India, it is worth noting that while there is no statute or regulation that expressly permits TPF, there is also no express prohibition on it. To that end, it is interesting to note that, unlike other common law jurisdictions where specific amendments were made to legitimise TPF, India did not have an embargo on champerty and maintenance in the Indian Contract Act, 1872.[11] Even judgments by Indian courts allude to the permissibility of TPF, although with certain riders. For example, a TPF arrangement would be considered illegal if it is demonstrably unconscionable, extortionate, or entered into for an improper object or to foment litigation that is unrighteous.[12] At the same time, 'a contract where one party agrees to

5. Arkin v. Borchard Lines Ltd. 2005 ECWA Civ 655, ¶16, 38.
6. Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent) UKSC 2019/0118.
7. Campbell's Cash and Carry Pty Ltd v. Fostif Ltd. 2006 HCA 41.
8. The Civil Law (Amendment) Act 2017 (Singapore), art. 5-B(2).
9. Deminor, 'In Review: Third Party Litigation Funding in Singapore' https://www.lexology.com/library/detail.aspx?g=cf53fd1c-8eb1-4425-9020-bfa4637e2204 (8 December 2022) accessed 9 February 2023.
10. The Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Act 2017 (Hong Kong).
11. Pechell v. Watson (1841) 8 M&W 691; Chedambara Chetty v. Renga Krishna Muthu Vira Puchaiya Naickar 1874 SCC OnLine PC 10 : (1873-74) 1 IA 241; Ram Coomar Coondoo v. Chunder Canto Mookerjee 1876 SCC OnLine PC 19 : (1876-77) 4 IA 23 (Ram Coomar Condoo).
12. *Ibid*.

fund litigation for certain benefits would be legally unobjectionable if no "lawyer" was involved and it was between third parties'.[13] That said, the judgements of Indian courts would indicate that TPF is not novel to India and it has always existed in traditional unregulated markets.[14]

Some states such as Maharashtra, Madhya Pradesh, Orissa and Uttar Pradesh have, in amendments made to Order XXV, Rules 1 and 2 of the (Indian) Code of Civil Procedure, 1908,[15] referenced rules that apply to 'financers' of a suit. The state amendments to these rules include the Court's power to order security for costs from the third-party financer to secure the costs to be incurred by the defendant, should the Court deem it fit.[16] The Supreme Court of India in 2018, in *A.K. Balaji* v. *Bar Council of India,*[17] noted that TPF is permissible, so far as the lawyer itself is not the funder.[18]

In view of existing law, as summarily discussed above, the TPF arrangements made with non-lawyers may be examined by the courts for being extortionate, unconscionable and/or against public policy. However, despite there being no embargo on TPF of arbitration in India, many issues still exist because of the lack of a comprehensive regime. These issues pertain to confidentiality, disclosure, and costs. The article will discuss these issues in further sections.

3. REQUIREMENT OF DISCLOSURE OF TPF ARRANGEMENTS IN ARBITRATION

A pertinent issue with respect to TPF arrangements has been that of disclosure of existence of such agreements in arbitration. Contrary stance has been taken on the issue in India and across the globe. While a set of scholars and practitioners argue that such disclosures are paramount for maintaining transparency in the arbitral process,[19] the other set argues that the questions relating to funding of parties is beyond the scope of

13. 'G' a Senior Advocate of the Supreme Court, In re AIR 1954 SC 557 : (1955) 1 SCR 490.
14. Ram Coomar Condoo (n 12).
15. The Code of Civil Procedure 1908, or XXV, r. 1.
16 Rajat Jariwal, Shruti Khanijow, Saniya Mirani, 'Litigation Funding: India', *Getting the Deal Through Guide* (Woodsford, 2021-2022).
17. Bar Council of India v. A.K. Balaji AIR 2018 SC 1382.
18. Bar Council of India's Standards of Professional Conduct and Etiquette Rules, 1975, pt. VI, ch. II; Advocate's Act 1961, s. 49(1)(*c*).
19. Mauricio Marengo, 'Third Party Funding and Conflicts of Interest: Mandatory Disclosure to Tame the Beast' https://www.academia.edu/42679677/

jurisdiction of arbitration tribunals and therefore, such disclosures are not a pre-requisite for maintaining transparency and fairness in the arbitral process.[20]

However, a report of ICCA Task Force on TPF has opined that there exists a unanimous consensus largely in favour of disclosures of TPF agreements in international arbitrations.[21] Broadly, the following advantages of disclosures of TPF arrangements emerge from the existing discussions on the issue:

Firstly, if not for such disclosures, the opposing party would be virtually left with no recourse to discover the existence of TPF arrangements in favour of the claimants (or otherwise). The strength of the claims is often proportionately linked to the existence of such TPF arrangements. A claim might be strong and legitimate thereby attracting third-party funders, due to higher chances of it being successful.[22] The financial strength of the claimant, owing to such TPF arrangements, thus also heavily influences the settlement processes of the disputes, if any.[23]

Secondly, such disclosures ensure that any conflict of interest between the funder and arbitrator are brought to fore.[24] In *Sehil v. Turkmenistan*, the ICSID Tribunal had ordered for the disclosure of TPF arrangement for two reasons: (a) ensuring the integrity of the arbitral proceedings, by pre-emptively checking for any potential conflict of interest between the funder and the arbitrator, and (b) ensuring security of costs, because the funder,

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Third_Party_Funding_and_Conflicts_of_Interest_Mandatory_Disclosure_to_Tame_the_Beast accessed 9 February 2023.

20. Tian-Yu DU, 'Research on Conflicts of Interest Arising from Third-Party Funding In International Investment Arbitration' (2018) 281 Advances in Social Science, Education and Humanities Research 422.
21. International Council for Commercial Arbitration & Queen Mary University of London, 'Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (ICCA Reports No. 4, 2018) 84 [ICCA Report].
22. Nathalie Allen Prince & David Hunt, 'Increasingly mandatory disclosure of third-party funding in arbitration' (*Financier Worldwide*, November 2018) https://www.financierworldwide.com/increasingly-mandatory-disclosure-of-third-party-funding-in-arbitration#.YA58SugzY2w accessed 9 February 2023.
23. Hadžimanović, N.,'Third-Party Funding in Arbitration: A Case for Mandatory Disclosure?', in Meškić, Z., Kunda, I., Popović, D., Omerović, E. *(eds) Balkan Yearbook of European and International Law 2019*, vol. 2019.
24. Meenal Garg, 'Introducing Third-Party Funding in Indian Arbitration: A Tussle between Conflicting Public Policies' (2020) 6(2) NLUJ Law Review 71, 80 (Meenal Garg).

not being a party to the proceedings, might eventually choose to vanish at the time of payment.[25]

4. SHOULD DISCLOSURES BE MADE MANDATORY?

On an international scale, there is a growing consensus on mandatorily disclosing the TPF agreements in international arbitrations. The ICC Guidance Note and the IBA Guidelines on Conflicts of Interest, require the arbitrators to disclose their relationships with any entity possessing a direct economic interest in the dispute, or an obligation to indemnify a party for the eventual award.[26] The SIAC Investment Rules 2017, explicitly empower the arbitral tribunals to order the disclosure of existence of a TPF arrangement.[27] Furthermore, the ICCA Task Force, which has attempted to provide certain guiding principles with respect to TPF in International arbitrations, has incorporated Principles' A.1.' to 'A.4.', mandating disclosure of TPF arrangements and the identity of the funders to the arbitrators and the arbitral institution, at the instance of the parties themselves.[28]

It is also essential to note that Asian countries, like Singapore and Hong Kong, have enacted domestic legislations requiring disclosure of TPF arrangements in arbitrations (as mentioned above). While the Singapore law places the onus on domestic lawyers of the parties to make such disclosures, the Hong Kong law requires the parties itself to disclose such TPF arrangement.[29] This, interestingly limits the effectiveness of disclosures in Singapore, where only local practitioners representing parties and not foreign lawyers would be covered by the mandatory disclosure requirement. Since foreign lawyers are not bound by the rules of practice as applicable to Singaporean lawyers, only best practices would presumably guide them on the issue of disclosures.[30]

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25. ICSID Case No. ARB/12/6 Procedural Order No. 3 of 12 June 2015.
26. Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration 2021, cl. II(D); IBA Guidelines on Conflicts of Interest in International Arbitration 2014, General Standard 6(*b*).
27. SIAC Investment Arbitration Rules 2017, r. 24(1).
28. ICCA Report 81.
29. S. 98-U, Singapore Civil Law Act (Cap. 43), ss. 5-A, 5-B; Hong Kong Arbitration Ordinance (Ord. 6 of 2017).
30. Christine Sim, 'Third Party Funding in Asia: whose duty to disclose' (*Kluwer Arbitration Blog*, 22 May 2018) http://arbitrationblog.kluwerarbitration.com/2018/05/22/third-party-funding-asia-whose-duty-disclose/?doing_wp_cron=1596980805.2989599704742431640625 accessed 9 February 2023.

In contradistinction, certain scholars have opposed a general mandatory duty of disclosure of TPF agreements. They are of the opinion that it is neither the task of the arbitral tribunal nor within the scope of their powers, to regulate the relationship between claimants and third parties, who are not within the scope of the issues raised before the tribunal.[31] However, it seems that such approach is based on a narrow understanding of the powers and duties of an arbitral tribunal, which has the primary duty to ensure that the award is rendered in an impartial and effective manner. In pursuance of such duties, the arbitral tribunal is empowered to take actions which might incidentally affect third parties, who have, on their own accord, acquired an economic interest in the eventual award of the tribunal. More so because such economic interest is tied so inherently to the outcome of the arbitration that conflict of the funder with an arbitrator or a representative of either party may prove fatal to the enforcement of the award, rendering the whole process of arbitration fruitless.

The Indian arbitration law would expectedly require such disclosures by its operation, especially since the arbitrators have a statutory duty to disclose. However, Indian law of disclosure of conflict in arbitration is driven by the arbitrator itself disclosing any conflict within its knowledge. Section 12(1) of the Arbitration and Conciliation Act 1996 ("Act"), read with Schedule V to the Act, requires the arbitrator to disclose in writing the existence of any direct or indirect relationship with any of the parties having an interest in the dispute.[32] The provision is quite widely worded in order to ensure the impartiality of the arbitral tribunal, and it would make sense for it to also include a third-party funder within its scope.[33] That said Indian law is silent on duty of the arbitrator to reasonably enquire if any TPF arrangements exist, so as to obviate the risk of non-fulfilment of duty under the Act. Hence, it would be a natural pre-requisite for parties to disclose the existence of any such TPF arrangement, in order to allow the arbitrators to make such disclosures in accordance with Section 12(1), the failure of which declaration is a ground for challenge of appointment of such arbitrator. Furthermore, the non-disclosure of such relationships by the arbitrator, ought to amount to *de facto* inability to perform the functions of arbitrator, within the meaning of Section 14(1)(a).

31. Jonas von Goeler, 'Third-Party Funding in International Arbitration and its Impact on Procedure', Kluwer Law International, 2016. See also Rebecca Leinen, 'Striking the right balance: disclosure of third-party funding', Oxford University Commonwealth Law Journal (2020), 20:1, 115-138.
32. Arbitration and Conciliation Act 1996, s. 12(1).
33. Amita Katragadda, (n 1).

5. STAGE OF ARBITRATION WHEN DISCLOSURE COULD BE MADE

The subsequent issue that arises with respect to disclosures of TPF arrangements is concerning the stage at which such disclosure may be made. Considering the currently prevailing jurisprudence, there exist three primary options with respect to stage at which such disclosures are to be made:

Firstly, a disclosure of existence of TPF arrangements can be required at the outset, before the appointment of the arbitrators itself, to ensure the impartiality of the tribunal from the very beginning. If a party does not disclose such TPF arrangements at the outset, and subsequently any conflict of interest comes to light, then the very validity of the award of the tribunal can be challenged under Section 34 of the Act.[34] Furthermore, the ICCA report on TPF, which incorporates a comprehensive discussion on several nuances of TPF arrangements, states certain principles which reflect a similar idea.[35]

Secondly, the disclosure of TPF arrangements can be ordered by the tribunal at any point during the proceedings. The SIAC Rules appear to fall within this category, as they empower to the tribunal to order such disclosures, but leave it open for the tribunal to decide when such disclosure is ought to be made.[36] However, such a provision does not take into consideration the time and resources already invested in the arbitral process before the tribunal orders such disclosure and a conflict of interest is brought to light.

Thirdly, the TPF agreements should be viewed as any other documentary evidence, which can be produced at the document production stage of the arbitral proceedings, and are subject to corresponding rules of relevancy and materiality. Certain arbitration cases in the past, like *South American Silver v. Bolivia*[37] and *RSM Production Corporation v. Saint Lucia,*[38] have adhered to such standards for disclosure of TPF arrangements. However, the fallacy with such a line of reasoning is that it does not take into consideration that a TPF agreement is not at par with other documentary

34. Arbitration and Conciliation Act 1996, s. 34.
35. Meenal Garg (n 24).
36. SIAC Rules, 24(l).
37. PCA Case No. 2011-2017, Procedural Order No. 13 of 21 February 2013, ¶8.
38. ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Suspension or Discontinuation of Proceedings of 8 April 2015, ¶67.

evidence, because the latter do not, generally, have a potential to give rise to a conflict of interest with the arbitrator itself.

6. DISCLOSURE AND ITS POTENTIAL THREAT TO CONFIDENTIALITY OF THE FUNDER

While the article has hitherto discussed the advantages of disclosure of any TPF arrangements in an arbitration proceeding, it should be noted that such disclosures may potentially threaten confidentiality of the funder. It is well-recognized that confidentiality is a grundnorm in arbitration. In that light, it is important to note that disclosures, of the kind discussed in this article, may threaten the confidentiality of the TPF arrangements, hence prejudicing the funder's right to confidentiality. While, the parties are interested in ensuring the confidentiality of the arbitration proceeding, the funder has an equal interest in ensuring the confidentiality of the terms of the Third Party Funding agreements.

This is owing to the fact that a TPF disclosure, in order to be effective, shall involve revealing the substantial details (professional, and/or financial) of the funder and its approach to the funding arrangements; thereby threatening its confidentiality.

Besides the threat to confidentiality posed by disclosure of TPF Agreements, it is noteworthy that TPF may in itself constitute a threat to confidentiality of arbitration proceedings. This is because the process of TPF naturally requires that a claimant, who wishes to find a funder for his claim, submit his claim to a potential funder, so that such a potential funder is able to conduct a cost-benefit analysis on the basis of factors such as likelihood of award being granted, the likely quantum of such award and other subtle factors. This obviously requires disclosure of information at a substantial level, therefore threatening the confidentiality of the entire case record. Further should the funder take the case, they will require regular updates on the progress of the proceedings; this would further put confidential information of the opposing party at peril of being exposed. This is typically protected by the party seeking funding through non-disclosure agreements ("NDAs") with the funder, that also forms a fundamental tenet of the TPF agreements.

In the jurisdictions where the practice of TPF is well-established practice, signing of an NDA between the potential funder and the claim-holder before any exchange of information is considered to be standard practice. This restricts the funder from releasing the information or any part of it

to any other entity and creates a contractual liability that binds the funder and may be invoked in case of breach. Other solutions include limiting the amount of information shared with the funder, redacting sensitive information, especially the information shared by the opposing party. If required, the opposing party would be granted an opportunity to identify and make its representation with regard to the sensitive information that is required to be redacted, the tribunal would deliberate and pass an order for such a redaction.[39] The ICCA- Queen Mary Report[40] mentions these practices, while highlighting that it may vary depending on the jurisdiction. One of the most important recommendations in the report is that "*…in all jurisdictions, a Party seeking funding and its counsel should ensure that a robust NDA is entered into before any substantive discussions with a Funder to protect against the disclosure of confidential communications*".[41]

A recent amendment to the Act also reflects progress in terms of greater confidentiality.[42] An insertion made to Section 42 of the Act, reads as under:

> *"42A. Confidentiality of information.—Notwithstanding anything contained by any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentially of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award"*

While this provision was seen as ambiguous and was criticized for leaving the extent and manner of disclosure unclear, it is nevertheless a right step towards ensuring greater confidentiality. To promote greater confidentiality in TPF, certain precautionary measures must be built into a TPF regulatory framework. Association of Litigation Funders published a voluntary Code of Conduct in England and Wales, which has also been applied to funded arbitration cases.[43] Introducing a similar code in India would benefit arbitration and litigation funders equally. An approach involving voluntary codes of conduct, limited disclosure obligations as well as the inclusion of "funders" within the arbitrator conflict provisions may help in

39. Kaira Pinheiro & Dishay Chitalia, 'Third-Party Funding In International Arbitration: Devising A Legal Framework For India' (2021) 14 NUJS L. Rev. 2 http://nujslawreview.org/wp-content/uploads/2021/10/14.2-Pinheiro-Chitalia.pdf accessed on 4 December 2022.
40. *Id.* at 16.
41. *Ibid.*
42. Inserted by (Indian) Act 33 of 2019, s. 9.
43. *Id.* at 5.

promoting a sustainable growth of TPF in India. Another approach would be for the arbitrators to consciously seek such information from the parties prior to making their disclosures. Since India is now moving from *ad hoc* to institutional arbitration regime, it may also be worthwhile for Indian arbitral institutions to consider including a mechanism for such disclosures while maintaining both – confidentiality of the TPF structure and sanctity of the arbitral process.

7. CONCLUSION

Globally, the law and policy with respect to TPF arrangements itself is far from settled, much less with respect to disclosures of such arrangements in arbitrations. The varying views are yet to be reconciled into a comprehensive standard, which can eventually be prescribed as a base guideline for all countries. However, moving forward, it seems that mandatory disclosures at the outset of the arbitral proceedings would be an appropriate way to approach the issue of disclosures, a standard which must be facilitated to bring into effect a robust TPF regime in India.

A balanced approach needs to be adopted in India as far as TPF and disclosures are concerned. It is pertinent to maintain a balance between the confidentiality of the arbitration proceedings and the parties' right to access justice. It is also important that a balance is maintained between the funder's right to confidentiality and the impartiality and independence of the arbitrators. Therefore, it will be prudent to change institutional norms for both domestic and international arbitrations in India to include appropriate disclosure obligations. Further, through a modification to Section 42A of the Arbitration Act, it is also crucial to include third-party funders in the list of parties with whom the information may be communicated. Moreover, to preserve the arbitrators' independence and impartiality, the provisions of Section 12 and the Fifth Schedule of the Act may be revised. Due to the funded party's lack of negotiating power, the relationship between the funder and the funded party must also be regulated to protect the interests of the funded party. This can be achieved by implementing a code of conduct for TPF in India. In India, where TPF is still in its infancy, a soft-law approach in the form of a model code of conduct would give the necessary boost and direction for the development and implementation of TPF.

RECONCEPTUALIZING CONSENT IN ARBITRATION AGREEMENTS - CHLORO CONTROLS REVISITED

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1. INTRODUCTION

One of the foundation principles of arbitration law is the principle of consent.[1] Unlike other forms of adjudication such as courts, which draw their jurisdiction from their respective statutes, an arbitration tribunal attains its competency through the consent of the parties before it. However, this principle of consent is not absolute, and in order to accommodate for the complex social realities, there has been the development of both consensual and non-consensual theories to involve non-signatories in the arbitration proceedings.[2] While the validity of these theories has faced stern opposition in some jurisdictions,[3] a doctrine that India has incorporated into its jurisprudence is the "Group of Companies Doctrine" through the case of *Chloro Controls India (P) Ltd* v. *Severn Trent Water Purification* ("**Chloro Control**").[4] However, in recent times, there has been severe criticism against the doctrine with the Supreme Court of India even referring the matter to a larger bench.[5] In light of the exponential growth of popularity and usage of arbitration in India over the past decade and the number of cases coming up before arbitration tribunals owing to the COVID-19 pandemic, the question of the impleading of non-signatories becomes of utmost relevance.

1. Sundra Rajoo, 'Law, Practice and Procedure of Arbitration in India' (Thomson Reuters 2021) 18.
2. Gary B Born, 'International Commercial Arbitration' (2) 1414 (Alphen aan den Rijn: Kluwer Law International, 2014).
3. Alexandre Meyniel, 'That Which Must Not Be Named: Rationalizing the Denial of U.S. Courts With Respect to the Group of Companies Doctrine' (2013) 3(1) The Arbitration Brief 18, 29.
4. Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc (2013) 1 SCC 641.
5. Cox and Kings Ltd. v. SAP India (P) Ltd. (2022) 8 SCC 1, para 47 (Supreme Court).

This paper begins by providing the relevant background of the case and the doctrine and then goes on to argue that the manner of importing the doctrine has in fact deviated from the underlying rationale of implied consent.

2. RELEVANT BACKGROUND OF THE CASE AND DOCTRINE

Chloro Control was a case before a full bench of the Supreme Court. In this case, there were two 'groups of companies', which had entered into a series of agreements through joint venture agreements or through subsidiaries. However, not every member of the respective groups were signatories in every single agreement, the most relevant of which was the Shareholder's Agreement which contained the arbitration clause.[6] As a result, when a dispute arose, the Indian Courts were tasked with determining as to what extent the non-signatories could be impleaded in an arbitration proceeding without compromising the principles of consent.

In order to resolve this dilemma, the Supreme Court turned to the jurisprudence of international arbitration law and found it appropriate to import the 'Group of Companies Doctrine' as laid out in *Dow Chemicals* v. *Isover Saint Gobain* ("**Dow Chemicals**").[7] The ICC in this case presented a three-level test to check if it is permissible to implead a non-signatory into an arbitration proceedings, namely (a) the presence of a tight group structure; (b) the involvement of the non-signatory at the stages of performance, termination or conclusion of the contract; and (c) the presence of a mutual intent between all parties (including the non-signatory) to be bound by the arbitration agreement.[8] It was said that by applying the above test, there would be an implied consent on behalf of the non-signatory to arbitrate the dispute and therefore, the tribunals would be able to expand their scope of jurisdiction over non-signatories.[9]

The Supreme Court in *Chloro Control,* appeared to provide several reasons for the adoption of such a doctrine. *Firstly,* the Court stated that the doctrine had found widespread judicial acceptance in several countries in the world such as in the United States, the United Kingdom and France. *Secondly*, by stressing on the requirement of mutual intention, the Court

6. *Supra* n 4.
7. *Dow Chemical France v Isover Saint Gobain*, ICC Case No 4131, Interim Award (23 September 1982).
8. *Ibid*.
9. Adyasha Samal, 'Extending Arbitration Agreements to Non-Signatories: A Defence of the Group of Companies Doctrine' (2020) 11 King's Student Law Review 73.

has highlighted that the doctrine is in fact based on consent as opposed to non-consent. This indicates that the doctrine is in consonance with the principles of arbitration law. *Thirdly,* on comparing the language present in the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") to Article II of the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958, ("**New York Convention**") the Court noted the absence of the phrase "*any person claiming through or under him*". This interpretation allows for the impleadment of non-signatories into proceedings as well. Therefore, the Courts seems to take a very pro-arbitration stance towards the application of the doctrine, a marked difference from previous cases which read the Section restrictively.[10]

However, there are certain concerns about the manner of importation of the doctrine, particularly with regards to the first and third rationale of the Supreme Court highlighted above. The following part of this paper aims to engage further with the reasoning of the Supreme Court as well as analyse the effect of the adoption of the test on the jurisprudence surrounding arbitration law in India.

3. ANALYSIS OF THE SUPREME COURT REASONING AND EFFECT

Regarding the manner of the importation of the doctrine, this paper has three concerns. *Firstly,* that the Court erred in holding that the doctrine had found widespread acceptances, particularly in the jurisdiction of the United States ("**A**"); *secondly,* that the Court erred in reading the doctrine under the "*claiming through or under"* present in the Arbitration Act ("**B**"); and *thirdly,* the vague manner in which the doctrine has been imported has resulted in an inconsistent application that has disregarded the underlying rationale of implied consent. ("**C**").

A. The Doctrine has Not Found International Acceptance

While it is conceded that the Group of Companies Doctrine has found some traction in some jurisdictions such as France,[11] Germany,[12] and Switzerland,[13]

10. Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya (2003) 5 SCC 531.
11. Sponsor AB v. Lestrade Pau, 26 November 1986 [1988] Rev arb 153 (France).
12. Bundesgerichtsh of [BGH] [Federal Court of Justice] Case No. III ZR 371/12 (May 8, 2014) (Germany).
13. X Ltd. v. Y and Z SpA Bundesgericht [BGerl [Federal Supreme Court] Aug 19, 2008 (Switzerland).

it remains largely unpopular in others such as the United Kingdom[14] and the United States.[15] Jurisdictions such as the latter two, tend to view arbitration law as a mere extension of contract law and therefore, impose a stringent threshold to check for the presence of intention of the parties. For instance, in the United Kingdom, courts have been highly hesitant to allow for a non-signatory to participate in arbitration proceedings, as it would go against the privity of the contract at both the adjudication stage as well as potentially in the enforcement stage.[16]

This appears to be the case in the United States of America as well, a jurisdiction which the Court claimed had acknowledged and accepted the Group of Companies Doctrine. However, in making this assertion, the Supreme Court did not cite any precedent or cases from the United States. In reality, the law in the United States, recognises only five theories in order to implead a non-signatory into an arbitration agreement, namely: (a) incorporation; (b) agency; (c) estoppel; (d) assumptions; and (e) veil piercing.[17] Hence, while there are certainly theories that do allow for the impleading of non-signatories into arbitration proceedings, these are largely mere direct imports from the law on contracts[18] and do not include the Group of Companies Doctrine.[19]

A factor that the Supreme Court seemed to consider in the making of its decision to import the doctrine appeared to be that such a doctrine had international recognition and therefore, was appropriate to incorporate into Indian jurisprudence.[20] However, the doctrine has not attained the level of international acceptance that the Supreme Court considered it to have attained, particularly in light of the analysis presented above regarding the few jurisdictions that the Supreme Court did look at. While this in no way limits the Supreme Court's ability to import the doctrine considering the controversial nature of the same and the potential challenges in its enforcement,[21] particularly in foreign jurisdictions, the Supreme Court

14. Peterson Farms Inc. v. C & M Farming Ltd. 2004 EWHC 121 : (2004) APP LR 02/04.
15. *Supra* n 3.
16. Yaraslau Kryvoi, 'Piercing the Corporate Veil in International Arbitration', (2010) 1 Global Bus L Rev 1.
17. Thompson-CSF, S.A. v. Am. Arbitration Asn. 64 F.3d 773 (2d Cir 1995).
18. Certain Underwriters at Lloyd's London v. Westchester Fire Insurance Co. 489 F.3d 580, 584 (3d Cir 2007).
19. Sarhank Group v. Oracle Corpn. 404 F.3d 657, 662 (2d Cir 2005).
20. *Supra* n 4.
21. There have been issues regarding the ability to enforce awards that utilise this doctrine. For instance, in Dalla v. Government of Pakistan 2010 UKSC 46, the UK Courts (the

ought to have given its rationale and provided a stronger basis for the manner of importation. Additionally, the vague manner in which the Court has imported the doctrine has resulted in an inconsistent application of the doctrine and a move away from the underlying rationale of 'implied consent', a proposition explored in the subsequent part of this paper.

B. The Court Erred in Reading the Doctrine Under the "Claiming Through or Under" Present in the Arbitration ACT

The Supreme Court demarcated the scope of the doctrine by reading it within the phrase "*claiming through or under*" as present in Section 45 of the Arbitration Act.[22] The Court contrasted this Section with Article II of the New York Convention and held that as the phrase "*claiming through or under*" was notably absent in the latter, there was a clear intent of the legislature to promote arbitration in India and would allow for the impleading of non-signatories into the proceedings.[23]

However, the issue with such a reading is that the Court in this case, appears to conflate the intention behind "*claiming through or under*" with the Group of Companies Doctrine. Generally, the usage of the phrase "*claiming through or under*" is limited to the matter of succession of interests and rights and aimed to provide a successor the ability to substitute itself in an arbitration proceeding in place of the party from which the right or interest devolved from.[24] Alternatively, the Group of Companies Doctrine aims to involve the non-signatory on the ground that there is a mutual intention to be bound by the arbitration agreement, thereby giving the non-signatory their own standing and ground, rather than figuratively piggybacking on another. While Indian jurisprudence regarding the scope of the phrase "*claiming through or under"* in the context of arbitration proceedings is fairly limited, foreign authorities seem to suggest a narrow scope of the same.

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site of execution was the United Kingdom) refused to mandate the enforcement of an award granted by a foreign tribunal on the grounds that the UK did not recognise the Group of Company Doctrine. Therefore, blanketly accepting such a doctrine, without considering its applications would result in the passing of awards which will not be enforceable in multiple prominent jurisdictions, thereby leading to a deadweight loss on behalf of the parties.

22. Arbitration and Conciliation Act 1996, s. 45.
23. *Supra* n 4.
24. Charlie Caher, Dharshini Prasad, Shanelle Irani, 'The Group of Companies Doctrine – Assessing the Indian Approach' (2021) 9(2) Indian Journal of Arbitration Law 44.

Section 82(2) of the English Arbitration Act 1996, which includes within the definition of the term party, "*any person claiming under or through a party*", has been limited in its application to parties which come into some form of interest [through actions such as novation, assignment or subrogation].[25] In fact, the English Courts have gone so far as to explicitly out rule any possibility for using the phrase to read the Group of Companies Doctrine.[26] This is similar to the position in another common law country, namely Australia.[27] In determining the scope of the phrase "*claiming through or under*", the High Court of Australia opted for a narrower view. The High Court held that the words 'through' and 'under' merely expressed a derivate cause of action against/derived from either party.[28]

Therefore, a recurring theme from the above two case studies is that the non-signatories' involvement in the arbitration proceedings is not an independent right, but rather consists of stepping into the shoes of another party. However, the Group of Companies Doctrine does not aim to merely substitute one party for another but rather consider the non-signatory as a party in itself to the proceedings. The underlying rationale necessarily mandates that there is an independently standing claim against the non-signatory. Therefore, the foundational blocks that build up these two principles are vastly different and it would be a grave error to read one into another.

The following part of this paper will aim to engage further with the effects that such a reading has had on Indian jurisprudence surrounding arbitration law and how such a reading has resulted in a marked shift away from the principle of consent.

C. The Judgement has Resulted in An Inconsistent Application of the Doctrine and A Move Away from the Underlying Rationale of 'Implied Consent'

One of the effects of the Chloro Control judgements was that, in the light of the notable absence of guidelines as to how each of the three legs of the test is to be construed and the issue highlighted in the preceding part of this paper, there has been a marked move away from the principle of implied

25. Francis Russell, *Russell on Arbitration* (24th edn., Sweet and Maxwell 2015).
26. The Mayor and Commonalty Citizens of the City of London v. Ashok Sancheti 2008 EWCA Civ 1283.
27. Tanning Research Laboratories Inc v. O'Brien (1990) 169 CLR 322, [11].
28. *Ibid*.

consent, which supposedly formed the basis of the Group of Companies Doctrine.

A prime example of this stark shift is evident in the case of *Cheran Properties Ltd.* v. *Kasturi and Sons Ltd.*[29] In this case, the Supreme Court relied on Section 35 of the Arbitration Act and the Group of Companies Doctrine to hold that despite the non-inclusion of a non-signatory at the stage of adjudication, an award could still be enforced against them. This is a problematic precedent as it not only expands the scope of the Group of Companies Doctrine, which was originally intended to provide a manner to include non-signatories in the adjudicating process but also violates principles of natural justice such as *audi alteram partem*, the right to be heard. This right is seen as fundamental to ensuring any adjudication process is fair and no individual is bound by an order without being able to adequately represent their version of events.[30] This in turn has led to a further expanding of the scope of the phrase "*claiming under or through*" that was developed in the *Chloro Control* case.

In addition to this, the rationale given in the *Chloro Control Case* itself leaves much to be desired with regard to how one should approach the application of the Group of Companies Doctrine. While the Court in the case, constantly emphasised the need for assessing mutual intention to be bound by arbitration, they failed to go beyond looking at the fact that this was a composite transaction instead.[31] However, adopting such an interpretation essentially shifts the focus and manner of the impleading from a position of consent to a position of merely being in a composite transaction. Such an approach does not take into account that commercial realities in the 21st century almost necessarily involve having a multiplicity of contracts that may or may not be intertwined with each other. Hence, holding a mere transaction as part of a composite transaction as a ground to invoke the application of this doctrine,[32] goes against the very basis of the doctrine itself.

If one was to consider the mere involvement of a third party in a composite transaction to hold that there was intent, then one makes consent a question of degree rather than kind by introducing a different standard for consent to

29. Cheran Properties Ltd. v. Kasturi and Sons Ltd. (2018) 16 SCC 413 (India).
30. Uzma Sultan, 'Explained: In Depth Analysis of the legal Principle 'Audi Alteram Partem'' (2020) 6(5) International Journal of Legal Developments and Allied Issues 1.
31. A composite transaction is a transaction in which there are multiple parties and multiple agreements.
32. Nirmala Jain v. Jasbir Singh 2018 SCC OnLine Del 11342 (India).

the substantive part and consent to the arbitration clauses of the contracts.[33] Therefore, it appears to be an underlying presumption that once a composite transaction is proved, the standard of consent for arbitration would somehow be lower. Such a position is not only fundamentally irreconcilable with the principles of contract law which mandates that the same form of consent be present for every stage of the contract[34] but also finds no support in any international treaties or laws pertaining to arbitration.[35]

4. CONCLUSION

The Group of Companies Doctrine was formulated with a very clear rationale, i.e., the principle of implied consent. Therefore, as a consent-based theory, in the absence of implicit consent, the doctrine must necessarily fail and there is an onus on those using this doctrine to handle the matter with utmost care to protect this core principle. However, to this effect, the Court in *Chloro Control* has failed to engage meaningfully with the doctrine which has in turn had detrimental impacts on the manner in which arbitration law has and will develop in India.

The author submits that reading in the Group of Company doctrine as part of the "*claiming through or under*" reflects an academically dishonest approach by increasing the scope of the phrase to an unprecedented level without any clear rationale to explain its reasons. The doctrine necessitates that the non-signatory be involved in the proceedings as a party and not merely as a substitute and therefore, attempts to reconcile these two factors. Additionally, guidelines must be drafted regarding when Courts can reasonably infer mutual intent to try and recalibrate the approach India has taken, back to the academically integral consent-centric analysis. Allowing for such a path forward would aid in evolving the discourse surrounding the impleading of non-signatories into arbitration proceedings and aid in developing a clearer standard for the same.

33. Tejas Chhura, 'The Need to Re-Think the Group of Companies Doctrine in International Commercial Arbitration', (2022) 15(1) NUJS L. Rev. 1.
34. D Cohen, *note in* Cour de Cassation, 5 January 1999, and Cour de Cassation, 19 October 1999 (2000) Rev Arb 92.
35. Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-Signatories' (2017) 8 Journal of International Dispute Settlement 610, 643.

AN EMERGENCY ARBITRATOR IS AN ARBITRATOR….IS THERE A NEED FOR STATUTORY RECOGNITION POST-AMAZON?

—Rajvansh Singh, Saksham Barsaiyan

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ABSTRACT

Interim relief is an instrument to protect the interests of parties and preserve the effectiveness of the enforcement of arbitral awards. The rules governing tribunal-ordered interim relief in arbitration have been a topic of discussion for a long time. This is primarily because of the interventionist approach of the Judiciary under Section 9 of the Arbitration & Conciliation Act, 1996 with respect to granting interim relief in arbitrations in India, which eventually defeats the very purpose behind parties entering into arbitration initially. In response to these difficulties, arbitration institutions introduced the mechanism of Emergency Arbitration. This mechanism allows the parties to seek interim relief through an emergency arbitrator before the formation of the arbitral tribunal. However, despite its advantages, challenges concerning the enforcement of emergency arbitrators' reliefs have prevented it from being utilized by parties effectively. This is so because there is nothing in the Indian Arbitration and Conciliation Act, 1996 to enforce such relief. Although the recent Supreme Court decision in Amazon v. Future Retail has recognized Emergency Arbitration, several issues still need to be revisited by the Legislature to strengthen the arbitration landscape in India. In this light, this paper aims to assess the legal standing of emergency arbitrators and the validity of their decisions. In doing so, the paper deals with a doctrinal question which is of immense import: Is an Emergency Arbitrator a full-fledged arbitrator? The paper answers this question in the affirmative by analysing the rules of different arbitral institutions. It further examines the amendments of the 246th Law Commission Report which were not incorporated into the Act. Finally, the paper charts a way to confer statutory recognition upon emergency arbitrations in India to derive its best workability.

1. INTRODUCTION

The securing of appropriate and effective interim relief in arbitration has assumed increasing importance with the growing complexity of commercial transactions.[1] Interim relief is certainly an effective tool that complements the enforcement of final awards and ensures a meaningful resolution of the dispute. Resolving a dispute is not a quick process. It can take months or sometimes years.[2] During this time, interim relief prevents the other party from engaging in harmful conduct, preserves evidence or subject matter that is material to the resolution of the dispute and prevents the dissipation of the assets.[3] Therefore, the potential to provide and enforce effective interim relief is imperative to maintain the status quo during the arbitral proceedings.

The Arbitration and Conciliation Act, 1996 [hereinafter "**The Principal Act**"] provides the parties to seek interim relief through national courts and the arbitral tribunal respectively under Section 9 and Section 17. A plain reading of Section 17 reveals that until constituted, the tribunal is toothless to grant relief. Thus in cases of urgency, the route of seeking relief from the tribunal is ruled out, and eventually, parties only have recourse to national courts.[4] Though resorting to the national court for urgent relief at the pre-arbitral stage is a norm, it is often criticised as the foremost reason as to why parties opt for arbitration over litigation is to avoid a rigorous court process.[5] In response to such shortcomings, institutions have introduced a useful arbitral tool known as the 'emergency arbitration procedure'[6] which enables the institutions to appoint an emergency arbitrator

1. Zia Mody & TT Arvind, 'Redeeming Sisyphus: The Need to Invigorate Interim Relief in International Commercial Arbitration', in Albert Jan Van den Berg (ed), *International Arbitration and National Courts: The Never Ending Story*, ICCA Congress Series, vol. 10 (Kluwer Law International 2001) 126; Christopher Boog, 'Chapter 18, Part III: Interim Measures in International Arbitration', in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, 2nd edn. (Kluwer Law International 2018) 2543.
2. Ashish Kabra, 'An Evolved Approach to the Court-Subsidiarity Model' (2017) 20(5) Int. A. L. R . 149.
3. Julian D M and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) ch. 23 para 1.
4. Sumeet Kachwaha, 'The Arbitration Law of India: A Critical Analysis' (2005) 1(2) Asian Int'l. Arb. J. 105, 113.
5. Tejas Karia, Ila Kapoor & Ananya Aggarwal, 'Post Amendments: What Plagues Arbitration in India' (2016) 5 Indian J. Arb. L. 230, 240.
6. Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration*, (vol. 12, Kluwer Law International 2005) ch. 4 para 5.

[hereinafter "**EA**"] to consider a request for such urgent relief. The word 'emergency' denotes the exceptional urgency of such requests that must be dealt with before the tribunal is formed.[7] Thus emergency arbitration procedures bridge the time lag between the parties' request for relief and the constitution of the tribunal.[8]

Anecdotal evidence reveals that Indian parties more often seek interim relief from EAs of international institutions, especially SIAC.[9] To tackle this appetite, Indian institutions such as MCIA, ICA, ICADR and the like, have also amended their rules to incorporate provisions for emergency arbitration. While this concept has been around for a good amount of time, it is disconcerting that the Indian legislature has remained silent on the status of the EA and the enforceability of their reliefs.[10] Given this backdrop, the present contribution aims at examining the legality of emergency arbitration in India. To this end, the article slices the discourse into four chapters. At the outset, it briefly outlines various factors which the parties need to consider while choosing an avenue for seeking interim relief (*Chapter 2*). Then, it critiques the concurrent jurisdiction between national courts and EA in relation to granting relief at the pre-arbitral stage (*Chapter 3*). The next chapter touches upon the enforceability of emergency reliefs, examines the status of an EA at the preliminary stage and then delves into the enforceability of their decision in the current Indian arbitration landscape (*Chapter 4*). Lastly, some concluding remarks are provided with the way forward to obtain the best workability of emergency arbitration in India (*Chapter 5*).

2. CHOICE OF FORUM: EMERGENCY ARBITRATOR OR COURT

For the purpose of seeking relief at the pre-arbitral stage, parties can either opt for an emergency arbitration procedure or resort to national courts. However, there are certain factors that parties should consider while

7. Maxim Osadchiy, 'Emergency Relief in Investment Treaty Arbitration: A Word of Caution' (2017) 34(2) J Int Arb 239, 241.
8. *Ibid*.
9. Risabh Gupta & Aonkan Ghosh, 'Choice Between Interim Relief from Indian Courts and Emergency Arbitrator' (Kluwer Arbitration Blog, 10 May 2017) http://arbitrationblog.kluwerarbitration.com/2017/05/10/choice-between-interim-relief-from-indian-courts-and-emergency-arbitrator accessed 13 May 2022.
10. Nishant Nigam & Anjali Dwivedi, 'The Viewpoint: Emergency Arbitration – An Absent Concept' (*Bar & Bench*, 29 November 2017) https://www.barandbench.com/view-point/untying-the-noose-around-cbd-and-cannabis-regulation-in-india accessed 23 May 2022.

choosing a forum. This chapter compares both the forums on factors which include [not in order] the cost; speed; confidentiality; court's neutrality; ex-parte relief and order against the third party.

A. Speed

In line with the party's need for urgent relief that cannot wait for a tribunal to be formed, the speed of the process is a key concern.[11] In the case of emergency arbitration, institutions set a certain timeline for the issuance of emergency relief. Although, these timelines are generally respected[12] institutions have reported that on average, they slightly exceeded the deadline. For instance, ICDR[13] and SCC[14] reported an average of 14 and 5-8 days respectively to issue a relief. Along with these deadlines, parties should also consider the time that will be invested to enforce the relief if there is no voluntary compliance by the other party.[15]

Institution	Time required to appoint EA	Time frame to grant the measure
MCIA[16]	Within 1 business day of receipt	Within 14 days of appointment of EA
HKIAC[17]	Within 24 hours of receipt	Within 14 days from referral to EA
SCC[18]	Within 24 hours of receipt	Within 5 days from referral to EA
LCIA[19]	Within 3 days of receipt	Within 14 days from appointment of EA
SIAC[20]	Within 1 day of receipt	Within 14 days of appointment of EA

11. Eliane Fischer and Michael Walbert, 'Chapter I: The Arbitration Agreement and Arbitrability, Efficient and Expeditious Dispute Resolution in M&A Transactions', in Christian Klausegger and others, *Austrian Yearbook on International Arbitration* (vol. 2017, Manz'sche Verlags-und Universitätsbuchhandlung 2017) 27.
12. Raja Bose & Ian Meredith, 'Emergency Arbitrator Procedures: A Comparative Analysis' (2012) 5 Int'L Arb. L. R. 186, 192.
13. Philippe Cavalieros & Janet Kim, 'Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations' (2018) 35(3) J Int Arb 275, 280.
14. *Ibid*.
15. *Id*, 294.
16. Arbitration Rules Mumbai Centre for International Arbitration ('MCIA Rules') (2nd edn, 15 January 2017) arts. 14.2, 14.6.
17. 2018 HKIAC Administered Arbitration Rules ('HKIAC Rules') (1 November 2018) sch. 4 paras 4, 12.
18. 2017 Arbitration Rules of the Arbitration Institute of The Stockholm Chambers of Commerce ('SCC Rules') (1 January 2017) app 2 arts. 4(2), 8(1).
19. London Court of Arbitration Rules ('LCIA Rules') (1 October 2020) arts. 9.6, 9.8.
20. Singapore International Arbitration Centre Arbitration Rules ('SIAC Rules') (6th edn, 1 August 2016) sch. 1 paras 3 and 9.

Speed of proceeding in courts, on the other hand, can vary widely between jurisdictions based on the court's attitude and familiarity with the arbitration.[21] Sometimes seeking interim relief from courts may be problematic based on the court's negative attitude. For instance, the judges of the commercial courts/divisions of Indian High Courts (Bombay High Court, for instance) are often assigned with non-commercial matters which protracts the whole process and the relief is not granted promptly.[22] While, at other times, resorting to the courts may be an ideal option. The Delhi High Court, for instance, is renowned for granting interim relief generally in an average timeline of 3 days.[23]

B. Cost

Institutions require the requesting party to pay fixed emergency arbitration fees upfront in full. Institutions charge a fixed amount of fee that covers their administrative expenses and the fee of EA. The fee structure of some institutions is;

Institution	EA's Fee	Filing Fee	Total Cost	Total Cost (USD)[24]
SIAC[25]	SGD 30000	SGD 5000	SGD 35000	USD 25470
SCC[26]	EUR 16000	EUR 4000	EUR 20000	USD 21480
HKIAC[27]	HKD 250000	HKD 200000	HKD 450000	USD 57350
LCIA[28]	EUR 22000	EUR 9000	EUR 31000	USD 33315
MCIA[29]	INR 300000	INR 80000	INR 380000	USD 4960

The court fee for a commercial Section 9 application in India does not exceed INR 4,000. Thus, ignoring the fee of the counsel, a comparison of institutional fees and court fees reveals that the latter is much cheaper. However, sometimes senior counsels are engaged just to argue the matter (apart from the solicitor) and charge exorbitant fees, eventually making the

21. Philippe Cavalieros (n 13) 294.
22. Department of Legal Affairs, *Report of the High Level Committee to Review the Institutionalization of Arbitration Mechanism in India* (2017) 19.
23. Risabh Gupta (n 9).
24. As per the exchange rate on 25th April 2022.
25. SIAC Rules (n 20) sch. 1 para 2, SIAC Schedule of Fees (1 August 2016).
26. SCC Rules (n 18) App 2 art 10.
27. HKIAC Rules (n 17) sch. 4 para 5, HKIAC 2018 Schedule of Fees.
28. LCIA Rules (n 19) art 9.5, LCIA Schedule of Cost (1 October 2020) para 5.
29. MCIA Rules (n 16) art 32, MCIA Schedule of Fees (15 July 2017).

court a more expensive option when compared to an arbitral institution. Additionally, this becomes costlier when interim relief is to be sought in multiple jurisdictions. In situations like this, an emergency arbitration procedure becomes cost-effective as it prevents the cost of initiating multiple court proceedings.[30]

C. Relief against the third party

Sometimes, parties seek interim relief against a third party who is a non-signatory to the arbitration agreement. But the contractual nature of arbitration limits the EAs' jurisdiction over the parties who submit their dispute to arbitration and are signatories to the agreement.[31] Therefore, EA cannot grant relief against third parties. ICC Rules, for instance, restrict EA from granting relief by stating, "*only to parties that are either signatories of the arbitration agreement [.....].*"[32] Conversely, Indian courts have the authority to render interim reliefs against third parties.[33]

D. Ex-parte Orders

At times, prior notice to the reluctant party may trigger the dissipation of assets from the concerned jurisdiction.[34] Hence, in such an event, to ensure the effectiveness of the relief, an element of surprise is necessary.[35] The majority of institutions bar their EAs from granting ex-parte relief. For instance, MCIA Rules require the EA"*to provide a reasonable opportunity to all parties to be heard.*"[36] Further, if any institution (Swiss Rules[37] for instance) permits so, that order can be challenged under Section 37 of the Principal Act for not providing parties with the opportunity to be heard.[38] On the contrary, Indian courts have the authority to render an ex-parte

30. Christoph Muller and Sabrina Pearson, 'Waving the Green Flag to Emergency Arbitration under the Swiss Rules: the Sauber Saga' (2015) 33(4) ASA Bulletin 808, 809.
31. J Fry, S Greenberg & F Mazza, *Commentary on the 2012 Rules* in *The Secretariat's Guide to ICC Arbitration* (ICC Service 2012) ch. 3 para 1098.
32. The ICC Rules of Arbitration ('ICC Rules') (1 January 2021) art. 29(5).
33. Risabh Gupta (n 9).
34. Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 2694.
35. Jasmine Sze Hui Low, 'Emergency Arbitration: Practical Considerations' (2020) 22(3) Asian Disp. Rev. 109, 110.
36. MCIA Rules (n 16) art 14.5.
37. Swiss Rules of International Arbitration ('Swiss Rules') (June 2021) art 29(3).
38. Godrej Properties Ltd. v. Goldbricks Infrastructure (P) Ltd. 2021 SCC OnLine Bom 3448.

relief. Furthermore, their refusal to do so can be appealed against under Section 37 of the Principal Act.[39]

E. Confidentiality

Confidentiality is the prime reason parties choose to arbitrate, as it limits the information to the public, competitors, press and others.[40] The process of emergency arbitration ensures the confidentiality of the underlying disputes, as institutions incorporate the confidentiality clause in their provisions which is applicable to the emergency arbitration proceedings as well. For instance, SIAC Rules expressly state that "*a party and any arbitrator, including any Emergency Arbitrator [....], shall at all times treat all matters relating to the proceedings and the Award as confidential.*"[41] However, resorting to the court can sometimes fail the parties' intention of keeping their differences confidential as there is a huge potential that the court proceedings may render the confidential information of the underlying dispute public.

F. Expertise of the Adjudicator

Adjudication of the dispute by an umpire whose expertise and experience can best deal with the area of the dispute has its benefits. An expert grants an ideal relief as he is competent to deal with the complex factual and legal issues that may arise in disputes.[42] Further, it enhances the speed of the proceedings which remains the topmost priority at that point in time. It is widely accepted that institutions assign matters to EAs based on their specialization in the subject matter. Further, these institutions make sure that an EA is available during the entire proceedings dedicating proper attention to the matter.[43] Contrarily, national courts are not equipped with a pool of specialist judges and additionally, it is highly unlikely that the specialist judge will be available at the time when an application for interim

39. Jabalpur Cable Network (P) Ltd. v. ESPN Software India (P) Ltd. 1999 SCC OnLine MP 74 : AIR 1999 MP 271.
40. Gary B Born (n 34) 3003; Joyjyoti Misra and Roman Jordans, 'Confidentiality in International Arbitration' (2006) 23(1) J Int Arbitr 39, 48.
41. SIAC Rules (n 20) r. 39.1.
42. Hermann J Knott & Martin Winkler, 'The Arbitrator and the Arbitration Procedure, Emergency Arbitration Securing advantages at an early stage' in Christian Klausegger and other (ed), *Austrian Yearbook on International Arbitration* (Manz'scheVerlags- und Universitätsbuchhandlung 2022) 171.
43. Diana P Mahéo & Christine L Thieffry, 'Emergency Arbitrator: A New Player In The Field - The French Perspective' (2017) 40(3) Fordham Int. Law J. 749, 760.

relief is made.[44] This compels the courts to assign arbitration disputes to the judges' non-specialist judges whose adjudication seriously compromises the credibility of the relief.[45]

G. Neutrality and Impartiality of the Adjudicator

Neutrality and impartiality of the court present in specific locations may also be a matter of significant concern.[46] Indeed, the concern is dominant where the respondent is a state or its entity and the interim relief is sought against the state in its own country as it may be the only available option. In such a situation there may be chances that the domestic court may be biased towards the state entity.[47] On the contrary, institutions ensure that the nationality of an EA and either of the parties remains different.[48] For instance, LCIA Rules ensure that "*where the parties are of different nationalities, a sole arbitrator or the presiding arbitrator shall not have the same nationality as any party [.....]*"[49]

3. RELATIONSHIP BETWEEN JURISDICTION OF EMERGENCY ARBITRATOR AND COURTS

Chapter II reflects that emergency arbitration is not without its disadvantages as the jurisdiction exercised by the tribunal is ineffective or impossible in some cases. This is attributable to inherent shortcomings which the tribunal possesses due to the nature and operation of the arbitration agreement. In such circumstances the court's assistance is imperative.[50] In this regard, Lord Mustill observed that at times court's intervention is highly beneficial to seek effective interim relief, otherwise, justice would be denied.[51] Hence, institutions have framed the emergency arbitration provision in a manner that does not necessarily exclude the court's jurisdiction to grant urgent relief for instance;

44. KajHobér, 'Chapter 10: Courts or Tribunals?' in Fabricio Fortese and other (eds) *Finances in International Arbitration* (Kluwer Law International 2019) 207.
45. Diana (n 43) 759.
46. Mike Salova, 'Interim Measures and Emergency Arbitrator Proceedings' (2016) 23 Croat. Arbit. Yearb. 73, 74.
47. Diana (n 43) 759.
48. LCIA Rules (n 19) arts. 6 and 9.6.
49. LCIA Rules (n 19) Art 6.1.
50. Erin Collins, 'Pre-Tribunal Emergency Relief in International Commercial Arbitration' (2012) 10(1) Loy U. Chi. Int'l. L. Rev. 105, 120.
51. *Coppee-Lavalin v Ken-Ren Chemicals and Fertilizers Ltd* (1994) 2 All ER 449.

The SIAC Rules: "*A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these Rules.*"[52]

The ICC Rules: "*The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, [.....]*"[53]

A bare reading of these rules demonstrates that institutions permit the parties to seek relief by the courts not only before the formation of the tribunal but even thereafter in "*exceptional*" or "*appropriate*" circumstances. Thus, the inception of emergency provision in institution rules has overlapped the jurisdiction of EA and national courts with respect to granting relief at the pre-arbitral stage. Under the supportive approach given by Lord Mustill, at times concurrent jurisdiction may be open to abuse. As during the EA's mandate or when they refused to grant relief, the reluctant party may approach the courts even under circumstances that do not fall under "*appropriate*" or "*exceptional*."

To avoid such abuse, the terms "appropriate" and "exceptional" have to be deliberated upon. In this regard, Smit's approach assumes importance; he proposes national courts restrict their supportive role to the circumstances where the relief is sought against third parties or on an ex-parte basis and must step back from granting relief in any other circumstances.[54] This approach respects the jurisdiction of an EA as it dilutes the court's interference to only those circumstances when the former is incapable of granting relief. Also, it precisely underlines what institutions meant by "*appropriate*" and "*exceptional*" circumstances.

Additionally, when the court plays a supportive role in granting interim relief, circumstances may arise when the court pre-assesses the merits of the dispute. Scholars and academicians opine that such pre-assessment indirectly impacts the proceedings.[55] For instance, if the court while granting relief makes favourable comments on the merits of the application

52. SIAC Rules (n 20) art. 30.3.
53. ICC Rules (n 32) art. 29(7).
54. Hans Smit, 'Provisional Relief in International Arbitration: The ICC and Other Proposed Rules' (1990) 1(3) Am. Rev. Int'l. Arb. 388, 394.
55. Grant Hanessian & E Alexandra Dosman, 'Songs of Innocence and Experience: Ten Years of Emergency Arbitration' (2016) 27(2) Am. Rev. Int'l. Arb 215.

for relief, the other party might consider settling the dispute rather than commencing the arbitration proceedings as the court in such instances has effectively decided the dispute. At this juncture, it is apt to contemplate the Channel Tunnel case which dealt with similar circumstances. In this case, Lord Mustill refused to grant interim relief. The reasoning behind this was based on the ground that "*injunction granted today, would largely pre-empt the very decision of the panel and arbitrators whose support forms the raison d'être of the injunction.*"[56] In the authors' opinion, national courts must follow Lord Mustill's approach while granting interim measures and should be wary of doing so if it is going to comment on the merits of the dispute.

4. ENFORCEABILITY OF EMERGENCY RELIEFS

Emergency arbitration provisions of institutions contractually bind parties,[57] and hence a high degree of compliance towards emergency relief is expected from them. Yet, there is no assurance that a party will comply with the same.[58] Thus, in such situations, the effectiveness of emergency relief is called into question. It is worthwhile to consider the findings of Queen Mary University's survey on international arbitration. As per the survey, 46% of the surveyed respondents were inclined towards opting for the national court to seek interim relief instead of emergency arbitration, with 79% of them citing the enforceability of emergency decisions as a significant concern.[59] Thus, it is all-important for an applicant to be confident about the enforceability of emergency reliefs, or else, the entire mechanism would become redundant.

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56. Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. 1993 AC 334 : (1993) 2 WLR 262, 366-68.
57. SCC Rules (n 18) app 2 art. 9(1) - "*An emergency decision shall be binding on the parties when rendered.*"; ICC Rules (n 32) art. 29(2) - "*The emergency arbitrator's decision shall take the form of an order. The parties undertake to comply with any order made by the emergency arbitrator.*"; MCIA Rules (n 16) art. 14.8 - "*Any interim relief ordered or awarded by an Emergency Arbitrator shall be deemed to be an interim measure ordered or awarded by a Tribunal. The parties undertake to comply with any such interim measure immediately [.....].*"; SIAC Rules (n 20) sch. 1 para 12 - "*The parties agree that an order or Award by an Emergency Arbitrator pursuant to this Schedule 1 shall be binding on the parties from the date it is made [.....].*"
58. Gary B Born (n 34) 2628.
59. Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015, White & Case) 27-28.

Coming to the crux of the paper, the enforceability of relief by EA under the present Indian context majorly stands on two pillars: the statutory recognition of EA under the Principal Act[60] and, the seat of an emergency arbitrator.

Delving upon the first pillar, the Principal Act is absolutely silent with respect to the EAs or enforcement of their reliefs. "The Law Commission of India" [hereinafter "**The Law Commission**"] in its Report no. 246[61] on "*Amendment to the Arbitration and Conciliation Act, 1996*" [hereinafter "**246**th **Report**"] attempted to accord legislative sanction to the emergency arbitration procedure by proposing the following amendment to the term "*arbitral tribunal*" defined under Section 2(d).[62]

"*Arbitral tribunal means a sole arbitrator or a panel of arbitrators and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator.*"

While the Indian arbitration community expected the change to be incorporated in the Principal Act, the Indian Parliament missed a golden opportunity to join the group of a few progressive nations to introduce such a provision. Another opportunity arose when the Srikrishna Committee made a scathing observation pointing out how "*India's approach differs from that of developed arbitration jurisdictions such as Singapore and Hong Kong which have recognised the enforceability of orders given by an emergency arbitrator"*[63] and emphasised upon adopting the recommendation of the 246th Report. However, the recommendation for the second time did not see the light of the day. Thus, unlike some contemporary countries like Singapore and Hong Kong, India failed to provide statutory recognition to an EA which leaves this issue unsettled.

The nomenclature of the term "emergency arbitrator" and the introduction of emergency arbitration procedure in the rules of the institution strongly second the notion of EA being an arbitrator. However, such an argument is not leading us to any determinative conclusion as to whether an EA is

60. Gracious Timothy, 'The Workability of Emergency Arbitrator in India: A Flawed Emergence of the Emergency Arbitrator' (2015) 19 Young Arbitration Review 55, 60.
61. Law Commission of India, *Report No. 246 - Amendments to the Arbitration and Conciliation Act 1996* (Law Com No. 20, 2012).
62. *Id*, 37.
63. Justice BN Srikrishna Committee, *High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (July 30, 2017) 76.

a full-fledged arbitrator. The authors firmly believe that this question has an affirmative answer. To prove so, the author, in this part, assesses the characteristics of an EA based on the distinctive features of an arbitrator.

It is imperative to define an arbitrator in order to ascertain its distinctive features. Surprisingly, there is a lack of guidance under both international conventions and national legislation relevant to defining an arbitrator. Thus it is practical to rely on the general definition of an arbitrator which represents the broad consensus of the arbitration community. Practitioners and scholars have subscribed to the view that different national legislatures are gravitating toward the common definition i.e. "*An arbitrator is an independent and impartial third subject entrusted by the parties with the resolution of their dispute, who will exercise his task in an adjudicatory manner and whose decision will yield the effects of a judgement rendered by state courts.*"[64]

A conspicuous reading of the definition reveals that an arbitrator comprises both contractual and jurisdictional elements. Thus, an EA must possess both of these figures to be recognized as a full-fledged arbitrator. Along similar lines, Yesilirmak also believes that if an EA possesses these two figures, their decision can be treated tantamount to the decision rendered by the arbitral tribunal, thus, enforceable.[65] With respect to the contractual figure, the arbitrator is authorized to issue an interim relief, if required. The source of this power is derived from the agreement between the parties. Similarly, when parties intend to avail the facility of emergency arbitration, they incorporate rules that provide it.[66] The international arbitration community also has no disagreement regarding the contractual nature of an EA. However, the same is not the scenario about the jurisdictional figure. Few scholars and academicians citing their reasons[67] believe that EA lacks jurisdictional figures. On the contrary, the authors opine that EA can also be regarded as a jurisdictional figure as he is bound to follow a procedure akin to an arbitrator. Further, he has to prepare a timetable for a judicial-like procedure and render reasoned decisions based on the submission by the parties. Furthermore, there are a plethora of reasons that can be placed

64. Fabio G Santacroce, 'The Emergency Arbitrator: A Full-fledged Arbitrator Rendering an Enforceable Decision?' (2015) 31(2) Arbitr. Int. 283, 291.
65. Yesilirmak (n 6) ch. 4 para 74.
66. Fabio (n 64) 291.
67. B Baigel, 'The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis' (2014) 31(1) J. Int'l. Arb. 1–18; Gracious Timothy (n 60); Jakob Horn, *Der Emergency Arbitrator und die ZPO* (Mohr Siebeck 2019).

to buttress the argument that an EA is not merely a contractual figure but also holds a jurisdictional figure.

First, the EA's mission is just like a proper arbitrator as he is required to adjudicate the legal claims of the parties in an "*independent and impartial manner*."[68] Ergo, an EA lacking any of these requirements can be challenged.[69] In addition to that, an EA is also required to ensure compliance with due process. Accordingly, he has to provide parties with a reasonable opportunity to present their case.[70] These fundamental principles of arbitration clearly indicate that the EA's mission is not merely contractual but an exercise of jurisdictional nature.[71]

Second, the emergency provisions extend the principle of *kompetenz-kompetenz* to emergency proceedings as all institutions vest power upon an EA to define the boundaries of its own jurisdiction.[72] The principle permits an EA to assess their own competence when it is challenged; in effect, he is authorized to decide on the validity of the arbitration agreement, the ultimate source of his jurisdiction.[73] This altogether establishes that an EA

68. MCIA Rules (n 16) art. 6 - "*Every arbitrator conducting an arbitration under these Rules shall be and remain at all times independent and impartial [.....].*"; ICC Rules (n 32) app 5 art. 2.4 – "*Every emergency arbitrator shall be and remain impartial and independent of the parties involved in the dispute.*"; LCIA Rules (n 19) Art 5.3 – "*All arbitrators shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate for or authorised representative of any party.*"
69. MCIA Rules (n 16) art. 10.1 – "*Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and/or independence [.....]*"; ICC Rules (n 32) arts. 14–1 - "*A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat [.....]*"; LCIA Rules (n 19) art. 10.1 - "*The LCIA Court may revoke any arbitrator's appointment if circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence.*"
70. Friedland & Paul, *Arbitration Clauses for International Contracts* (2nd edn. Juris, Huntington 2007) 143.
71. M Valasek & F Wilson, 'Distinguishing Expert Determination from Arbitration: The Canadian Approach in a Comparative Perspective' (2013) 29(1) Arbitr Int 63, 71.
72. MCIA Rules (n 16) art. 14.5 - "*The Emergency Arbitrator shall have the powers vested in the Tribunal pursuant to these Rules, including the authority to rule on his own jurisdiction [.....]*"; SIAC Rules (n 20) sch. 1 para 7 - "*The Emergency Arbitrator shall have the powers vested in the Tribunal pursuant to these Rules, including the authority to rule on his own jurisdiction [.....]*"; HKIAC Rules (n 17) Sch 4 para 10 - "*The emergency arbitrator shall have the power to rule on objections that the emergency arbitrator has no jurisdiction [.....]*".
73. Miguel Gómez Jene, *International Commercial Arbitration in Spain*, (Kluwer Law International 2019) 168.

possesses jurisdictional nature as it was near impossible to find such power in a mere contractual basis of arbitration.

Third, the remedial powers to grant interim relief conferred upon the EAs are almost similar to those vested with the arbitral tribunal. For instance, an EA appointed under MCIA Rules has the "*power to order or award any interim relief that he deems necessary.*"[74] And, it permits the tribunal to "*issue an order granting an injunction or any other interim relief it deems appropriate.*"[75] Thus, although MCIA does not expressly state that these powers are similar, a textual comparison of these provisions reveals that the power vested upon EAs and arbitral tribunal is the same.

Finally, just like a tribunal, an EA also has a seat.[76] The seat in the arbitration agreement governs the law of the place where arbitration is to be held,[77] the competent court exercising supervisory function and further, the legal framework in which the proceedings will be carried out. Thus, the seat of arbitration is not a geographical notion but constitutes a voluntary juridical nexus between an arbitration and a given legal system. The seat is yet another feature signifying that EA possesses jurisdictional figures.[78]

The key features mentioned above strongly suggest that an EA possesses both contractual and jurisdictional elements and can therefore be regarded as a full-fledged arbitrator. However, there is still a grey area, as mentioned, an EA is not expressly included in the term "arbitral tribunal" of the Principal Act. Thus, it is the discretion of the court as to whether it will consider the jurisdictional nature of an EA or not. In such circumstances, it majorly depends upon the judiciary's attitude towards arbitration. While, on one hand, the arbitration-friendly court will duly respect the relief of an EA considering its jurisdictional nature. But on the other hand, other courts will refrain from doing so based on the reasoning that the institutional rules

74. MCIA Rules (n 16) art. 14.7.
75. MCIA Rules (n 16) art. 15.1.
76. MCIA Rules (n 16) arts. 14.7, 30.7 and 23.1; SIAC Rules (n 20) sch. 1 para 4 - "*If the parties have agreed on the seat of the arbitration, such seat shall be the seat of the proceedings for emergency interim relief.*"; HKIAC Rules (n 17) sch. 4 para 9 - "*If the parties have agreed on the seat of arbitration, such seat shall be the seat of the Emergency Relief proceedings*".
77. *PT Garuda Indonesia v Birgen Air*, 2002 SGCA 12, para 24 (Singapore Ct. App.); Nigel Blackaby, *Redfern and Hunter on International Arbitration* (5th edn, OUP UK, 2014) ch. 3 para 51.
78. Julian (n 3) 172.

do not trump the Principal Act and therefore cannot provide something that the statutory act does not.

The Supreme Court of India in its much-awaited "Amazon.com NV Investment Holdings LLC v. Future Retail Ltd."[79] judgement dealt with the status of an EA. The Court had to determine "*as to whether an award delivered by an Emergency Arbitrator under the Arbitration Rules of the SIAC Rules can be said to be an order under Section 17(1) of the Principal Act.*" The Future Group argued that it could not since the Principal Act consciously remains silent in relation to emergency arbitration even after the suggestions of the Law Commission and the Srikrishna Report. Rejecting these arguments, the court examined various sections and pointed out how the Principal Act grants parties autonomy to choose to govern their disputes by institutional rules which also includes rendering interim reliefs by EAs. Based on this reasoning, the Court stated that emergency arbitration is endorsed by the Principal Act, not prohibited as argued by the Future Group. The court here could have possibly taken a negative stance considering the definition of the arbitral tribunal and the limited scope of Section 17. However, it applied the purposive and constructive interpretation to the existing provision of the Principal Act and recognised the EA's award in the absence of any statutory framework.

The Supreme Court has set a benchmark by delivering a judgement that is not just important for India but for nations across the globe. However, the judgement is subject to be set aside if, in future, the higher bench of the Court delivers judgement to the contrary. Nevertheless, the author after much deliberation on the nature of emergency arbitration firmly believes that if any such future events occur, the Court will once again take the liberal stance.

While the legislations of majority of the jurisdictions across the globe do not explicitly recognize an EA as a full-fledged arbitrator, their reliefs are indirectly enforced under legislation that recognizes and enforces the reliefs of the arbitral tribunal. This is done based on the reasoning that an EA is an arbitrator and serves the purpose of the regular arbitral tribunal by rendering the interim measures. Similarly, Indian courts indirectly enforce the emergency order/award under Section 17. However, this provision has its own disadvantage being restricted to enforcing the orders/awards passed by India-seated arbitral tribunals. This is so because Section 17 is present in Part I of the Principal Act and by virtue of Section 2(2), it is applicable

79. (2022) 1 SCC 209 : 2021 SCC OnLine SC 557.

only to Indian-seated arbitration. Thus, while Section 17 can indirectly enforce relief of Indian-seated EA, it becomes ineffective in enforcing relief of foreign-seated EA.

Thus, when Part I is inapplicable, the question arises as to whether the relief of foreign-seated EA is enforceable under Part II of the Principal Act. *Firstly*, Part II lacks any provisions similar to Section 17. *Secondly*, awards under Part II are enforced in accordance with the "*Convention on the Recognition and Enforcement of Foreign Arbitral Awards*" (hereinafter the "**New York Convention**"). Going by the experts' opinion, the Convention only enforces awards of a 'final' nature. However, the interim award of an EA under the institution rules is not 'final' and is subject to modification by an EA himself and the tribunal formed thereafter.[80] Thus, due to the lack of finality, the foreign-seated emergency award is not enforceable under Part II. Moreover, the Convention only recognizes an award and any decision of an EA in the form of an order is also not enforceable under Part II.[81] Thus it is very difficult to enforce the interim order/award of foreign-seated EA under the Principal Act. This inability of the legislature compels the parties to seek relief through Indian courts.

Interestingly, Indian courts have adopted a '*hybrid approach*'[82] wherein they indirectly enforce the interim relief of an EA by granting a mirror relief under section 9. In *Avitel,*[83] the petitioner already sought interim relief from a Singapore-seated SIAC-administered EA. Subsequently, he filed a Section 9 application seeking similar relief. After an independent

80. MCIA Rules (n 16) art. 14.9 - "*Any order or award of the Emergency Arbitrator may be confirmed, varied, discharged or revoked, in whole or in part, by an order or award made by the Tribunal upon application by any party or upon its own initiative.*"; LCIA Rules (n 19) Art 9.9 - "*Any order or award of the Emergency Arbitrator [.....] may be confirmed, varied, discharged or revoked, in whole or in part, by order or award made by the Arbitral Tribunal upon application by any party or upon its own initiative.*"; ICC Rules (n 32) art. 29(3) - "*The emergency arbitrator's order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order. The arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator*".
81. Jasmine (n 35) 112; Tejas Karia (n 5) 241; Sai RGarimella & Poomintr Sooksripaisarnkit, 'Emergency Arbitrator Awards: Addressing Enforceability Concerns Through National Law and the New York Convention' in Katia Fach Gomez and others (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International 2019) 68.
82. Grant Hanessian (n 55) 231.
83. Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd. 2014 SCC OnLine Bom 929.

review of the circumstances, the court granted a mirror relief similar to one granted by SIAC. The Court, while doing so, clarified that the present application was not to enforce the emergency award, but was seeking a relief independent of the emergency award.

Similarly, the Delhi High Court in *Raffales*[84] while considering the maintainability of a petition under Section 9 clarified that "*recourse to Section 9 of the Act is not available for the purpose of enforcing the orders of the arbitral tribunal; but that does not mean that the Court cannot independently apply its mind and grant interim relief in cases where it is warranted*." The court held that an emergency award cannot be enforced under the Principal Act and the parties are left with no recourse but to file a civil suit.

Thus, the parties have found a flexible approach to solve this problem, which uses the existing provisions of the Principal Act in an innovative way. However, this hybrid approach does not seem to be a feasible option, as parties would be required to again present the case before the court when the same has been done before the EA. Also, the court would also require some time to review the matter and grant relief, and during this time, if the reluctant party dissipates the assets, the whole point of getting relief from an emergency arbitration would be futile.

In 2015, Section 17 was amended to ensure that the measures rendered under this provision were statutorily enforceable.[85] The newly introduced Section 17(2) drew inspiration from Article 17H of "UNCITRAL Model Law on International Commercial Arbitration" [hereinafter "**Model Law**"]. The Parliament while drafting Section 17(2) omitted a critical element (emphasized) of Article 17H(1) of the Model Law which stipulates that "*An interim measure issued by an arbitral tribunal shall be recognized as binding... and enforced upon application to the competent court, irrespective of the country in which it was issued [.....].*"[86] While it is difficult to comprehend if this omission was deliberate or a consequence of some oversight, the mere addition of the term "*irrespective of the country in which it was issued*" in Section 17(2) would have ensured the enforceability of relief of foreign-seated EAs.

84. Raffles Design International India (P) Ltd. v Educomp Professional Education Ltd. 2016 SCC OnLine Del 5521.
85. Report No. 246 (n 61) 27.
86. *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law* (1985) art. 17-H(1).

5. CONCLUSION AND WAY FORWARD

As per Queen Mary's 2021 International Arbitration Survey, the ability to enforce the relief of EAs makes the seat 39% more attractive to users.[87] The importance of emergency arbitration was fore casted way before by arbitration-friendly seats like Hong Kong and Singapore. Accordingly, these nations made favourable amendments regarding emergency arbitration in their respective legislations as soon as the concept was introduced by the HKIAC and SIAC Rules.[88] Such an expeditious move was expected from the Parliament with the introduction of this concept in the rules of prominent arbitral institutions in India.[89] However, it remained aloof even after the recommendation of the 246th Report and the Srikrishna Report. The situation became graver when the reluctant party in *Amazon v. Future Retail* used the oversight of the Parliament as an argument to get away with the emergency award. However, the Supreme Court adopted the pro-arbitration approach and settled the matter.

Better late than never, the Parliament can still provide a statutory framework for emergency arbitration by including EA in the definition of the 'arbitral tribunal'. This revolutionary move would ensure that international parties choose Indian institutions to get their issues resolved. However, merely expanding the definition of 'arbitral tribunal' would do nothing more than mere lip service to creating an effective emergency arbitration regime as the Principal Act is incompetent to enforce awards/orders of foreign-seated EA. This drawback can be done away with by permitting a small tweak in Section 17. The legislature should simply add on the term "*irrespective of the country in which it was issued*" in Section 17(2). By virtue of this addition, a foreign-seated emergency order/award will be enforceable in India under Section 17.

Incorporating this suggestion in the Principal Act along with the recommendations of the 246th Report would ensure that emergency awards/orders of both domestic and foreign-seated EAs are enforceable in India. Nevertheless, it remains to be seen when emergency arbitration procedures will see the light of day. However, the problem is not as exaggerated as it

87. Queen Mary University of London, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World* 8.

88. Kartikey Mahajan & Sagar Gupta, 'Uncertainty of Enforcement of Emergency Awards in India' (*Kluwer Arbitration Blog*, 7 December 2016) http://arbitrationblog.kluwerarbitration.com/2016/12/07/uncertainty-of-enforcement-of-emergency-awards-in-india accessed 7 June 2022.

89. Justice BN Srikrishna Committee Report (n 63) 3.

seems, the lack of cases on enforcement issues of emergency reliefs reflects parties' voluntary compliance with the decision of an EA. But, to play safe, prominent Indian institutions like MCIA can amend their rules to specify a monetary penalty for each day in which the respondent fails to comply with EAs' award. This could turn out to be extremely productive if direct enforcement via a national court is not possible.[90]

90. Ben Giaretta, 'The Practice of Emergency Arbitration' 2017 (1) Belgian Rev. Arb. 83, 98.

REVISITING THIRD-PARTY FUNDING– AN ANALYSIS OF THE NEW ICSID ARBITRATION RULES

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ABSTRACT

The use of third-party funding (TPF) as a means of financing investment arbitrations has seen an exponential surge in the last two decades. It has gained traction and credibility as it has the potential to increase access to justice, while allowing the funded party to maintain cash flow. However, in the absence of any governing regulations, such an increase in the use of TPF has led to two primary concerns: potential conflicts of interest,and increased risk in recovering arbitration costs. Against this backdrop, the International Centre for Settlement of Investment Disputes (ICSID) amended its arbitration rules in 2022 (ICSID AR) and introduced two new provisions to address these concerns around TPF:(i) Rule 14 of the ICSID AR introducing disclosure requirements for TPF; (ii)and Rule 53 of the ICSID AR directing an arbitral tribunal to consider the existence of TPF as evidence of the 'relevant circumstances' to be considered for the determination of a request for security for costs (SFC).

The author argues that while the mandatory disclosure requirement in terms of Rule 14 is well-motivated and necessary to reduce conflicts, the language of Rule 14 may fail to address some of the concerns around disclosure. These concerns include - the inadequacy of penalty for non-compliance with the disclosure requirement, issues of conflict arising on account of funding obtained by parties after the constitution of the arbitral tribunal, and the relevance of a specific provision granting an arbitral tribunal the power to order disclosure of any additional information. Further, this paper argues that TPF should have no bearing on requests for SFC. In this backdrop, this paper examines the viability of adding the existence of TPF as evidence of the

'relevant circumstances' to be considered for determination of a request for SFC.

1. INTRODUCTION

On 21 March 2022, the Member States of the International Centre for Settlement of Investment Disputes ("**ICSID**") confirmed extensive amendments to the ICSID Regulations and Rules ("**ICSID Rules**")-the flagship procedural guidelines for resolving international investment disputes. The comprehensive ICSID Rules, which came into effect from 01 July 2022, are an outcome of extensive consultation and deliberation carried out between the Member States for over five years. They are also the culmination of six working papers, intending to '*modernize, simplify, and streamline'* the ICSID Rules.[1]

The ICSID Rules include the amended ICSID Arbitration Rules ("**ICSIDAR**"),which are the rules of procedure for arbitration proceedings conducted under the aegis of the constituent treaty of the ICSID.[2] With the latest amendments, ICSID AR has also been significantly overhauled to increase transparency and efficiency, and enhance disclosures in arbitration proceedings.

One such amendment to the ICSID AR is the introduction of provisions addressing third-party funding ("**TPF**"), a fast-developing phenomenon, which previously remained unregulated by the ICSID Rules. The ICSID AR, after extensive deliberations,have now introduced two provisions, each concerning separate aspects of TPF – (a) Rule 14 of the ICSID AR, which governs the disclosure of TPF; and (b) Rule 53 of the ICSID AR, which permits the tribunals to consider the existence of TPF while assessing a request for security for costs ("**SFC**"). This paper seeks to critically analyse these two provisions governing the treatment of TPF under the new ICSID AR, while drawing parallels with the rules of other arbitral institutions and treaties/ agreements. Part-I of the paper briefly traces the evolution of TPF and the nuances and technicalities of a formal definition of TPF, which isan indispensable predicate to impose any regulations relating to TPF. It also briefly mentions the reasons for a sudden surge in the usage of TPF and the ethical and procedural concerns surrounding it, especially in investment

1. The ICSID Rules and Regulations (as amended 01 July 2022) https://icsid.worldbank.org/resources/rules-amendments accessed 15 October 2022 ('ICSID AR').
2. 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').

arbitrations. In Part-II, the author examines the disclosure requirement, the primary issue surrounding TPF in the investment arbitration. The author first evaluates the advantages and concerns regarding the disclosure requirement and how it has been addressed in the rules of other major arbitral institutions, treaties/ agreements, and decisions of the ICSID tribunals. Juxtaposing this with the new regime under the ICSID AR, the author thereafter examines the features and concerns in relation to the new disclosure requirement under Rule 14 of the ICSID AR. In Part - III, the author critically examines the new provision governing SFC and how the existence and terms of TPF affect the decision of the arbitral tribunal in granting SFC. Finally, Part-IV concludes with an examination of the viability of the disclosure requirement under the new ICSID regime, and consideration of TPF as evidence while determining any of the relevant circumstances for the grant of SFC.

2. UNDERSTANDING THE PREMISE: ON A DEFINITION OF THIRD-PARTY FUNDING

A. Evolution of TPF and Definitional Ambiguity

For a general understanding, in broad terms, TPF can be described as an arrangement in which a non-party funding entity, with no prior interest in the dispute, provides monetary and/ or other assistance to one of the contesting parties (in most cases, the claimant) and/ or its affiliate, with the expectation of receiving remuneration or reimbursement contingent on the outcome of the dispute.

Historically, TPF or any other form of funding by a non-disputing party was prohibited in common law jurisdictions on account of it being in violation of the doctrines of maintenance and champerty,[3] and was practically unknown in civil law jurisdictions.[4] However, recognition of dispute funding in Australia and the United Kingdom at the beginning of this century paved the way for a slow but accelerating usage of TPF across jurisdictions globally including Singapore, Hong Kong, China, Latin America, and Europe.[5] In less than two decades, TPF has now climbed from the fringes of acceptability in certain common law jurisdictions to

3. Max Radin, 'Maintenance by Champerty' (1935) 24 Calif. LR 48: Providing history of maintenance and champerty, dating back to Ancient Greece and Rome.
4. Frank J Garcia, 'Third-Party Funding as Exploitation of the Investment Treaty System' (2018) 59(1) Boston College Law School Faculty Papers 1, 2.
5. Lisa Bench Nieuwveld & Victoria Shannon Sahani, *Third-Party Funding in International Arbitration* (Kluwer Law International, 2nd edn., 2016).

occupying center stage in the global commercial and arbitration market. However, despite this continuous surge in the usage of TPF in domestic litigation and arbitrations worldwide, a precise definition of TPF, or its usage and acceptance, continue to be mooted.[6]

Originally conceived as a mechanism to enable impecunious or cash-constrained individuals and companies to afford litigation costs, dispute funding is now also increasingly being used by solvent companies to ensure smooth cash flow and risk management.[7] This has led to innovations in the variety and complexity of TPF models and funding arrangements prevalent today, thereby creating confusion surrounding the definition and usage of TPF.[8]

B. Differing Views on Adoption of TPF

Despite the definitional ambiguity and the lack of concrete regulations governing TPF, the use of TPF in investment arbitrations has witnessed an exponential growth on account of factors such as increasing arbitration costs, additional constraints on corporate legal budgets, etc.[9] In this background, the proponents of TPF list out its numerous benefits in investment arbitrations including (a) its ability to increase access to justice for investors, especially small and medium entities, who can now pursue valid claims otherwise unaffordable for them;[10] (b) its use for larger and solvent corporations to ensure cash flow while pursuing a meritorious claim;[11] and (c) its potential for reducing frivolous claims as a funder would filter them out to avoid losses.[12]

At the same time, several scholars and practitioners have criticised TPF for giving rise to multiple ethical and procedural issues. These issues include

6. International Council for Commercial Arbitration, *Report of The ICCA-Queen Mary Task Force on Third-Party Funding In International Arbitration*, ICCA Reports No. 4 ('ICCA-Queen Mary Report') (April 2018), 46.
7. Victoria Shannon Sahani, 'Judging Third-Party Funding' (2016) 63(2) UCLA L. Rev. 388, 397.
8. *Ibid*.
9. Rachel Howie & Geoff Moysa, 'Financing Disputes: Third-Party Funding in Litigation and Arbitration' (2019) 57 Alta. L. Rev. 465, 471.
10. *Ibid*.
11. W Kirtley & K Wietrzykowski, 'Should an Arbitral Tribunal Order Security for Costs when an impecunious Claimant is Relying upon Third-Party Funding' (2013) 30(1) J. Int. Arb. 18.
12. Rachel & Geoff (n 9), at 471; Sahani (n 7) at 398; Maya Steinitz, 'Whose Claim is This Anyway? Third-Party Litigation Funding' (2011) 95 Minn. L. Rev. 1310.

inter alia (a) conflict of interest of arbitrators and lawyers involved in arbitration proceedings;[13] (b) issues relating to transparency and disclosure requirements regarding the funding arrangement;[14] (c) proliferation of frivolous and speculative claims being brought at the behest of funders;[15] (d) nature and degree of the funder's influence (a non-party) on the arbitration proceedings; (e) jurisdiction of the arbitral tribunal;[16] (f) allocation of cost and SFC;[17] and (g) creation of a structural imbalance between large corporate investors and smaller States.

However, in recent years, it has been seen that the benefits of TPF have outweighed its disadvantages and led to it becoming a popular avenue for dispute funding, thereby changing the discourse around it. Instead of considering a complete prohibition of TPF, arbitral institutions and/ or trade agreements and treaties are now mostly considering regulation of TPF to ensure transparency and fairness in arbitral proceedings.[18] The regulations aimed at TPF primarily seek to address two issues – the disclosure requirement of TPF, and the relevance of TPF in awarding SFC– which have been examined in detail in the following section.

3. DISCLOSURE OF THIRD-PARTY FUNDING

A. Understanding the Need for Disclosure

The independence and impartiality of arbitrators is paramount in arbitration proceedings for fair, free, and unbiased arbitral proceedings, primarily due to the private nature of such adjudication. Unlike judges of courts, who are state servant and are chosen and appointed by the state, the arbitrators are generally chosen by private parties or entities. Thus, the potential for conflict of interest of arbitrators and the question of the arbitrators' impartiality, which can significantly impact investment arbitration proceedings, has always been a fundamental consideration while regulating the use of TPF.

13. Sarah E. Moseley, 'Disclosing Third-Party Funding in International Investment Arbitration' (2019) 97 Texas LR 1181, 1189.
14. *Ibid.*
15. *Id*., at 1191.
16. *Id*., at 1189.
17. Kirtley & Wietrzykowski (n 11), 30.
18. Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates, signed 16 April 2018.

It is to address this fundamental concern that formulation of disclosure requirements was necessitated.[19]

The proponents of disclosure requirements have argued that ascertainment of the existence of TPF is imperative to avoid any potential conflict of interest. The threat of conflict is even more exacerbated in investment arbitrations on account of factors like the high concentration of practitioners in the investment arbitration community who often play the role of both arbitrators and lawyers (in different arbitrations) and/ or have a relationship with the funding entities;[20] parties' involvement in the appointment of the arbitral tribunal; and the dearth of clear binding professional rules governing the arbitrators and lawyers. In addition to this apparent advantage of avoiding conflicts, some proponents have also argued that disclosure of TPF would also act as a catalyst in ascertaining costs or SFC requests, which will be examined by the author in Part III of this paper.

On the other hand, the disclosure requirement has received certain backlash from funders and funded parties due to their imminent fear that disclosing the existence of TPF will be strategically misused by the opposite party to considerably delay the arbitral proceedings by filing frivolous challenges to the appointment of arbitrators and superfluous requests for SFC.[21] They have also contended that the existence of TPF is irrelevant to the conduct of the arbitration proceedings and cannot be treated differently from any other form of financing such as insurance, corporate loans or contingency fee arrangement.[22]

Gradually, there has been a prevailing consensus that TPF can raise potential conflicts of interest, and therefore, it should be disclosed. Therefore, the regulatory focus has shifted to determining the scope of disclosure, in order to strike a delicate balance between transparency to mitigate concerns around undisclosed TPF on the one hand and fairness and confidentiality for the funded party on the other. The two primary questions to be resolved are: whether there should be a mandatory disclosure of the TPF arrangements by parties and whether the arbitral tribunal should be allowed to call upon for disclosure of the contents of the funding arrangement.

19. Jennifer A. Trusz, 'Full Disclosure: Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration' (2013) 101 Geo. L.J. 1649.
20. Sarah (n 13), 1190.
21. Trusz (n 19).
22. Sarah (n 13), 1194.

To analyse how ICSID AR have addressed this issue, by way of context, it is important to first examine the disclosure requirements under rules of other arbitral institutions and treaties, as also rules under the previous ICSID regime.

B. Disclosure Requirements Under Other Arbitral Institutional Rules and Treaties

Till 2014, there were no formal rules or guidelines of any organisation or major arbitral institution which governed TPF or called for its disclosure. In the absence of any formal rules, the requirement of disclosure of TPF was being examined by arbitral tribunals on a case-to-case basis. This led to uncertainty regarding the disclosure requirement. Thereafter, there have been developments in disclosure requirements on different fronts:

(i) IBA Guidelines –Before any arbitral institution made any strides towards addressing the issue of TPF and its disclosure, the International Bar Association ("**IBA**") first published the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration ("**IBA Guidelines**"),[23] which addressed the issue of conflict. The General Standard 6(b) read with General Standard 7, of the IBA Guidelines provides that the arbitrators shall disclose any relationship, direct or indirect, between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. This included third-party funders within the scope of relationships that the arbitrator must disclose to the parties to an arbitration.

(ii) Arbitral Institution Rules - While the IBA Guidelines are 'soft-law', they paved the way for arbitral institutions to gradually adapt and update their rules to address the issue arising from TPF arrangements. The Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada[24] ("**CAM-CBCC**") was the first arbitral institution that recommended the parties to disclose TPF. The Singapore International Arbitration Centre ("**SIAC**"), a major arbitral institution, then followed the suit with the SIAC Investment

23. IBA Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines') (2014) http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx accessed 19 August 2017.
24. Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada Administrative Resolution 18/2016, arts. 3, 4 and 5 http://www.ccbc.org.br/Materia/2890/resolucao-administrativa-182016/en-US accessed 8 October 2022.

Arbitration Rules 2017 ("**SIAC Rules**"). While the SIAC Rules do not mandate disclosure, they allow the tribunals to order disclosure of TPF arrangements, including the identity of the funder, source of funding, interest of the funder in the outcome of the arbitration proceedings, and whether the funder has committed to take any adverse costs on itself.[25] Following this trend, the Hong Kong International Arbitration Centre ("**HKIAC**") also introduced TPF-related provisions in the HKIAC Administered Arbitration Rules, 2018 ("**HKIAC Rules**") wherein it has been made ***mandatory*** for the funded party to disclose the existence of TPF and the identity of the funder to the arbitral tribunal.[26] The HKIAC Rules further provide that the arbitral tribunal may consider TPF while determining costs. However, there is no express provision in the HKIAC Rules empowering a tribunal to ask for a direct disclosures of the contents of the funding agreement.

In continuation of this regulatory drift, the International Chamber of Commerce ("**ICC**") Arbitration Rules, 2021 ("**ICC Rules**"), arguably the gold standard of arbitral institutional rules, has also incorporated provisions on mandatory disclosure of TPF. The ICC Rules now mandate parties to disclose the existence and identity of any non-party funder to assist the arbitrators in avoiding any conflict of interest and maintain independence and impartiality.[27]

(iii) ***Trade agreements and treaties*** - In addition to the rules of arbitral institutions, TPF and its disclosure has also found a place in certain new-generation free trade agreements or bilateral investment treaties. One of the first treaties to lay down provisions regulating TPF was the EU-Canada Comprehensive Economic and Trade Agreement (CETA), which provides its own definition of TPF and mandates disclosure of the existence of TPF by the funded party.[28] Thereafter, TPF has been regulated differently in the EU–Singapore Investment Protection Agreement,[29] the Canada–Chile Free Trade Agreement,[30] and the 2019 Netherlands Model Bilateral Investment Treaty,[31]

25. The SIAC Investment Rules 2017, art. 24(I).
26. HKIAC Administered Arbitration Rules, art. 44(1).
27. International Chamber of Commerce ("**ICC**") Arbitration Rules 2021, art. 11(7).
28. EU–Canada Comprehensive Economic and Trade Agreement, 14 January 2017, arts. 8.1 and 8.26.
29. EU–Singapore Investment Protection Agreement, 21 November 2019, arts. 3.1(f), 3.8 and 3.19(6).
30. Canada–Chile Free Trade Agreement, 5 February 2019, art. G-23-bis.
31. 2019 Netherlands Model Bilateral Investment Treaty, art. 19.

making trade agreements and bilateral treaties another important way to regulate TPF.

C. Disclosure Requirement Under the Erstwhile Icsid Regime

Prior to the amendments, TPF was completely unregulated in ICSID arbitrations. Parties to arbitration proceedings were not mandatorily required to disclose the existence of any funding arrangement to the arbitral tribunal or the opposite party. Thus, the disclosure of TPF by parties was either voluntary or when so directed by the arbitral tribunals on a request made by the opposing party. In order to address the issue of arbitrators' conflict and to ensure complete impartiality, the arbitral tribunals were generally lenient towards such requests for disclosure of the existence of TPF and the identity of the funder. It is probably for this reason that the funded parties had started to voluntarily disclose the existence of TPF and identity of funders if the non-funded parties made any such requests for disclosure, even in the absence of any express order from the arbitral tribunal.[32]

However, conflicts arose where non-funded parties sought disclosure of the details and terms of the funding agreements, which had no apparent link to the issues in dispute.[33] In such instances, the tribunals were generally reluctant to direct the funded party to disclose the terms of the funding agreement as these terms are confidential and privileged, and there is a high probability of their misuse by the non-funded parties.[34] For this reason, it is observed that the tribunals rarely ordered such disclosure of the terms of the funding arrangement, unless exceptional circumstances warranted such disclosure. For instance, in *S&T Oil Equipment & Machinery Ltd.* v. *Romania,*[35] the funder had ceased to pay for the funded party's fees and costs on account of some dispute regarding the termination of the funding arrangement which was being litigated separately. This led to

32. ICSID Secretariat, 'ICSID Proposals for Amendment of the ICSID Rules, Working Paper #1', ('Working Paper #1') (3 August 2018), 135 WP1_Amendments_Vol_3_WP-updated-9.17.18.pdf (worldbank.org) accessed 20 October 2022.
33. Kirstin Dodge, Jonathan Barnett, Lucas Macedo and Patryk Kulig, 'Third Party Funding and reform of the ICSID Arbitration' (2021) 15(3) Revista Romana De Arbitraj 15, 21.
34. RSM Production Corpn. v. Saint Lucia ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs with Assenting and Dissenting Reasons (13 August 2014).
35. S & T Oil Equipment & Machinery Ltd. v. Romania ICSID Case No. ARB/07/13, Order of Discontinuance of the Proceedings (16 July 2010).

the premature termination of the arbitral proceedings. In this instance, considering that the funding agreement itself was disputed, disclosing its terms had become necessary in the arbitral proceedings. Another instance was the case of *Muhammet Çap & SehilInşaat Endustrive Ticaret Ltd. Sti*. v. *Turkmenistan,*[36] where the Respondent State in its second request for security for costs additionally alleged that the Claimant would evade a cost against it (as done by the Claimant in a previous case), basis which the Tribunal directed the funded party disclose the '*nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it/they will share in any successes that Claimants may achieve in this arbitration.*'

Besides these exceptions, the general trend of ICSID tribunals has been to direct limited disclosure of TPF only. However, considering there were no formal guidelines and there is no regime of *stare decisis* in investment arbitrations, there was an inordinate delay in resolving TPF issues. This reason, along with the risk of conflict, called upon the ICSID Secretariat to formally address disclosure requirements in its amended institutional rules.

D. Disclosure Requirements Under the New ICSID Regime

Learning from the experience of other arbitral institutional rules, investment treaties and trade agreements, and its own tribunal decisions, and after six extensive rounds of consultation with the members States, the ICSID Secretariat has introduced Rule 14 of ICSID AR to specifically address the issue of TPF in ICSID proceedings. Rightly dismissing the suggestions of a few Member States to prohibit TPF completely,[37] ICSID's introduction of Rule 14 is in consonance with its overarching aim to increase transparency and enhance disclosures in ICSID arbitral proceedings, while modernizing the entire process. The Rule 14 has been reproduced herein below for easy of reference:

'Rule 14

Notice of Third-Party Funding

1. *A party shall file a written notice disclosing the name and address of any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through*

36. Muhammet Çap & Sehil Inşaat Endustrive Ticaret Ltd. Sti v. Turkmenistan ICSID Case No. ARB/12/6, Procedural Order No. 3 (12 June 2015).
37. Working Paper #1, 131.

a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ("third-party funding"). If the non-party providing funding is a juridical person, the notice shall include the names of the persons and entities that own and control that juridical person.

2. *A party shall file the notice referred to in paragraph (1) with the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.*

3. *The Secretary-General shall transmit the notice of third-party funding and any notification of changes to the information in such notice to the parties and to any arbitrator proposed for appointment or appointed in a proceeding for purposes of completing the arbitrator declaration required by Rule 19(3)(b).*

4. *The Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3).'*[38]

While the practical application and implications of Rule 14 remain to be seen, the author believes that Rule 14 offers the following primary features and concerns:

(i) Definition of TPF – Unlike rules of other arbitral institutions such as SIAC, HKIAC, and CAM-CBCC which have regulated TPF without defining its contours, the ICSID Secretariat was well aware that a clear definition of TPF is indispensable for regulating its use in investment arbitrations.[39] Accordingly, Rule 14(1) of the ICSID AR defines a '*third party funder*', and accordingly TPF as '*non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ("third-party funding").*'

The author is of the view that such a broad, yet simplified definition of TPF has the scope of accommodating various forms of contemporary TPF arrangements that are being employed in practice. This can

38. ICSID AR, r. 14.
39. Working Paper #1, 131.

significantly reduce interpretative issues on what qualifies as TPF for several reasons. *Firstly*, the definition expressly includes funding received through a '*donation or grant*', which captures agreements that are '*not-for-profit*. For instance, the arrangement between the Bloomberg Foundation and Uruguay in *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and* Abal Hermanos SA (Uruguay) v. Oriental Republic of Uruguay.[40] This reduces the ambiguity around the non-inclusion of arrangements that are for the public interest or for purposes of advocacy. *Secondly*, from a perusal of the working papers and the inclusion of the word '*directly or indirectly*' in Rule 14(1) of the ICSID AR, it can be concluded that the definition includes arrangements with party representatives such as asuccess-based fee arrangements, thereby expanding the scope of its application. This is in significant contrast to the recent Vienna International Arbitral Centre (VIAC) Rules of Investment Arbitration and Mediation 2021 (Article 6), which expressly exclude arrangements with '*party representatives'*. Thus, a clear definition of TPF under the ICSID AR has immense potential to reduce interpretative ambiguities.

(ii) **Mandatory Disclosure of '*Name*' and '*Address*' –** The ICSID AR has followed the recent trend (under ICC Rules*et al*) of making disclosure of TPF mandatory, instead of envisaging tribunal-ordered disclosure as provided under the SIAC Rules. Rule 14(1) read with Rule 14(2) of the ICSID AR unequivocally mandates the parties to file a written notice disclosing the 'name' and 'address' of the funder. This requirement sets a clear threshold for disclosure and leaves no room for ambiguity. This mandatory disclosure of funding arrangement, prior to the registration of request for arbitration, may prove to be advantageous to avoid any conflict of interest without any additional cost or delay. On this basis, the arbitrators and/ or ICSID will be able to run a conflict check even before the constitution of the arbitral tribunal. This is a welcome addition.

However, the language of the second part of Rule 14(2) of the ICSID AR may give rise to certain issues. This part of Rule 14(2) effectively permits parties to avail TPF even after the constitution of the arbitral tribunals. While a continuing disclosure requirement seems to have

40. Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v. Oriental Republic of Uruguay ICSID Case No. ARB/10/7.

sound underlying intentions, it could have catastrophic consequences in terms of additional cost and time. For instance, in a situation where TPF is disclosed post-initiation of arbitral proceedings, it will force the arbitrators and/ or the ICSID to re-run the conflict check, and in case of any conflict, it may lead to the reconstitution of an arbitral tribunal. Such late-stage reconstitution will increase time and costs and take away one of the most important advantages of disclosure.[41] Thus, the author believes that to avoid such disruption of the arbitral proceedings, the ICSID AR should have clarified that post-registration, the parties shall mandatorily disclose any funding proposed to be availed, but only be allowed to avail such funding from a particular funder if it does not result in any conflict.

(iii) Disclosure of the identity of the ultimate beneficial owners – The most unique feature of the amendments lies in the last line of Rule 14(1) of the ICSID AR, which mandates parties to disclose the names of persons or entities in control of the funder. Initially rejected by the ICSID Secretariat during five rounds of consultation,[42] this provision was incorporated in the last round on account of constant pressure from several Member States. These States requested for a disclosure of the funder's corporate structure and ultimate beneficial owner ("**UBO**") as an additional safeguard to avoid potential conflicts.

The author agrees that this provision (unique to the ICSID AR) can potentially avoid any latent conflicts, especially in circumstances where the funder is a shell company/ special purpose vehicle incorporated only for avoiding direct conflict. However, this unique feature is also the subject of major criticism as the ICSID Secretariat, or the proposing Member States have failed to address the following issues regarding the disclosure of UBO:

a) They put a higher threshold of mandatory disclosure on the funder as compared to the funded party itself, which is not required to provide any information about its corporate structure or UBO;

b) The corporate structure of funders and/ or their holding investors is considered to be highly confidential and sensitive commercial information. Sharing such information might put the funders at risk

41. Sarah (n 13), 1200.
42. ICSID Secretariat, 'ICSID Proposals for Amendment of the ICSID Rules, Working Paper #6', ('Working Paper #6') (12 November 2021), 18 https://icsid.worldbank.org/sites/default/files/documents/ICSID_WP_Six.pdf accessed 20 October 2022.

of being in violation of confidentiality agreements or pose other financial risks;

c) This provision has the potential to create significant confusion among parties about the extent of the disclosure, making it unclear and difficult to comply with; and

d) In any event, Rule 14(4) of the ICSID AR grants discretionary power to arbitral tribunals to order such disclosure, if and when required. Therefore, there was no need to make disclosure of UBO mandatory in all proceedings.

Thus, it remains to be seen if this provision will be beneficial in avoiding conflicts or will cause further confusion for the parties.

(iv) The Funding Agreement Dilemma - The ICSID AR seem to adopt a balanced approach regarding the controversial issue of disclosure of terms of the TPF agreement. Unlike other institutional rules such as ICC, which do not address the issue of tribunals' power to call for disclosure of terms of the agreement,Rule 14 (4) of the ICSID AR reinforces the tribunals' discretionary power to '*order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3)*'. This seems to be a restatement of the unamended position as tribunals have always had the discretion under the previous general rules on evidence (AR 34(2)(a)) to order disclosure of relevant materials, arguably including the funding arrangement.[43]

Furthermore, the fact that this discretionary power has to be exercised cautiously and only in compelling circumstances is evident from the discussions surrounding the finalisation of the text of Rule 14(4) of the ICSID AR, and the ICSID Secretariat's dismissal of the suggestion of some Member States to make disclosure of '*further information*' mandatory on request of a non-funded party. This is primarily because a funding agreement is an outcome of negotiations between the funding parties and contains sensitive information, access to which may give the arbitrators or the opposite party insights on the funder/ funded party's view on the merits of the matter, weakness, settlement strategy, etc.

It is for this reason that the ICSID was also quick to dismiss the suggestion of one Member State to disentitle a party from invoking Confidential Business

43. RSM, ICSID Case No. ARB/12/10; S&T Oil, ICSID Case No. ARB/07/13.

Information ("**CBI**") privilege as the basis for not disclosing information. The ICSID Secretariat rightly realised that the funding arrangement would contain confidential and protected information, and tribunals would have the power to address this under Rule 14(4) of the ICSID AR so as to order disclosure without violating any evidentiary privileges of the parties on a discretionary and scarce basis.[44]

Nevertheless, while the practical implications of this rule and how the tribunal will address the issue of disclosure of further information remain to be seen, it appears that Rule 14(4) has the potential of opening a new battlefield around whether and to what extent, such powers ought to be exercised, especially in relation to SFC requests.

4. SECURITY FOR COSTS AND TPF

Security for costs, as the name suggests, is a form of provisional/ interim measure which mandates a party to deposit security to cover the parties' (predominantly the respondent's) estimated costs to be incurred in the arbitral proceedings, including legal costs, tribunal and administrative fees.[45] It is aimed at guarding the parties (primarily respondents) against an unfortunate yet probable circumstance of having to incur legal costs on an unmeritorious or frivolous claim, but are unable to recover or enforce potential costs award passed in their favour due to the opposite party's reluctance or incapability to pay. Thus, it must be distinguished from other forms of security, for instance, the security for anticipated damages.[46]

The policy consideration underlying SFC, especially in the context of investment arbitrations, is to balance the interests of the respondent State to recover legal costs (which are less likely to be judgment-proof) on the one hand,[47] and the claimant's right of access to justice (who may be facing financial difficulties on account of the respondent State's actions and/ or misappropriation).[48] This problem is further exacerbated on account of the existence of TPF as it could lead to a situation of '*arbitral hit-and-run*'

44. ICSID Secretariat, 'ICSID Proposals for Amendment of the ICSID Rules, Working Paper #5', (15 June 2021), 279 https://icsid.worldbank.org/sites/default/files/publications/WP%205-Volume1-ENG-FINAL.pdf accessed 20 October 2022.
45. Sarah Brewin & Nathalie Bernasconi-Osterwalder, 'IISD Best Practices Series: Securities for Costs (2018) 1.
46. Miriam K Harwood, Simon N Batifort and Christina Trahanas, 'Third Party Funding: Security for Costs and other key issues' in Barton Legum (ed), *The Investment Treaty Arbitration Review* (2nd edn, 2017) 10, 104.
47. Working Paper #6, 230 para 498.
48. *Ibid.*

in which the claimant's arbitration cost is funded by a third-party funder but who might not be liable to meet any cost award passed against the claimant.[49]

Against this context, the author examines two questions: *First*, whether, and in what circumstances, do arbitral tribunals have the authority to award SFC. *Second*, in the event that arbitral tribunals have the power to award SFC, how does the existence and terms of TPF affect the decision of grant of SFC.

A. Role of TPF While Granting SFC – An Examination of Other Arbitral Institutional Rules and Treaties

The primary issue before an arbitral tribunal adjudicating a request for SFC is to first determine whether it has the authority to entertain such requests. With time, it has become clear that most institutional rules grant the tribunal the power to award SFC, either expressly or impliedly. For instance, Article 25.2 of the Arbitration Rules of the London Court of International Arbitration (2014), Article 24 of the HKIAC Rules, Article 24(j) of SIAC Rules, and Article 38 of the Stockholm Chamber of Commerce (SCC) Arbitration Rules, 2017 give explicit power to the arbitral tribunal to order SFC.

On the other hand, most other major arbitral institutions, including the ICC, do not contain a specific provision governing SFC. Even then, it is recognised and accepted that the general power of a tribunal to grant provisional or interim measures can be extended to encompass SFC.[50]

Even though most of the institutional rules grant implied or express authority to award SFC, they do not contain any guiding principles for the arbitral tribunal while adjudicating on a request for SFC. Further, none of these institutional rules, expressly or impliedly, address the implications of TPF on requests for SFC.[51] Thus, the principles and factors for determining SFC and the role of TPF in this process is left to tribunal's discretion.

In general, arbitral tribunals constituted under the aegis of these institutional rules have been reluctant to grant SFC. This is particularly true

49. Young Hye (Martina) Chun, '"Security for Costs" Under the ICSID Regime: Does it Prevent "Arbitral Hit-and-Runs" or Does it Unduly Stifle Third-Party Funded Investors' Due Process Rights?' (2021) 21 Pepp. Disp. Resol. L.J. 477, 479.
50. Miriam (n 46), 105.
51. ICCA-Queen Mary Report (n 6), 176.

for investment arbitrations, as SFC has been ordered in rare circumstances. One such instance is the arbitration of *Serafín García Armas and Karina García Gruber* v. *The Bolivarian Republic of Venezuela*,[52] ***(Armas)*** wherein the Tribunal concluded that there were '*exceptional circumstances*' which warranted the grant of SFC. These circumstances were that the absence of any resources available with the Claimant to pay the adverse costs order; and the Claimant had availed TPF arrangement which precluded the funder from paying any potential costs.[53] Therefore, the tribunal concluded that there were '*exceptional circumstances*' which warranted the grant of SFC. However, the tribunal in *Armas* clarified that mere existence of TPF cannot be a ground to grant SFC.

Additionally, recent investment agreements like the EU-Vietnam Investment Protection Agreement[54] and the draft EU-Mexico Global Agreement[55] also empower the arbitral tribunals to grant SFC. However, as is the case with institutional rules, these agreements do not provide any determining factors for the grant of SFC, although they impose a somewhat lower threshold of '*reasonable grounds*' to ascertain the inability of a Claimant-investor to pay costs. Pertinently, however, the EU-Vietnam Investment Protection Agreement provides that while considering these requests for SFC, the tribunal shall take into account the existence of TPF,[56] thereby promoting the general view that TPF can play a role while assessing requests for SFC.

B. SFC Requests and the Role of TPF Under the Erstwhile ICSID Regime

To effectively understand the significance of the ICSID reforms, it is imperative to examine how SFC was regulated under the erstwhile ICSID regime. Similar to other major institutional rules, under the previous ICSID regime, there was no separate rule pertaining to SFC and it was regulated as a provisional measure in terms of Article 47 of the ICSID Convention and Rule 39 of the ICSID AR. Therefore, while addressing the issue of SFC, arbitral tribunals generally applied the settled basic standard for the grant of provisional measures,[57]: (a) identification of the rights to be

52. Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela, UNCITRAL, PCA Case No. 2013-3.
53. *Ibid*.
54. EU-Vietnam Investment Protection Agreement, 30 June 2019, art. 3.48.
55. EU-Mexico Global Agreement, 21 April 2018, art. 22.
56. EU-Vietnam Investment Protection Agreement, 30 June 2019, art. 3.37.
57. Young (n 49), 482.

preserved; (b) requested measures are necessary to protect that interest; and (c) existence of urgency and necessity.

Additionally, SFC requests were granted only in '*exceptional circumstances*' - such as abusive conduct or bad faith.[58] This reflects the balancing act between the grant of SFC requests and the claimant's right to access to justice, which does not arise while considering requests for other provisional measures. Thus, ICSID tribunals have previously put a higher burden on respondent States, resulting in the dismissal of most SFC applications, except in '*two and a half*' arbitration proceedings.[59]

The first instance where SFC was granted by an ICSID Tribunal was in the case of *RSM Production Co. v. St. Lucia,*[60]***(RSM)*** wherein the majority Arbitrators granted St. Lucia's request for SFC based on the Claimant's history of non-compliance with costs awards, its admitted poor financial status, and its reliance on a third-party funder who was presumably not liable for any adverse costs.[61] In *RSM*, the Claimant's history of non-compliance was considered a compelling exceptional circumstance, which was further supported by other factors such as the existence of TPF. In his assenting opinion, the Arbitrator Gavan Griffith proposed that in instances where there is TPF, the burden be shifted on the Claimant to prove why SFC should not be ordered.[62]

Relying on *RSM*, in 2018, another ICSID Tribunal in *Armas v. República Boliviariana de VenezuelaI*[63] granted SFC. In *Armas*, the Tribunal's order was significantly influenced by the existence of a funding arrangement under which the funder was not liable for an adverse costs order. Thus, the Tribunal shifted the burden of proof, directing the Claimant to prove its solvency and ability to pay potential cost orders. On the Claimant's failure to discharge this burden, the Tribunal had ordered SFC to the applicant party.

58. Dr. Sam Luttrell, 'Observations on the Proposed new ICSID Regime for Security for Costs' (forthcoming) 36(3) Journal of International Arbitration, 5.
59. Young (n 49), at 480.
60. RSM, ICSID Case No. ARB/12/10.
61. RSM, ICSID Case No. ARB/12/10, paras 81-82.
62. RSM, ICSID Case No. ARB/12/10, para 18.
63. Luis García Armas v. Bolivarian Republic of Venezuela ICSID Case No. ARB(AF)/16/1, Judgment of the Hague Court of Appeal on Set Aside (19 January 2021).

Following *RSM* and *Armas,* the majority Arbitrators *in Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan,*[64] though having ordered the grant of SFC initially owing to the Claimant's lack of funds and reliance on TPF, later rescinded the order on account of the Claimant's failure to arrange for a security amount. This was done as the order on SFC would have resulted in denial of access to justice to the Claimant.[65]

A closer look at the above arbitral decisions makes it evident that SFCs have been ordered sparingly and only on determining the existence of *'exceptional circumstances'*. While there is no definitive test to determine the existence of such circumstances, tribunals have generally considered factors such as past non-compliances, bad faith, and financial incapability to cover adverse costs. At the same time, tribunals have consistently observed that the mere existence of TPF is not sufficient to constitute *'exceptional circumstances'* so as to warrant the grant of SFC. For instance, the Tribunal in *Euro Gas Inc. and Belmont Resources Inc. v. Slovak Republic*[66] observed that *'...third party funding which has become a common practice do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs.*'[67] That said, as observed in RSM, Armas and Herzig TPF arrangements which preclude the funder's liability for adverse costs has been crucial in the determination of SFC in requests.

C. Role of TPF While Granting SFC – Examining The New ICSID Regime

Considering the increase in SFC applications and inconsistency in the approach of the arbitral tribunals, the ICSID Secretariat has now introduced a new standalone provision (Rule 53 of ICSID AR) governing SFC requests. This marks a shift from the previous provisional measure-based regime.

64. Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan ICSID Case No. ARB/18/35, Decision on Security for Costs (27 January 2020), paras 1, 2, 22.
65. Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan ICSID Case No ARB/18/35, Procedural Order No. 5 (9 June 2020), paras 22–23.
66. Euro Gas Inc. and Belmont Resources Inc. v. Slovak Republic ICSID Case No. ARB/14/14 Procedural Order No. 3 Decision on the Parties' Request for Provisional Measures (23 June 2015).
67. *Id*., paras 121-123.

The Rule 53 of the ICSID AR has been provided herein below for easy of reference:

'Rule 53

(1) Upon request of a party, the Tribunal may order any party asserting a claim or counter claim to provide security for costs.

(2) The following procedure shall apply:

(a) the request shall include a statement of the relevant circumstances and the supporting documents;

(b) the Tribunal shall fix time limits for submissions on the request;

(c) if a party requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request so that the Tribunal may consider the request promptly upon its constitution; and

(d) the Tribunal shall issue its decision on the request within 30 days after the later of the constitution of the Tribunal or the last submission on the request.

(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider all relevant circumstances, including:

(a) that party's ability to comply with an adverse decision on costs;

(b) that party's willingness to comply with an adverse decision on costs;

(c) the effect that providing security for costs may have on that party's ability to pursue its claim or counter claim; and

(d) the conduct of the parties.

(4) The Tribunal shall consider all evidence adduced in relation to the circumstances in paragraph (3), including the existence of third-party funding.

(5) The Tribunal shall specify any relevant terms in an order to provide security for costs and shall fix a time limit for compliance with the order.

(6) If a party fails to comply with an order to provide security for costs, the Tribunal may suspend the proceeding. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.

(7) A party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.

(8) The Tribunal may at any time modify or revoke its order on security for costs, on its own initiative or upon a party's request."[68]

Rule 53(1) of the ICSID AR provides that an arbitral tribunal may order any party to provide SFC, upon a request being made by a party. Specifically, Rule 53(3) provides a list of non-exhaustive factors an arbitral tribunal should consider while deciding an SFC request. These factors include a party's ability to comply with an adverse decision on costs, its willingness to comply with an adverse decision on costs, the effect of SFC on a party's ability to pursue its claims/ counter claim, and the conduct of the parties.

A bare reading of Rule 53(3) evidence the ICSID Secretariat's intent to provide general guidelines based on the existing practice of tribunals, without inhibiting the flexibility to address varying and developing factual circumstances. The broad formulation of '*all relevant circumstances*' further reflects the practice of arbitral tribunals to consider all relevant factors cumulatively and not in isolation. Thus, while not explicitly providing that SFC should be ordered in '*exceptional circumstances'*, Rule 53(3) of the ICSID AR envisages similar conditions and factors that were being considered by the arbitral tribunal under the erstwhile ICSID regime.

The exclusion of TPF as a relevant circumstance in Rule 53(3) is laudable. This is in consonance with the general position of arbitral tribunals that the existence of TPF *per se* is not the sole determinative factor for grant of SFC requests, as it could lead to parties obtaining SFC on a systematic basis and thereby blocking legitimate claims.

However, an issue arises with the ambiguous and uncertain language of Rule 53(4) of the ICSID AR, which provides that an arbitral tribunal shall consider *all* evidence adduced in relation to the circumstances in Rule 53(3) of the ICSID AR, including the existence of TPF. It is possible that Rule 53(4) of the ICSID AR, read with Rule 14(4) of the ICSID AR will unnecessarily increase requests for disclosure of terms of the funding

68. ICSID AR., R. 53.

agreement, specifically regarding the liability of the funder in case of adverse costs. Read with the language of Rule 53(4) of the ICSID AR, which provides that the tribunal '*shall*' consider the existence of TPF as evidence of relevant circumstances mentioned in Rule 53(3) of the ICSID AR, this will mandate the tribunals to order disclosure of terms of the funding agreement. The author believes that the specific inclusion of TPF in Rule 53(4) of the ICSID AR may prove to be counterproductive since arbitral tribunals have always had the power to order such disclosure and consider the existence of TPF while determining a request for SFC in terms of Rule 53(3) of the ICSID AR, if required.

Going one step further, the author argues that the existence of TPF or even the fact that a TPF agreement precludes the funder from any potential costs, should have no bearing on the determination of SFC requests. TPF should not be considered as evidence of the existence of any '*relevant circumstance*' in terms of Article 53(3) of the ICSID AR, including the financial ability of the claimant to cover adverse costs. Consideration of TPF as evidence of '*relevant circumstances*' under Rule 53(3) of the ICSID AR appears to be based on an incorrect and dated premise that TPF is only obtained by impecunious claimants, and the existence of TPF will reveal their impecuniosity. As set out in Part I of this paper, TPF is now being availed by impecunious and solvent claimants alike, and therefore, no presumption can be drawn regarding the financial capabilities of the claimant.

The author argues that a solvent claimant using TPF as means of financing its arbitration cost should not be treated differently from a claimant who is self-financing its arbitration cost. In reality, the fact that the claimant has obtained TPF may put it in a better position to satisfy any cost liability in comparison to a party that would have used its own assets to pursue the arbitration claim. Further, even for an impecunious claimant, requests for SFC should be adjudicated on the basis of other '*relevant circumstances'* to be determined on a case-to-case basis. In the event that the respondent State is able to prove the existence of such '*relevant circumstances*', which warrant a grant of SFC, the impecunious claimant may be called upon to demonstrate that it either has sufficient funds to cover the adverse costs order or it is due to the wrongful act of the respondent State that it is so impecunious that an order of SFC would impede its ability to continue with the case. In such a scenario, the claimants may also be allowed to use any provision obliging the funder to bear adverse costs as a defence to the SFC order. Thus, the existence of TPF should have no bearing on the

determination of the SFC request, except as a defence for an impecunious claimant. Against this context, the inclusion of TPF as evidence of '*relevant circumstances*' under the ICSID AR may be redundant and unnecessary.

5. CONCLUSION

The proliferation of TPF in investment arbitrations in the last two decades and the continuous deliberations surrounding its usage prompted the ICSID Secretariat to address the issue. Accordingly, the new ICSID AR include specific provisions governing the disclosure of TPF and its implication on SFC requests.

The systematic mandatory disclosure requirement introduced under Rule 14 of the ICSID AR has been lauded by all stakeholders, as the disclosure regime is most conducive to the development of TPF while maintaining the independence of arbitral tribunals. However, a careful analysis of Rule 14 of the ICSID AR highlights that the ICSID Secretariat may have failed to address some of the emerging concerns around such disclosure. *First*, there is no clarity as to how arbitral tribunals will address any conflict issue arising on account of funding obtained by the parties post the constitution of the arbitral tribunal. This may be misused by the respondent States to delay the arbitral proceedings by entering into a bogus funding agreement with a conflicted party, which might result in the reconstitution of the arbitral tribunal. *Second*, the imposition of costs as penalty for non-compliance with the disclosure requirement, especially when such misrepresentation or non-compliance could result in late-stage reconstitution of the tribunal, does not adequately satisfy the purpose of the rule itself. *Third*, there remains a question on the necessity for introducing Rule 14(4) of the ICSID AR which explicitly empowers arbitral tribunals to order disclosure of further information, as this further information is irrelevant to the issue of conflict.

In addition to these concerns around disclosure, the ICSID Secretariat has also failed to clarify the role of TPF in determining SFC requests. The reference to TPF as a factor to be considered while determining '*relevant circumstances*' in Rule 53 (4) of the ICSID AR may further convolute the existing practice, rather than clarifying it. The author believes that the ICSID Secretariat could have examined the possibility of TPF being entirely irrelevant to the determination of SFC requests while formulating Rule 53 of the ICSID AR.

THE INDIA-BRAZIL BIT: ONE STEP FORWARD, TWO STEPS BACK

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ABSTRACT

The Investment Cooperation and Facilitation Treaty Between the Federative Republic of Brazil and the Republic of India is a landmark international investment agreement for several reasons. Both countries are one of the largest economies in the world and have denounced the forum of investor-state arbitration in the past. Both countries have, in recent years, demonstrated their displeasure with the constraints on the right to regulate that the investor-state dispute settlement mechanism embodies. Thus, this bilateral treaty is apotentially ground-breaking treaty. This article critically analyses important provisions of the treaty. The article first gives an overview of the approach taken by the two countries with respect to investment agreements. It then analyses important provisions under the treaty. The last part of the article discusses the dispute settlement mechanism proposed under the treaty and critically analyses the decision to exclude the mechanism of investor-state arbitration. The overall objective of the article is to review the substantive and procedural provisions of the treaty to show how this type of agreement strikes a new balance between the protection of investors and the right to regulate.

1. INTRODUCTION

India's approach to foreign investment has seen several phases in the past few decades. India's recent outlook towards investment agreements is a product of India's loss in the *White Industries* case, wherein the tribunal found that the delayed justice in India violated the effective means standard of asserting claims.[1] Post the *White industries* case, India further witnessed several bilateral treaty claims being filed against it. This led to India issuing

1. White Industries Australia Limited v. The Republic of India UNCITRAL, Final Award (30 November 2011).

a model bilateral treaty in 2015,[2] which was the basis for all future treaties with India.

There has been a similar movement in Brazil's outlook on investment agreements. The new generation treaties negotiated by Brazil showcase Brazil's new approach to investment agreements - tailor-made agreements in tangent with Brazil's requirements. These agreements are known as Agreements on Cooperation and Facilitation of Investments ('ACFIs'). The new generation ACFIs signed by Brazil are tailored towards balancing the rights of investors and the State's right to regulate.[3] The agreements envisage 'cooperation' and 'facilitation', not investment 'protection'.[4] ACFIs proposed by Brazil also, interestingly, provide for State-to-State arbitration and not investor-state arbitration.[5]

The India-Brazil BIT is said to be an amalgamation of the two approaches of the countries. It was signed by the parties on 25 January 2020. Notably, just like the ACFIs signed by Brazil, the India-Brazil BIT has no provisions for investor-state arbitration.

2. IMPORTANT PROVISIONS

A. Objective

The characterization of the India-Brazil BIT is set in the objective clause, which states "*to promote cooperation between the Parties in order to facilitate and encourage bilateral investments*".[6] As mentioned earlier in the context of Brazil's signed ACFIs, this objective showcases the emphasis

2. Revised Model Indian Bilateral Investment Treaty, (2015) https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf accessed 8 February 2023.
3. Robert Volterra and Giorgio Francesco Mandelli, 'India and Brazil: Recent Steps Towards Host State Control in the Investment Treaty Dispute Resolution Paradigm' (2017) VI Indian Journal of Arbitration Law, 91.
4. Prabhash Ranjan, 'India-Brazil Bilateral Investment Treaty – A New Template for India?' Kluwer Arbitration Blog (19 March 2020) http://arbitrationblog.kluwerarbitration.com/2020/03/19/india-brazil-bilateral-investment-treaty-a-new-template-for-india/ accessed 18 September 2022.
5. See Brazil-Angola Cooperation and Facilitation Agreement (signed on 1 April 2015, entered into force on 28 July 2017) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4720/download.
6. The Investment Cooperation and Facilitation Treaty Between the Federative Republic of Brazil and The Republic of India (signed on 25 January 2020) (hereinafter 'India-Brazil BIT') art. 1.

on the *facilitation* and *encouragement* of investments by the countries, rather than the *protection* of investors.

B. The Definition Clause

Article 2.4 of the India-Brazil BIT defines investment as – "*an enterprise, including a participation therein, in the territory of a Party, that an investor of the other Party owns or controls, directly or indirectly, or over which it exerts a significant degree of influence that has the characteristics of an investment, including the commitment of capital, the objective of establishing a lasting interest, the expectation of gain or profit and the assumption of risk.*"[7]

The definition is an enterprise-based definition of investment. This is similar to the definition in India's model bilateral treaty.[8] This form of definition is in contrast to the asset-based definition. In the former, the investment is associated with an enterprise. In the latter, *'any asset'* can be covered under the definition. This essentially limits the investments covered under the treaty to investments by entities that have an actual presence in the host State.

The question of what constitutes an investment for the purpose of a bilateral treaty is a heavily discussed issue in investor-state arbitration cases. Understandably so, as whether an investor's activities fall within the purview of investment or not is a deciding factor for an arbitral tribunal's jurisdiction.

First-generation treaties often provided a broad definition of investment. These treaties mainly covered established businesses that invested capital in the host State.[9] The scope of investment was usually kept broad to provide a larger scope of investments with the necessary protection. However, in recent years, treaties have been drafted with a more restricted definition.[10]

7. India-Brazil BIT, signed 25 January 1996, art. 2.4.
8. See n 2.
9. Noah Rubins, 'The Notion of 'Investment' in International Investment Arbitration', in Norbert Horn and Stefan M. Kröll (eds), Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, *Studies in Transnational Economic Law* (Kluwer Law International 2004) 283-324.
10. Wenhua Shan and Lu Wang, 'The Definition of "Investment": Recent Developments and Lingering Issues', in Jean Engelmayer Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration, ICCA Congress Series* (Kluwer Law International 2019) 169 - 197.

Duration of investment, element of risk, regularity of profit and return and a substantial commitment and significance to the host State's development are considered the general characteristics of a protected investment.[11] These characteristics elucidated by Schreuer[12] were first followed by a tribunal in Fedax v. Venezuela.[13] These characteristics were later refined in Salini v. Morocco[14], which stated:

> *'The doctrine generally considers that investment infers: contributions, certain duration of performance of the contract and a participation in the risks of the transactions. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.'*

The *Salini criteria* have been implemented by some tribunals and have been rejected by others.[15] However, the abovementioned characteristics have, in some form, or the other the basis for adjudging whether an investment has been made by an investor or not.

The India-Brazil BIT implements much of the *Salini criteria* but excludes 'significance for the development' of the host State as this characteristic is generally not easy to prove for investors. In essence, the BIT tightens the scope of protected investments. This can also be seen by the fact that the article enlists not just what falls within the definition but also what does not constitute an investment.[16]

11. Prabhash Ranjan, 'Definition of Investment in Bilateral Investment Treaties of South Asian Countries and Regulatory Discretion' (2016) 26 Journal of International Arbitration 217.
12. C.H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001).
13. Fedax NV v. Republic of Venezuela ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997) para 63.
14. Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco [I] ICSID Case No. ARB/00/4, Decision on Jurisdiction (31 July 2001) para 52.
15. Noah Rubins, 'The Notion of 'Investment' in International Investment Arbitration', in Norbert Horn and Stefan M. Kröll (eds), Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, Studies in Transnational Economic Law (Kluwer Law International 2004) 283 -324.
16. India-Brazil BIT, signed 25 January 1996, art. 4.1.

C. Substantive Protections

1. *Fair and Equitable Treatment*

One of the key unique features of the India-Brazil BIT is the forfeiture of the 'fair and equitable' ('FET') clause. The FET clause essentially states that foreign investors should be accorded 'even-handed', 'unbiased' 'just' and 'legitimate' treatment in host States.[17] The language instead enlists certain prohibited measures. These enlisted measures include 'denial of justice', 'breach of due process' and 'discriminatory behaviour'.[18] The terms used in the language of the BIT are the standard terms used to advocate for a case of breach of fair and equitable treatment. However, by choosing to replace the term FET with more constrained language, the countries have chosen to restrict the scope of the protection and safeguard their right to regulate. The provision also does not use the term 'Full Protection and Security'. Instead, it mentions discrimination in the protection of physical security *only;* clearly demonstrating the policy of tightening the scope of protection.[19]

This move by the countries is due to the vague nature of the FET clause, which has led to several arbitration claims. It has been previously stated that the scope of the FET provision can only be assessed based on specific case scenarios.[20] A classic example of this is the quandary faced in the case of *Philip Morris* v. *Uruguay.*[21] The *Philip Morris* case caused much debate as it demonstrated that the investor-state arbitration system could be used to question the public policy measures of a State. In the case, Philip Morris filed a claim against Uruguay's plain packaging law. Philip Morris contended that the FET clause was violated as the regulations breached their legitimate expectations as investors because the measures were not based on sufficient scientific research. This argument, however, was eventually dismissed. Due to the ambiguity of the contours of the FET standard, any measure of the State could be subject to a claim. Thus, the objective of the

17. MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile ICSID Case No. ARB/01/7, Award, (May 25, 2004) para 113.
18. India-Brazil BIT, signed 25 January 1996, art. 2.4.
19. India-Brazil BIT, signed 25 January 1996, art 4.1(*v*).
20. Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) para. 118; Chemtura Corporation v. Government of Canada, (formerly Crompton Corporation v. Government of Canada) UNCITRAL, Award (2 August 2009) p. 123.
21. Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (8 July 2016).

countries is to streamline the possible measures that violate the rights of the investor.

The clause also states that only international law as recognised under the laws of the States is applicable.[22] For illustration**,** India follows the 'doctrine of dualism' which provides that international law is not automatically incorporated into the domestic legal order and that for an international convention or a treaty to be *'embodied'* in Indian law, it has to be enacted by the Indian parliament.[23] Thus, under this BIT, parties will first have to demonstrate that there has been a breach of the 'denial of justice' standard or the 'breach of due process' standard *as incorporated* under Indian law. It has been argued that the wording of this provision effectively leads to the exclusion of the FET standard.[24] The author disagrees. While the ramifications of this restriction are yet to be seen, the author believes the provision upholds the essence of an FET standard. In the author's opinion, the *actual* difference or ramifications of the change in wording is unlikely to be enormous. Both India and Brazil are nations with advanced and well-structured laws that recognize principles of international law. Thus, the standards under Indian or Brazilian law are in tangent with internationally recognized standards. The restriction is unlikely to lead to the exclusion of fair and equitable treatment to the investors. A better characteri**s**ation of the clause would be that the contours of the FET standard are set *within the scope* envisaged under the national laws of the two States; ensuring that obligations or standards not incorporated under Indian law or Brazilian law are not imported under the garb of customary international law.

2. *Expropriation*

Article 6.3 of the India-Brazil BIT explicitly states *'that this Treaty only covers direct expropriation'*. Indirect expropriations are thus not covered by the BIT. This is consistent with Brazil's stance on expropriation in recent times.[25] Indirect expropriation, also known as, creeping expropriation occurs when a measure or a series of measures by a host state leads to near total deprivation of the investor's investment. Whether a host states

22. India-Brazil BIT, signed 25 January 1996, art. 4.1.
23. Constitution of India, Art. 253; Union of India v Azadi Bachao Andolan (2004) 10 SCC 1; Maganbhai Ishwarbhai Patel v. Union of India (1970) 3 SCC 400 : (1969) 3 SCR 254.
24. Henrique Choer Moraes and Pedro Mendonc¸ 'Cavalcante, The Brazil-India Investment Cooperation and Facilitation Treaty: Giving Concrete Meaning to the "Right to Regulate" in Investment Treaty Making' (2021) 36 ICSID Review 304, 313.
25. See n 5.

measure constitutes as indirect expropriation or not requires a 'a case-by-case, fact-based inquiry".[26]

Indirect expropriation again has a broad and vague scope. Consistent with the approach in the previous provisions, the intention of the India-Brazil BIT is to streamline the scope of protection.

3. *Most Favoured Nation ('MFN') Clause*

An example of an MFN clause can be seen below:[27]

> *"Neither Contracting Party shall subject investments and activities associated with such investments by the investors of the other Contracting Party to treatment less favorable than that accorded to the investments and associated activities by the investors of any third State."*

Essentially, through an MFN clause, claimants can import more favourable clauses from other investment treaties signed by the host State. There is considerable variance in case law on whether MFN clauses are applicable to dispute resolution clauses. In *Maffezini* v. *Spain,*[28] the Spain-Argentina BIT had an exhaustion of local remedies clause. However, Maffezini successfully argued that the Spain-Chile BIT does not contain an exhaustion of local remedies clause and hence the jurisdiction of tribunal should be upheld in the case. There have also been multiple cases where the importation of dispute resolution clauses has been rejected by the tribunal.

The India-Brazil BIT does not contain an MFN clause. This is consistent with India's stance on MFN clauses. India's model bilateral treaty does not contain an MFN clause, as well.[29] In the *White Industries* case[30], the applicable BIT was the India-Australia BIT. The claimant imported the 'effective means' provision from the India- Kuwait BIT. An 'effective means' clause states that a host State must provide to an investor effective

26. 2012 U.S. Model Bilateral Investment Treaty, para 4 of annex. B https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf accessed 7 February 2012.
27. Agreement between the Government of the Republic of Benin and the Government of the People's Republic of China concerning Promotion and Reciprocal Protection of Investments (signed 18 February 2004) art. 3.2.
28. Emilio Agustín. Maffezini v. Kingdom of Spain ICSID Case No. ARB/97/7, Award (November 13, 2000).
29. See n 2.
30. See n 1.

legislative means to assert its rights. The award rendered found India liable to pay heavy costs for the breach of this imported 'effective means' clause.[31] Naturally, India has since not been an advocate of the MFN clause.

The author believes that the MFN clause is an important clause to ensure equality of protection for foreign investors. Thus, the complete deletion of the clause in the India-Brazil BIT is overly restrictive. However, it is also understandable why the countries took the step. The India-Brazil BIT's language and clauses vary from the other treaties signed by the countries. Hence, the addition of the MFN clause will defeat the objective of the unique drafting of the India-Brazil BIT.

4. *Corporate Social Responsibility ('CSR')*

Including a CSR clause in bilateral treaties is a very recent trend in investment agreements. CSR refers to certain principles or practices that companies and multinational corporations follow to reduce any negative impact or increase their positive impact on the lives of the people living in the host State. These clauses generally obligate investors to contribute to sustainable development in the host State and to voluntarily comply with principles of 'responsible business conduct'.[32]

The author believes a CSR clause goes a long way in balancing the rights and obligations of a foreign investor. Investment agreements usually only include obligations of the State. Although a foreign investor has to comply with the national laws of the host State while making an investment, having a CSR clause helps elevate these obligations to an international obligation. Thus, this provision may encourage foreign investors to participate in social causes in the host State and make a positive impact.

5. *Public Policy Exceptions*

The India-Brazil BIT also includes a public policy exception clause in Article 23. A public policy exception clause essentially states that measures undertaken by host States for the protection of certain public policies are exempted from scrutiny. The wording of the clause under the BIT is similar to the wording given in Article XX of the General Agreement on Tariffs and Trade ('GATT').[33] The clause is *parimateria* to Article 32.1

31. See n 1 at para 16.1.1.
32. India-Brazil BIT, signed 25 January 1996, art. 12.
33. General Agreement on Tariffs and Trade, (concluded on 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, annex 1-A.

of India's model bilateral treaty. The provision essentially states that the parties to the BIT are not prevented from executing non-discriminatory measures relating to pertinent areas of State regulation like public health, environmental protection and maintenance of public order.

The aforesaid provision is also to be read with Article 22 of the BIT, which states that each party may adopt or enforce any measure that would ensure that the investment activity within its territory is undertaken in compliance with the "*labour, environmental and health law"*[34] of the state.

The main difference between the provisions given above is that while Article 23 is a general public policy exception clause, Article 22 is specific to investment activity in the territory of the host State.

It is not uncommon in international law for State to provide similar exceptions. For example, under the European Court of Human Rights ('ECtHR') **jurisprudence** there is a doctrine known as the margin of appreciation doctrine. Under the doctrine, States are permitted space to manoeuvre their obligations under the ECtHR to meet necessary collective goals.

Under Article XX of GATT, the test to ascertain whether a measure comes under the exception is two-tiered.[35] The first tier is to ascertain whether the measure in question has an objective. The second tier would be to ascertain whether the measure in question has the requisite nexus to the objective. It can be inferred that a similar test will be used for disputes arising out of the India-Brazil BIT.

3. DISPUTE RESOLUTION MECHANISM

The most unique and noteworthy aspect of the India-Brazil BIT is the absence of a provision providing for investor-state arbitration. This aligns with the objective of the BIT.

The focus of the approach by both countries is on dispute prevention through diplomatic means. Although the provisions combine the approach of both countries, it can be stated to be more of a Brazilian model of dispute resolution.

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34. India-Brazil BIT, signed 25 January 1996, art. 22.1.
35. *The Public Order Exception under WTO Law*, in Zena Prodromou, *The Public Order Exception in International Trade, Investment, Human Rights and Commercial Disputes*, 56 (Kluwer Law International) 21.

Under the BIT, the parties are to establish a Joint Committee. This Joint Committee will comprise government officials from both countries and will have its own rules of procedure.[36] Article 18 states that any party that believes there has been a breach of the provisions under the treaty should refer the issue to the Joint Committee.[37]

To refer to an issue, either party will have to make a written request to the other party. The Joint Committee will then, within 120 days, evaluate any such submission made and prepare a report.[38] The measure in question may be a general measure or a measure affecting a particular investor. If it is a measure particularly affecting an investor, then the 'representatives *of the affected investor may be invited to appear before the Joint Committee'*.[39]

Only in the event that the dispute cannot be resolved through this procedure, shall the dispute be referred to arbitration between the States, provided each party consents.[40] Interestingly, the provisions also provide for amicus curiae briefs.[41] Another interesting feature of the arbitration procedure under the BIT is that the arbitral tribunal cannot award compensation.[42]

4. DISPUTE RESOLUTION MECHANISM- AN ADEQUATE REMEDY?

With increasing transnational trade and investment post World War II, the need was seen for a forum that would protect foreign investors' rights in a host State. However, over the years, concerns have arisen about a system *that allows big corporations to sue countries*.[43] The criticisms against the system are manifold. Below, the author highlights some of the main criticisms against the system.

Firstly, investor-state arbitration has been criticised for infringing a State's 'right to regulate'. The notion is that a tribunal of three private persons with only a commercial background should not be allowed to question a

36. India-Brazil BIT, signed 25 January 1996, art. 13.
37. India-Brazil BIT, signed 25 January 1996, art. 18.1.
38. India-Brazil BIT, signed 25 January 1996, art. 18.2.
39. India-Brazil BIT, signed 25 January 1996, art. 18.3.
40. India-Brazil BIT, signed 25 January 1996, art. 19.1.
41. India-Brazil BIT, signed 25 January 1996, art. 18.4.
42. India-Brazil BIT, signed 25 January 1996, art. 19.2.
43. Claire Provost and Matt Kennard, 'The obscure legal system that lets corporations sue countries', *The Guardian* (10 June 2015) https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid accessed 19 September 2022.

law or a regulation passed by a State. This infringes on the most basic function of a State- law-making.[44] Moreover, when a domestic court questions a law legislated by the State, it is held to certain standards of judicial accountability.[45] However, non-public actors (arbitrators) are not subjected to the same accountability. Arbitrators have been criticized for being *'elite private judges'* with no understanding of public law.[46] The fact that arbitration proceedings are usually confidential further corroborates the lack of accountability argument.

Second**,** and probably the most prominent criticism that the *Philip Morris case*[47] validated, is that foreign investors utilise the forum to *arm-twist* the host States. Investors can challenge laws relating to the public interest if they are not profitable to them via the means of investor-state arbitration. Such challenges not only dissuade the host state from enforcing certain laws but also dissuade other States that are deliberating on implementing similar laws. This is known as a 'regulatory chill'.

Thirdly, it has been contented that investor-state arbitration is a pro-investor forum. This is because only investors can file a claim through a BIT. Moreover, when a treaty is signed, only a state acquiesces to compulsory arbitration.[48] Another contention on the same lines has been that since only investors can bring a claim against States, arbitrators have a financial incentive in rendering pro-investor decisions.[49]

There are procedural criticisms against the forum as well. The main criticisms are regarding the exorbitant costs, lack of transparency, lack of predictability and no appellate review mechanism in investor-state arbitration. The exorbitant damages that may be awarded and the general

44. Diana Marie Wick, 'Legal & Business Article: The Counter-Productivity of ICSID Denunciation And Proposals For Change' (2012) 11 J. Int'l Bus. & L. 239, 247.
45. Gus Van Harten, *Investment Treaty Arbitration and Public Law* 4 (Oxford Scholarship Online, 2007).
46. Pia Eberhardt & Cecilia Olivet, 'Profiting from Injustice, How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom' (Corporate Europe Observatory 2013).
47. See n 21.
48. Robert W. Schwieder, 'TTIP and the Investment Court System: A New (and Improved?) Paradigm for Investor-State Adjudication' (2016) 55 Colum. J. Transnat'l L. 178, 185.
49. Eduardo Zuleta, 'The Challenges of Creating a Standing International Investment Court', in Jean E. Kalicki and Anna Joubin-Bret, *Reshaping the Investor-State Dispute Settlement System* 409 (2015); Gus Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion.' (2010) 2.1 Trade, Law and Development 19, 36.

expenses involved in the procedure are a substantial financial burden on the States. For example, the average claim for damages in investor-state arbitration is about $492 million.[50] Moreover, according to the Organization for Economic Cooperation and Development (OECD), the average cost of an investor-state arbitration proceeding is about $8 million.[51]

With these criticisms and the experiences that both countries have had with paying exorbitant compensation to investors through the mechanism, the exclusion of the investor-state dispute settlement ('ISDS') mechanism from the India- Brazil BIT does not come as a surprise. The World Trade Organization ('WTO') dispute settlement mechanism is closest to investor-state arbitration. The concerns around investor-state arbitration are not found to be against the WTO dispute settlement mechanism. What makes the two systems different? The biggest difference in the mechanisms is that the WTO mechanism is State-to-State arbitration. Moreover, exorbitant amounts in compensation is one of the main issues that States have with the ISDS. However, as a decision under the WTO dispute settlement mechanism doesn't significantly affect the coffers of the State, there is less opposition to the mechanism.[52] Thus, the author believes that the fact that damages are not imposed on the losing State in the WTO mechanism plays a role in its survival.

Keeping these observations in mind, the India-Brazil BIT seems to be implementing the WTO model for dispute resolution. However, a copy-paste implementation of these characteristics is unsuitable. The WTO mechanism does not cater to the needs of individual investors or private citizens. It settles disputes that are inherently matters between States. The reason why the mechanism does not impose compensation is due to the presumption of equality. It is accepted that every State is a sovereign and the measures of the State are only to be questioned to the extent that it is inconsistent with the WTO agreements. However, the context of investor-state arbitration is slightly different. Investors and States are not on an equal footing. One party, the State, holds much more power and can reduce an investor's financial power to nil. The focal point in investment protection

50. Diana Rosert, 'The Stakes Are High: A Review of the Financial Costs of Investment Treaty Arbitration', (International Institute for Sustainable Development, July 2014).
51. David Gaukrodger & Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community', (OECD Publishing 2012) http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf accessed 19 September 2022.
52. Rochelle Dreyfuss, 'The EU's Romance with Specialized Adjudication', (2016) 47 Int'l Rev. of Intellectual Property and Comp. L. 887, 889.

is not on the measure but on the economic *effect* of the measure on an investment. Thus, a tribunal's power to award compensation is crucial in investor-state disputes. If the tribunal cannot award compensation, and the investor has made exorbitant losses because of the host State's measures, will the mechanism be able to truly protect the interests of the investor?

State-to-State arbitration and the dispute prevention mechanism under the India-Brazil BIT are mechanisms that can probably safeguard the interests of investors. However, it is to be noted that the birth of investor-state arbitration in itself signifies that diplomacy as a means to protect investors has failed in the past.[53] Would a State be able to protect and advocate for the interests of its investors sufficiently? Is there a possibility that the protection of diplomatic relations between the countries may, in the future, supersede the interests of an investor? This system could also lead to further politici**s**ation of investor disputes. This may lead to either of two possibilities; added political pressure on a host State or an investor's interests being diminished to further the political interests of the States. Either possibility would limit the objectives of investment protection. Moreover, this mechanism will also lead to further red-tapism. Investors will have to first deal with the government officials in their State and patiently push their agenda forth. Investors will then have to wait for a response from the host State. Bureaucracy across the world is often critici**s**ed for being slow and cumbersome. By adding another layer of bureaucracy, the procedure may further add to the woes of an investor.

The BIT states that the Joint Committee will be comprised of government representatives.[54] Some investor-state disputes involve very complex facts and legal issues. A question arises as to whether the members of the Joint Committee would have the necessary knowledge to understand and evaluate the issues presented to it.

Notably, the BIT also states that if the measure in question involves a specific investor, then *"a Party may deny submission to the dispute prevention procedure matters pertaining to a specific investor which have been previously submitted by that investor to other dispute settlement mechanisms, unless those proceedings are withdrawn from other dispute settlement mechanisms."*[55]

53. Gus Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2.1 Trade, Law and Development 19, 33.
54. India-Brazil BIT, signed 25 January 1996, art. 13.2.
55. India-Brazil BIT, signed 25 January 1996, art. 18.3(*c*).

This clause, the author believes, is concerning. This clause essentially says that a party may 'deny' the submission of an investor. The rights given to government officials herein are sweeping. Moreover, the clause also restricts the investor from bringing any other form of claim against the host State. This excessively restricts the rights of the investor. In this scenario, the investor may have to forfeit any claims it has brought against the host State in national courts. If the investor does not receive adequate protection from the mechanism laid down in the BIT, then the investor would be left without a remedy. This situation is likely to arise because a tribunal under the BIT cannot award compensation.

5. CONCLUSION

The author believes there are concerning elements to the dispute resolution mechanism under the India-Brazil BIT. While the restriction of the scope of some of the provisions balances the State's right to regulate and the safeguards accorded to investors, the dispute resolution mechanism under the BIT is excessively restrictive. The author believes that a more balanced approach would have been to have the first step of dispute prevention and then the possibility of investor-state arbitration. This would have adequately balanced the rights of both stakeholders. An overly restrictive dispute resolution clause will lead to more forum shopping. Investors will find ways to ensure that their dispute is heard under the provisions of a different treaty with more favourable provisions. The only companies that will not be able to find a way out of a restrictive BIT are smaller non-multinational companies. The brunt of a cumbersome and inadequate dispute settlement mechanism will ultimately be borne by companies with limited capital. This will defeat the purpose of the BIT and the objective of the two States.

On a concluding note, the India-Brazil BIT is a welcome upgradation of investment agreements. However, it remains to be seen whether the dispute resolution mechanism under the BIT will adequately protect the rights of investors or not.

THE ICSID AMENDMENTS: ANALYSING THE CHANGES TO THE ARBITRATION RULES AND WHAT THEY ENTAIL FOR CAPITAL IMPORTERS AND DEVELOPING COUNTRIES

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ABSTRACT

*The International Centre for the Settlement of Investment Disputes ["**ICSID**"] has been a monolith in the field of investment arbitration. However, one concern that has been perpetual regarding this institution is its general lean towards western capital exporters. Recently, on the 21st of March, 2022, the member countries assented to certain amendments in the rules which were ushered in through the six working papers. This article primarily looks at how these amendments, especially in the arbitration rules, will affect investment arbitration in developing countries with regards to the ICSID.*

In lieu of this, the article has been divided into three main parts, excluding the introduction, conclusion, and ancillary sections. First, the article briefly summarises the amendments brought about in the ICSID Arbitration Rules of the Centre and the Additional Facility Rules. Second, the article analyses the tentative impact that these amendments will have on how ICSID arbitration is approached from the perspective of developing countries and non-contracting parties. Third, the article proposes tentative changes that may be made to the amendments to further balance the scales between capital importers and exporters. The article concludes by acknowledging that, while not perfect, the amendments come as a positive development, with respect to ICSID Arbitration, especially for capital importers and developing countries.

1. INTRODUCTION

The ICSID was set up in 1996 through a multilateral treaty, the ICSID Convention ["**Convention**"], as a forum for addressing investor-state

discrepancies.[1] Since its conception, one demerit that has plagued this, and many other well-known international arbitration institutions,[2] is that they have a general lean towards western capital exporters rather than the developing countries where this capital is exported to.[3] However it is important to clarify that the existence of this 'lean', a position supported by a section of authors, cannot be attached solely to the institution itself, it has to do with the *process, players, and background* of investment arbitration that are connected with the said institution. While this statement may seem very broad, the assertion will become clear when we see the purpose of mentioning the seeming tilt towards developed countries.

The primary facet of this *'lean'* that we must keep in mind for the purpose of this article is the apparent bias of arbitrators (the abovementioned players) in favour of investor claimants. This is supported by the fact that arbitrators often give legal interpretations to rules and principles that are in the favour of capital exporters like the United States ["**US"]** or the United Kingdom.[4] Apart from apparent bias, the costs and drawn-out process of international investment arbitration average at around 8 million US dollars and can reach values of up to 30 million US dollars.[5] This may not be feasible for developing countries, which may not have the specialisation or legal expertise to deal with investment arbitration in the first place.[6] The cherry on the top comes in the form of unequal bargaining power, where host states are often forced to give up on their own economic viability,

1. International Centre for the Settlement of Investment Disputes, 'About ICSID' https://icsid.worldbank.org/About/ICSID accessed 2 August 2022.
2. Aniruddha Rajput, 'Chapter 8: India and ICSID' in Rajput (ed); *Protection of Foreign Investment in India and Investment Treaty Arbitration* (Kluwer Law International 2017) 171-194.
3. Olivia Chung, 'The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration' (2006-2007) 47 Va. J. Int'l. L. 953.
4. Gus Van Harten, 'Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern', (International Institute for Sustainable Development, 13 April 2012) https://www.iisd.org/itn/en/2012/04/13/pro-investor-or-pro-state-bias-in-investment-treaty-arbitration-forthcoming-study-gives-cause-for-concern/ accessed 10 January 2023.
5. United Nations Conference on Trade and Development, *Latest Developments in Investor-State Dispute Settlement* IIA Issues Note No. 1 (2010) UNCTAD/WEB/DIAE/IA/2010/3 https://unctad.org/system/files/official-document/webdiaeia20103_en.pdf accessed 17 February 2022.
6. Anton Strezhnev, 'Why Rich Countries Win Investment Disputes: Taking Selection Seriously' (2017) https://static1.squarespace.com/static/5931baca440243906ef65ca3/t/59c55e2829f187ed71aba071/1506106921710/why_rich_countries_win_investment_disputes.pdf accessed 17 August 2022.

sustainable growth, and public policy mandates in order to persuade wealthy nations to invest in their country (the background).[7] This can be seen from the fact that most of the bilateral investment treaties ["**BIT**"] entered into in the 1990s and early 2000s were more of a dictation of terms by a Western power that the developing countries could either "leave or take".[8] The model can be explained by the circumstance that there was competition for foreign investment during this time. BITs entered by the United States with developing countries like Nicaragua or Honduras, while technically negotiable, always took the form of the model that the US had drafted.[9]

It is considering this, that India, while partaking in the field of foreign direct investment ["**FDI**"], is a non-signatory to the ICSID Convention.[10] This view was substantiated by the Indian Council for Arbitration, which had advised the Finance Ministry against joining the ICSID Convention back in 2000.[11] The reason given by the Ministry can be summarised in two points:

1) The general lean of ICSID towards western capital-exporting states.

2) The lack of review that the ICSID process entails, both under the touchstone of the Indian Judicial System and public policy.[12]

While some of these shortcomings have been addressed by the Model Bilateral Investment Treaty that India adopted in 2015,[13] there can be no denying the fact that overall, the ICSID process is still not completely impartial or aligned with the interests of developing countries. The word *'process'* gains emphasis at this junction, as it indicates that it is not solely

7. Rajput (n 2).
8. Chung (n 3).
9. Todd Allee and Clint Peinhardt, 'Evaluating Three Explanations for the Design of Bilateral Investment Treaties' (2014) 66(1) World Politics 47.
10. Simon Weber, 'What Happened To Investment Arbitration In India' (*Kluwer Arbitration Blog*, 27 March 2021) http://arbitrationblog.kluwerarbitration.com/2021/03/27/what-happened-to-investment-arbitration-in-india/ accessed 11 August 2022.
11. The Hindu Business Line Bureau Press Release, 'ICA Against India Joining Global Dispute Settlement Body' https://www.thehindubusinessline.com/todays-paper/tp-others/article29064097.ece accessed 22 August 2022.
12. *Ibid*.
13. Abhisar Vidyarthi, 'Revisiting India's Position to Not Join the ICSID Convention' (*Kluwer Arbitration Blog,* 2 August 2020) http://arbitrationblog.kluwerarbitration.com/2020/08/02/revisiting-indias-position-to-not-join-the-icsid-convention/ accessed 7 August 2022.

the institution (barring a few areas such as rules relating to public policy, as we have already seen), but rather external components such as high costs, tilted agreements, and arbitrator bias that eventually act as a burden to developing countries.

Recently, on the 21st of March 2022, the member States of ICSID approved the amendments to the ICSID Rules and Regulations ["**Amendments**"].[14] These amendments are the culmination of six working papers issued between 2018 and 2021. The Amendments aim to "optimise" the current ICSID process. While these Amendments were not drafted with capital importers in mind, they will have an impact on how the said importers associate with ICSID Arbitration. In light of this, the article will explore how individual amendments made to the arbitration rules affect the domain of investment arbitration in developing countries, especially those like India that are not signatories to the Convention. Once this aspect has been aptly analysed, the article will also ponder over certain changes that may be made to the Amendments that will further facilitate balancing the scales between developed and developing countries with respect to ICSID Arbitration.

Additionally, for the purpose of this article, the terms *'capital importers'* and *'developing countries'* have been majorly used interchangeably throughout. While this generalisation may seemingly lack nuance, the reason behind making the same for the specific purpose of this article is that a majority of Investor State Dispute Settlement ["ISDS"] claims are against developing countries, which are the host states for investment. Around 80% of recent ISDS claims are against *'developing countries or transition economies'*, with more than 70% being brought by investors from developed countries (statistics for 2019).[15] While in the recent global discourse, even developed countries like the United States have become a hub for foreign investment,[16] grouping on the basis of the terms *'capital*

14. International Centre for Settlement of Investment Disputes, 'ICSID Rules and Regulations Amendment' https://icsid.worldbank.org/resources/rules-amendments#collapse- accessed 9 October 2022.
15. United Nations Conference on Trade and Development, 'Investor-State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019' (July 2020) UNCTAD/DIAE/PCB/INF/2020/6 https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf accessed 12 January 2023.
16. Jannick Damgaard and Carlos Sanchez-Munoz, 'United States is World's Top Destination for Foreign Direct Investment' (*International Monetary Fund Blog*, 7 December 2022), https://www.imf.org/en/Blogs/Articles/2022/12/07/united-states-is-worlds-top-destination-for-foreign-direct-investment accessed 12 January 2023.

importers' and *'developing countries'* is to portray that investor claims are usually against developing countries brought by a developed investor.

Further, *'non-contracting parties'* are those countries that are not signatories to the ICSID Convention. The impact of the Amendments on the first two categories and 'non-contracting parties', that are developing countries is mostly similar, and the same will be explained subsequently. A minor difference arises in the case of 'non-contracting parties', with some of the Amendments affecting them to a greater extent. This will also be explored in detail in the further sections.

2. A BRIEF SUMMARISATION OF THE ARBITRATION AMENDMENTS

Article 25(1) of the Convention lays down that the jurisdiction of the Centre will only encompass the contracting states to the Convention and their nationals.[17] India, not being a signatory,[18] is governed by the Additional Facility Rules ["**AFR**"], which, as per Article 2, provides for dispute resolution through arbitration even when the parties are not contracting states to the Convention.[19] These AFRs were also subject to the recent amendments, with changes being made to an almost identical tune as the Centre's Arbitration Rules.

One of the prime amendments was the provision related to the disclosure of the identity of third-party funders.[20] The proviso of third-party funding in international arbitration, which has been subject to dissonance because of issues like conflicts of interest between funder and arbitrator,[21] is largely unregulated in the Indian context.[22] Rule 23 of the Amended AFR of Arbitration provides that the identity of this third-party, who is a juridical person, must be duly revealed. What is more is that *'identity'* in the case

17. 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), art. 25.
18. Abhisar (n 13).
19. ICSID Additional Facility Rules and Regulations for Arbitration ('ICSID Additional Facility Rules') (March 2022), art. 2.
20. ICSID Additional Facility Rules (March 2022), r. 23.
21. South American Silver Ltd v. The Plurinational State of Bolivia PCA Case No 2013-15, Procedural Order No. 10, para 70.
22. Amita Katragadsa, Bipin Aspatwar, Shruti Khanijow and Ayushi Singhal, 'Third Party Funding in India' (*Cyril Amarchand Mangaldas,* 2019) https://www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf accessed 23 August 2022.

of a juridical person would mean the owner of the firm or company that provides the funds.[23]

Another very pertinent change is the provision for expedited arbitration ["**EA**"], as was added by Chapter XIII of the AFR.[24] This envisages a much quicker and potentially cheaper arbitration process, where the maximum time for declaration of the award is 380 days from the date of the first session.[25]

Lastly, and no less important to our discussion on the impact of the Amendments on developing countries, is the increased ambit of the jurisdiction related to ICSID Arbitration under the AFR.[26] What the AFR now provide is that even when *both* the parties or their nationals are not contracting states, they will still have access to arbitration proceedings under the Additional Facility Secretariat.[27] The implication of this change when seen with the other amendments will have a large impact on ICSID Arbitration in developing states, as has been expounded upon in the later sections of the article. While the amendments that have been summarised in this section, they do not cover all the substitutions and transpositions that have been ushered in by the six working papers, those that have been mentioned cover the relevant bases that are necessary to analyse how the Amendments will impact capital importers.

3. ANALYSIS OF THE AMENDMENTS THROUGH THE LENS OF DEVELOPING COUNTRIES AND NON-CONTRACTING PARTIES

On the surface, the amendments seem to have been able to solve several problems that were associated with ICSID Arbitration.[28] Working Paper 6, which is a culmination of the deliberations that had taken place prior to finalising the text of the Amendments, highlights some of these concerns and how they were attempted to be solved. Aspects such as conflict between

23. Dr. Julia Grothaus and Hannes Ingwersen, 'Modernising ICSID: New Rule Amendments Get Go-Ahead from Member States' (*Linklaters,* 19 April 2022) https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2022/april/icsid-rules-finalised-amendments accessed 15 August 2022.
24. ICSID Additional Facility Rules (March 2022), ch. XIII.
25. ICSID Additional Facility Rules (March 2022), r. 81.
26. AFR, art. 2 (n 19).
27. *Ibid*.
28. Yarik Kryovi, 'ICSID Arbitration Reform: Mapping Concerns of Users and How to Address Them' (*Kluwer Arbitration Blog*, 11 November 2018) http://arbitrationblog.kluwerarbitration.com/2018/11/11/icsid-arbitration-reform-mapping-concerns-of-users-and-how-to-address-them/ accessed 3 August 2022.

arbitrators and external funders and access to investment arbitration for smaller parties are some of the problems deemed to have been dealt with.[29] However, these *"problems"* are different for investors and investees, and it is with this statement in mind that the amendments will be analysed.

Before we move on to said analysis, let us understand the *'lens'* against which the amendments will be scrutinised. For the purposes of this article, *interests* and *inclusivity* of developing countries are the two main criteria that will be used to judge the amendments. What these terms entail is that we will first see the extent to which the Amendments set off the problems that ICSID Arbitration poses for capital importers (the process, players, and background aspects that were explored in the first section of this article). This will be followed by a look into how much the Amendments aid in increasing the inclusivity (ease of participation) of these countries in the arbitration process.

A. Third-Party Funding

Third-Party Funding ["**TPF**"], in the scope of international commercial or investment arbitration, can be defined as a situation where a disinterested (no direct relation to the dispute) entity may fund one of the parties in return for a certain percentage of damages or proceeds that the funded party might get on getting a favourable award.[30] This aspect of TPF, which may be used by less prosperous parties and states (especially, developing countries) to offset the high cost of "ISDS",[31] seems like a good way to provide *'access to justice'* to said parties. However, the on-ground situation is very different, with these outside or third-party funders preferring to fund claims not *'for'* but *'against'* such developing countries. These countries, due to not having the legal capacity to defend themselves properly or not wanting to ruin their international reputation, choose to settle for "*unmeritorious claims"* with unfavorable terms, which benefits the third-party funder and the opposite party.[32] Further, even where TPF is used to finance a respondent from a

29. International Centre for Settlement of Investment Disputes, 'Background on Working Paper # 6' (12 November 2021) https://icsid.worldbank.org/sites/default/files/publications/Backgrounder_WP.pdf accessed 10 October 2022.
30. International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (ICCA Report No. 4, April 2018), 14.
31. E De Brabandere and Julia Lepeltak 'Third-Party Funding in International Investment Arbitration' (Fall 2012) 27(2) ICSID Review - Foreign Investment Law Journal 379.
32. Brooke S Güven, Karl MF Lockhart and Michael R Garcia, 'Chapter 14: Regulating Third-Party Funding in Investor-State Arbitration Through Reform of

developing state, the disproportionate cost of paying back the funder will still have to be borne by the people residing in that country in the event of an adverse award.[33] Thus, the need for having a coherent regulatory framework related to the aspect of TPF in ICSID becomes crucial.

Rule 23 of the AFR has fulfilled this 'need' to a limited extent,[34] as summarised above, "*direct"* or "*indirect*" Third Party Funders are mandated to disclose their identity to the Secretariat under this rule. While this is a step in the right direction, Rule 23 does not solve all the developmental concerns of TPF. Several authors have pointed out that the, mere disclosure of basic details regarding external funders, that too in a private capacity, will do very little when it comes to safeguarding the interests of developing countries against the malicious intentions of many of these third-party funders.[35] While 23(4) does provide that the tribunal *'may'* order the third parties to provide additional information regarding the funding agreement,[36] this *may* not prove to be efficacious considering that the only discrepancy that tribunals are looking out for is whether there is a conflict of interests between the funders and the arbitrators.[37] The intent behind such funding and whether it is detrimental to the *"sustainable development"* model that the ICSID envisages is delved into.[38]

Therefore, while the essence of this change did have capital importers at its base (intentionally or unintentionally), the way in which it is worded and executed has left a lot to be desired. This can be seen as an instance which shows us how the problems faced by developed and developing countries are different (or rather incongruous). For exporters, only arbitrator bias against funders had to be dealt with. However, for importers, apart from the said bias, even the intention of the funders themselves with respect to developmental goals must be tackled.

ICSID and UNCITRAL Arbitration Rules: Holding Global Institutions to Their Development Mandates' in Anderson and Beaumont (ed), *The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?* (Kluwer Law International, 2020) 296, 297.

33. Brabandere (n 31).
34. ICSID Additional Facility Rules (March 2022), r. 23.
35. Brooke (n 32).
36. AFR 23(4) (n 20).
37. Brooke (n 32).
38. Brook Güven and Lise Johnson, 'Third-Party Funding and the Objectives of Investment Treaties: Friends or foes?' (*International Institute for Sustainable Development,* 27 June 2019), https://www.iisd.org/itn/en/2019/06/27/third-party-funding-and-the-objectives-of-investment-treaties-friends-or-foes-brooke-guven-lise-johnson/ accessed 15 August 2022.

To do this, a narrower and more specific clause, that would investigate the intent of such funding, is something that would have helped in balancing an already tilted scale. (How this may be achieved will be dealt with in the later part of this article).

B. The Provision for Expedited Arbitration

As has been previously elucidated in the article, the cost and time of ISDS is often very burdensome for developing states and parties from such states.[39] Therefore, the provision relating to EA in the newly introduced Chapter XII of the AFR may tempt the states that, in the ordinary course, would not be able to bear the costs of full drawn arbitration proceedings - to opt for ICSID Arbitration.[40] This chapter provides for a situation where the parties can mutually agree to undergo the EA process,[41] select the number of arbitrators,[42] and even choose to opt out of EA where there is a change in the situation or severity of the dispute.[43] With an average ICSID arbitration proceeding taking 3.6 years to conclude,[44] the EA mechanism comes as a pleasant relief to many developing countries and parties who may have wanted to partake in arbitration under the ICSID rules. EA as envisaged under Chapter XII of the AFR provides for a major reduction in the time taken for the arbitration process to conclude, as can be understood from the illustration given below:

> *"First Session (30 days from Constitution of Tribunal) + Claimant First Memorial (60 days)+ Respondent Counter Memorial (60 days)+ Claimant reply to counter memorial (40 days)+ Respondent rejoinder (40 days)+ Hearing (60 days) + Statements and Written Submissions on Cost (10 days) + Award (120 days)."*[45]

39. United Nations Conference on Trade and Development,'World Investment Report 2012: Towards a New Generation of Investment Policies' (5 July 2012) https://unctad.org/system/files/official-document/wir2012_embargoed_en.pdf accessed 17 February 2023.
40. UNCTAD (n 5).
41. ICSID Additional Facility Rules (March 2022), r. 75.
42. ICSID Additional Facility Rules (March 2022), r. 76.
43. ICSID Additional Facility Rules (March 2022), r. 86.
44. Anthony Sinclair, Louise Fisher and Sarah Macroy, 'ICSID Arbitration: How Long Does it Take?' 4(5) Global Arbitration Review https://www.goldreserveinc.com/wp-content/uploads/2016/01/ICSID-arbitration-How-long-does-it-take.pdf accessed 17 February 2023.
45. ICSID Additional Facility Rules (March 2022), r. 81.

A pertinent point to note is that representation is cumulative, meaning, under the illustration above, the Claimant's First Memorial must be filed within 60 days of the conclusion of the First Session. The exception to this is the calculation of the time period of the Award, which will start after the conclusion of the Hearing. Thus, the maximum time for the hearing to be held is 260 days after the conclusion of the first session [which is envisaged to be heard remotely as per 80(2)][46] and the maximum time for the declaration of the award is 380 days from the date of the first session.

This procedure for EA drastically reduces the time taken for the conclusion of arbitration under the ICSID, and as already pointed out, comes as a positive change for developing countries that may not have the manpower or resources to engage in a prolonged arbitration process.[47] However, a problem that may still crop up in cases where a dispute arises with capital exporting parties is that they may be reluctant to agree to the EA process. This hesitance on their part may be due to legitimate reasons, such as the novelty of the procedure. On the other side of the coin, the reasons may not always be "*legitimate",* and might be a ploy to pressurize the developing countries that may not have the resources to continue on with the process and will have to give in to the settlement. This problem can be rectified with a few tweaks, as will be discussed later in the article. However, once these tweaks are ironed out, EA can act as a game changer for developing countries with limited resources or smaller claims. Not only will the monetary problem be solved, but this streamlined process will also help in situations where the importers have limited legal infrastructure or dispute resolution expertise.[48]

C. Increased Ambit of Jurisdiction under the AFR

The AFR, as they stood in 2006 (previous iteration of amendments), did visage providing arbitration facilities where "*either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State*."[49] What the Amendments have done is broadened the

46. ICSID Additional Facility Rules (March 2022), r. 80(2).
47. Diana Rosert, 'The Stakes Are High: A Review of the Financial Costs of Investment Treaty Arbitration' (International Institute for Sustainable Development, July 2014) https://www.iisd.org/system/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf accessed 17 February 2023.
48. Steven Burkill and Aaron Murphy, 'The 2022 ICSID Rules – What do They Mean for Asia?' (*Watson Farley and Williams,* 20 April 2022) https://www.wfw.com/articles/the-2022-icsid-rules-what-do-they-mean-for-asia/ accessed 14 January 2023.
49. ICSID Additional Facility Rules (Unamended as in 2006), art. 2.

either-or model to a *both* model.[50] Now, ICSID Arbitration can be provided under the AFR even where:

"*1) Neither of the parties is Contracting Stateor a party of a Contracting State.*

*2) A Regional Economic Integration Organisation ["***REIO***"] is a party to the dispute*."[51]

For the purposes of our discussion, this article will mainly focus on point one. However, as under point two, now even when REIO's like the Association of Southeast Asian Nations are a party to the dispute,[52] arbitration can be availed under AFR. What point one essentially brings to the table is a provision for two non-signatories to the Convention to avail arbitration under the ICSID Secretariat. The Indian Model Bilateral Investment Treaty ["**BIT**"] stipulates submission of the dispute to arbitration under the ICSID AFR in Article 16.[53] The scope of this provision can now be widened to include situations where both the parties are non-contracting states, say for example, where an investment dispute arises between India and Libya under the BIT entered between the two.[54] This greatly increases utility of ICSID Arbitration to non-signatories, a majority of whom are developing countries.[55]

4. CONTEMPLATING THE IMPACT OF EXPEDITED ARBITRATION AND BROADENED JURISDICTION BOTH INDIVIDUALLY AND JOINTLY

Part III of this article has already analysed what the amendments may entail for capital importers and developing countries. Keeping this in mind, the present Part will only deal with the impacts that the abovementioned changes will have on the way in which arbitration under the ICSID is approached.

50. Sebastian Seelmann-Eggebert and Stephanie Forrest, 'A New Chapter for ICSID: 4 Key Amendments to the ICSID Rules' (*Latham and Watkins*, 24 March 2022), https://www.lw.com/admin/upload/SiteAttachments/Alert%202946.v5.pdf accessed 14 January 2023.
51. AFR, art. 2 (n 19).
52. Association of Southeast Asian Nations, 'About ASEAN' https://asean.org accessed 9 October 2022.
53. Government of India, 'Model Text for the Indian Bilateral Investment Treaty' https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf accessed 17 February 2023.
54. Agreement between the Republic of India and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments (adopted 26 May 2007) https://dea.gov.in/sites/default/files/Libya.pdf accessed 17 February 2023.
55. Anton (n 6).

When we look at the aspect of EA individually, a high likelihood arises that disputes between developing countries under the ICSID will become much more convenient. If both the parties to the dispute (a capital importer, on one hand, and an investor from a developing country, on the other) have a general lack of resources,[56] it is only logical to assume that they would opt for the EA mechanism, which would greatly reduce the time and cost of arbitration, apart from being less burdensome on the country or individual investors. This would entail a general shift in how ISDS will be approached, especially between developing countries, with the possibility that ICSID arbitration will become the preferred choice of dispute settlement in such situations. When both these changes are read together, we see that even the non-contracting states and parties from such states have the provision of availing themselves of the mutually advantageous situation that has been laid down above. Thus, providing for a positive environment where such states can avail the benefits and convenience that arbitration under the ICSID provides, without taking on the risks or responsibilities that come with becoming a signatory to the Convention.[57]

5. AMENDING THE AMENDMENTS: SUGGESTIONS

After having objectively analysed the Amendments, it can be inferred that the Amendments may act as a weight on the side of capital importers in an already tilted ISDS model under the ICSID. However, in some respects, they fail to account for aspects that need attention or have some missing elements. Pursuant to this, the article puts forth certain suggestions that could further make ICSID Arbitration equitable:

A. Substantive Public Policy

One of the prime contentions of developing countries against arbitration under ICSID is that there is not ample scope for review of the awards with respect to the public policy of the respective country.[58] Article 53(1) of the ICSID Convention and Rule 70(4) of the AFR on arbitration clearly provide that an ICSID award shall be binding and cannot be challenged in local judicial bodies.[59] The grounds for annulment are only limited to procedural

56. *Ibid.*
57. Crina Baltag; 'The Risk of Investment under the ICSID Convention' (*Transnational Dispute Management5*, 2006) www.transnational-dispute-management.com/article.asp?key=893 accessed 17 February 2023.
58. Rajput (n 2).
59. Flughafen Zürich AG and Gestión e Ingenería IDC SA v Bolivarian Republic of Venezuela ICSID Case No ARB/10/19.

issues like corruption, improper constitution of the tribunal, among others.[60] There is no express provision providing that the award can be tested on the touchstone of state interest or public policy. When such a provision is provided for in the New York Convention,[61] it entails that it can feasibly be incorporated in the ICSID Convention, as well. The degree and strictness of this departure from policy may be kept very narrow,[62] but a provision that provides for are course where this narrow interpretation has been met, ideally, should be available. While this may hamper the aspect of *'finality'* of the award, the positives may be said to outweigh the negatives because, (i) This change will consider the interest of the host country by mandating public policy, which is a model that has recently come into the limelight. This can be seen through the modernised Energy Charter Treaty, which goes as far as to allow *'regulatory change'* in the interest of public policy such as human rights.[63] (ii) The scope of appeal that is being suggested is a narrow one, and it is only when the legitimate interests of the host country are violated that it should be invoked. (iii) This model has already been successfully implemented in the domain of investment arbitration (as we have seen with the New York Convention), thus already has a precedent on which it can base itself.

B. Purposive TPF Clause

As has already been contemplated in this article, the requirement of only the name and address of the funder does not adequately tackle the issue of TPF and unscrupulous claims against developing countries.[64] Keeping this in mind, the Amendments could have envisaged a more purposive clause. One of the ways in which this could have been achieved is by inclusion of a new sub-clause to Rule 23 of AFR saying, "*The Tribunal **shall** order disclosure*

60. Christopher P. Moore, Laurie Achtouk-Spivak and Zeineb Bouraoui, 'ICSID Awards' (*The Guide to Challenging and Enforcing Arbitration Awards* 2nd edn., Global Arbitration Review, 8 June 2021) https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/icsid-awards accessed 23 August 2022.
61. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (New York Convention) art. V(2)(*b*).
62. Enron Nigeria Power Holding Ltd v. Federal Republic of Nigeria et al ICC Case No. 14417/EBS/VRO/AGF.
63. Energy Charter Secretariat, 'Finalisation of the negotiations on the Modernisation of the Energy Charter Treaty' (June 24, 2022) https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf accessed 17 February 2023.
64. Brooke (n 32).

of further information regarding the funding agreement and the non-party providing such funding in a case where the claim submitted substantially goes against the development-oriented standards of the ICSID." While this may seem very broad and ambiguous, tribunals should ensure that capital importers do not take advantage of this clause, and it is only invoked when the third parties are funding the claims maliciously, on unsubstantiated or improper grounds, with disregard for the capital importer's situation or public welfare. The wording of the sub-clause is merely suggestive, and one with more refined wording may be introduced if it contains the purpose for which the above suggestion has been propounded.

C. Unbiased Implementation of the EA Process

Rule 88(2) of the AFR lays down that the Tribunal will have the power to decide if an arbitration should no longer be expedited, based on relevant facts and circumstances, upon the request of a party. Working on the same logic, a clause should be implemented that allows for *submission* of the dispute to EA, at the discretion of the Tribunal, when one of the parties' requests for the same. As this article has already discussed, the reasons for rejection of the EA process may not always be legitimate, and the Amendments should take this into account so that the purposes for which EA was added (convenience, streamlining and reduction of costs) can be fulfilled. This change will also be in favour of developing countries, which will want to opt for the EA mechanism wherever it is applicable, to prevent unnecessary loss of already limited resources.

6. CONCLUSION

It has rightly been said by Samuel Gompers, the founder of the American Federation of Labor, "*Do I believe in arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion*". In this light, it is essential that we level the playing field in ISDS and streamline it, if the system is expected to continue functioning.[65] The Amendments come as a positive change which align with this *"essentiality",* and while not consciously, make the process of ICSID Arbitration more appealing to developing countries, capital

65. UNCITRAL Report by the Kingdom of Bahrain on reforming procedural aspects of ISDS for UNCITRAL Working Group III , 'Possible reform of investor-State dispute settlement (ISDS): comments by the Kingdom of Bahrain' (31 July 2019) https://uncitral.un.org/sites/uncitral.un.org/files/uncitral_wg_iii_bahrain_submission_31_july_2019.pdf accessed 17 February 2023.

importers and non-signatories to the Convention. Barring a few points that the Amendments have overlooked, it can safely be said that the merits outweigh the demerits. This is just the first of hopefully many steps towards bringing capital exporters and importers on par.

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