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FOREWORD

–Dr. Abhishek M. Singhvi[1]

I congratulate this initiative by the editorial staff and the Advisory Board, apart from those in the legal profession, of supporting the Indian Arbitration Law Review ("**IALR**") as a new journal on arbitration law and process. So important is this subject that, despite the proliferation of writings and publications in relation thereto, any new initiative is welcome, provided it adheres to indicia of excellence in content, themes, writers, advisors and quality of the ultimate output.

It is heartening to see that the present proposed publication, subject to its eventual birth, easily and in an accomplished manner, does so. The illustrious names on its Board of Advisors gives it a flying start and an advance certification by associating established reputations with a nascent publication. Its themes appear offbeat, innovative and creative, as reflected in articles on "*Growing Convergence of International Arbitration and Human Rights*"[2] and "*Appraising Remote Arbitration Arising from The Pandemic: Reality Check and Thoughts on Keeping Arbitration Going*".[3] Even within the traditional, nitty gritty arbitration themes, an attempt appears to have been made to address topics less frequently addressed eg. "*Publication of Arbitral Awards: Balancing Confidentiality and Transparency in Arbitration*".[4]

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1. BA (Hons), MA (Cantab), PhD (Cantab), PIL (Harvard); Dr Singhvi is a Senior Third Term sitting Member of Parliament; eminent jurist; former Chairman, Parliamentary Standing Committee on Law & Justice; former Additional Solicitor General of India; Senior Advocate, Supreme Court of India; and Senior National Spokesperson, Indian National Congress. Views are personal.
2. Meenal Garg, *Growing Convergence of International Arbitration and Human Rights* (2022) 4 Ind Arb L Rev.
3. Steve Ngo, *Appraising Remote Arbitration Arising from The Pandemic: Reality Check and Thoughts on Keeping Arbitration Going* (2022) 4 Ind Arb L Rev.
4. Binsy Susan and Amogh Srivastava, *Publication of Arbitral Awards: Balancing Confidentiality and Transparency in Arbitration* (2022) 4 Ind Arb L Rev.

Though guilty of quoting myself, I can do no better than to plagiarize (myself!) from what I wrote in the Foreword for another new arbitration journal some time ago. I had then said:

> *"The birth of a new journal, dedicated to arbitration, is undoubtedly an occasion to celebrate. While congratulating the organisers of this enterprise heartily in this inaugural issue, I must nevertheless remind them of the wag's naughty comment that a publication, like some other forms of human endeavour, may be a joy to conceive, but are invariably a pain to deliver. This salutary warning will remind them to constantly strive that extra bit and suffer that extra pain to maintain the quality and integrity of this journal."*[5]

Since I started my law practice with arbitrations and having retained great affection for this "*first love in law*", I went onto lament its decline on several parameters:

> *"Having recounted my own "Memoirs of a Personal Journey Through Indian Arbitration Law"*[6] *in 2016 in another arbitration journal and having had the privilege of having appeared in a large number of the major arbitration judgments of the apex court, I am saddened by the degradation of this principal bypass to litigation, even after the enactment of the glittering UNCITRAL Model law as far back as 1996. The ABCD bedevilling litigation—**A**ccess, **B**acklog, **C**ost and **D**elay—has engulfed Indian arbitration despite seminars, sermons, legislative amendments and numerous Supreme Court judgments. Hence, non arbitral ADRs—mediation, conciliation, Lok Adalats, ad hoc settlement procedures and so on—have developed and grown as further bypasses to the original bypass. That is good for ADRs, much needed in India, but it equally underlines the manifold failures of*

5. Abhishek M Singhvi, *Foreword* (2021) 1(1) Ind Rev Int'l Arb 1.
6. Abhishek M Singhvi, *Memoirs of a Personal Journey through Indian Arbitration Law* (2016) 4(2) Ind J Arb L 14.

> *the Indian arbitral process, despite the fanfare surrounding the 1996 Act."*[7]

This "*Good, Bad and the Ugly*" of Indian arbitration includes the absence of any uniform arbitration ethic and culture in a hugely diverse federal Indian constitutional and judicial structure. Highly divergent perspectives regarding court interference in awards by different Indian courts at different hierarchical structures, huge delays in judicially correcting prior erroneous apex court decisions by the apex court, the intermediate spawning of large progeny arising from those errors, the patent errors of law regarding "*arbitral seat*" which keep happening even by the Supreme Court despite clearly established legal principles, the lack of sufficient weight and focus on issues of "*party autonomy*", the continuing legislative and judicial flip flops on reference to arbitration under Section 11, and other similar issues continue to be the main bugbears which beset this vital subset of law.

Fortunately, some of these transgressions and weaknesses have led to greater reformist zeal, more and better writings and an attempt to make the rightful core of arbitration law and practise, which is virtuous and good, shine and glow by severing the negative baggage it has acquired over the years. There is thus hope and positivity instead of despondency and despair. This new publication is an example of the former. I wish it all the best wishes and Godspeed.

7. Abhishek M Singhvi, 'Foreword' (2021) 1(1) Ind Rev Int'l Arb 1.

INDIAN ARBITRATION LAW REVIEW

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

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Editorial Note

—Syamantak Sen & Vivek Badkur

The Indian Arbitration Law Review (IALR) was established with an idea to further the research in the realm of arbitration law in 2018. Eventually, its first edition came to fruition a year later in 2019 and since then it has been an annual affair. We are particularly thankful to Mr Udyan Arya Srivastava, Mr Prabal De and Mr Pranjal Agarwal, the Editor-in-Chief of the previous volumes and their colleagues. It is because of them that the Journal has reached this pedestal. We must also thank Mr Prashant Mishra, our Patron, without whose guidance and support this Journal would not have been conceptualized.

We are quite delighted that in addition to being published by the venerated Eastern Book Company, we are now also indexed on leading research databases – HeinOnline and SCCOnline.

It is always an honour to have eminent members of the legal fraternity donate their time and efforts to the furtherance of legal research through their support of student-run initiatives. We boast of having some of the most renowned individuals in the field of arbitration on our Board of Advisors. We are honoured to have these internationally recognized luminaries, jurists, practitioners and academicians, from all over the globe provide their able guidance to us for this Journal. We are also indebted to Dr Abhishek M. Singhvi for kindly agreeing to author the Foreword for this edition, despite his busy schedule.

We take pride in the efforts of our entire editorial body, who have worked tirelessly over the past year, despite exigencies created due to the raging pandemic, to bring this volume to fruition. We are also indebted to our distinguished peer-review board for their time. Lastly, we thank and congratulate all the authors who sent us their work. Although we were

unable to publish all submissions, each piece had its own unique value, and certainly contributed to the culture of scholarship in arbitration law.

In the legal field, there often exists the misconception that research is an extraneous skill for practitioners and is only consequential within academia. Its practical aspects are underestimated, despite it being a fundamental tool for lawyers irrespective of their area of practice. Research provides the crucial analytical foundation required for the application of the law. It would not be an exaggeration to state that it is the groundwork upon which the notion of the legal profession is erected. A shortage of consideration to this primary skill proves to be an impediment to the development of individuals, entities or even certain domains of law.

Arbitration is one such domain where further exploration is required to expand the current dossier of research available to the world. It is a relatively novel but eclectic body of law whose evolving nature provides ample room for a more complex examination of its functioning through doctrinal research. This form of research is essential in enhancing substantial portions of the law through an in-depth examination of the legal doctrines, analysis of which is currently lacking in the field of arbitration.

The present volume, therefore, consists of doctrinally researched articles of stellar quality, seeking to seal the gap that exists in research of arbitration. This volume intends to encourage the practice of doctrinal research by providing its readers with a unique corpus of well-written legal study on a broad variety of subjects of both international and domestic importance in the arbitral sphere. We are hopeful that it will contribute to the existing scholarship in the field of arbitration.

Finally, we would like to thank our readers, such as yourself, who have provided us valuable feedback, which has certainly improved the Journal's quality, over the years. This time as well, we would be open to receiving your feedback and criticism.

ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE THROUGH THE LENS OF CONFIDENTIALITY IN INTERNATIONAL ARBITRAL PROCEEDINGS

—Ravitej Chilumuri[*]*, Yuvraj Choksy*[**] *& Pranjal Agarwal*[***]

ABSTRACT

Confidentiality is an integral component of arbitration, and one of the primary reasons why arbitration is preferred over litigation. This was also recognized by a former Secretary General of the Court of International Arbitration in the Esso Case in 1976 when arbitration was still a novel concept.[1] *However, despite its fundamental nature, confidentiality continues to remain a contentious issue in terms of its exceptions which have been created in international jurisprudence over the years; one such exception being the admissibility of illegally obtained evidence. This article primarily looks to explore the admissibility of illegally obtained evidence through the lens of the concept of confidentiality in arbitration.*

This article has been divided into four parts for a clear segregation of topics that have been covered. Part I explores the concept of confidentiality across international and Indian jurisprudence. Part II examines the general law on the admissibility of illegally obtained evidence in various countries, including India. Part III discusses illegally obtained evidence as a violation of the principle of confidentiality in arbitration. Part IV offers concluding remarks of the authors on the confounding interplay of illegally obtained evidence and confidentiality.

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1. Expert Report of Stephen Bond, Esq. in *Esso* v. *Plowman* 11-3 Arb Int'l 273 (1995).

1. CONFIDENTIALITY: INSTITUTIONAL RULES, NATIONAL LEGISLATIONS, JUDICIAL DECISIONS

Confidentiality in arbitration can be construed as the parties' asserted obligations to not disclose information about the arbitration to third parties or the public. It extends not only to prohibiting third parties from attending the arbitral hearings, but also to prohibiting parties to an arbitration from disclosing hearing transcripts, as well as written pleadings and submissions in the arbitration, evidence adduced in the arbitration, materials produced during disclosure and the arbitral award(s) and orders, to third parties.[2]

There are numerous advantages conferred by confidentiality in arbitration,[3] including a much reduced possibility of negatively impacting continuing business relations[4] and setting adverse judicial precedents.[5] Importantly, it offers an opportunity for parties to make arguments that they would be otherwise reluctant to make in a public forum.[6] However, given the uncertainty over the scope of confidentiality, in order to better understand how confidentiality operates within international commercial arbitration, it is imperative that we examine the ways in which different jurisdictions and arbitral institutions have resolved the confidentiality conundrum.

A. Institutional Rules

Arbitral institutions around the world have laid down the principles of confidentiality, its applicability, the nature of the obligations, and whether and to what extent can parties derogate from said obligations. While the International Court of Arbitration **("ICC")** Rules primarily vest power (and discretion) with the tribunal to make orders concerning the confidentiality of arbitral proceedings,[7] the London Court of International Arbitration **("LCIA")** Rules provide for non-derogable confidentiality obligations on the parties.[8] This can be juxtaposed against Article 39.1 of the Singapore International Arbitration Centre **("SIAC")** Rules, which starts with the words "*unless otherwise agreed by the parties*", and provides for

2. Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2001) 3005.
3. Harvard Negotiation Law Review, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' https://www.hnlr.org/wp-content/uploads/sites/22/HNR203_crop-1.pdf.
4. Charles S. Baldwin, Protecting Confidentiality and Proprietary Commercial Information in International Arbitration, 31 TEX. INT'L L J 451, 453 (1996).
5. Supra n3.
6. *Ibid*.
7. ICC Rules 2021, art. 22(3).
8. LCIA Rules 2020, art. 30.1.

confidentiality obligations on an opt-out basis. Notably, the LCIA rules also empower the tribunal to adopt information safety measures, thus addressing increasing data security concerns too.[9] Pertinently, almost all institutional rules on confidentiality provide certain exceptions.

For instance, disclosures may be made for the performance of a legal duty, to protect or pursue a legal right, or to enforce or challenge an award.[10] A case in point is the 2018 amendment to the Hong Kong International Arbitration Centre Rules in 2018 under which the relatively narrow exception to confidentiality principles in favor of protecting a legal right or interest or enforcing or challenging an award in legal proceedings before a court or other judicial authority as given in the original 2013 rules[11] has been broadened by substituting "other judicial authority" with "other authority".[12] Thus, under the amended HKIAC Rules, where a previous award has rendered certain rights in favour of a party, the same can now be disclosed not only before the Court but also before a subsequent tribunal in order to safeguard that legal right, thereby providing for an exception in cases of parallel arbitration proceedings. Additionally, some rules also carve out exceptions in the pursuance of an order by the tribunal,[13] or to an advisor of the party.[14] These principles operate as an important (though not overriding) consideration when tribunals consider questions of disclosures (and as is later argued, even admissibility of evidence).

B. National Legislations

Most national legislations do not expressly address the issue of confidentiality and instead leave it to be determined by the parties to the arbitral proceedings.[15] This is primarily because many nations have adopted the UNCITRAL Model Law, which does not contain any explicit provisions on confidentiality.[16]

9. LCIA Rules 2020, art. 30A.
10. LCIA Rules 2020, art. 30.1; AIAC Rules 2018, r. 16; HKIAC Rules 2018, r. 45.2; SIAC Rules 2016, r. 39.2.
11. HKIAC Rules 2013, art. 42.
12. HKIAC Rules 2018, art. 45.
13. SIAC Rules 2016, art. 39.2(e).
14. HKIAC Rules 2018, art. 45.3(c).
15. For e.g., United States Federal Arbitration Act 1925, English Arbitration Act 1996, Swiss Private International Law Act 1987, Arbitration Law of the People's Republic of China, Japan Arbitration Act 2003.
16. United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006

Nevertheless, some countries, including India,[17] have addressed the issue of confidentiality in their respective statutes including providing for exceptions to the same. Some jurisdictions such as the United Kingdom[18] and France[19] have adopted an implied duty of confidentiality while the law in Australia applies confidentiality on an opt-out basis. Importantly, even in jurisdictions that imply a general duty of confidentiality, its protection is not absolute, but subject to exceptions or limitations. For example, Australian Law permits reasonable disclosures for the establishment or protection of the legal rights of a party to the arbitral proceedings in relation to a third party.[20] Similarly, Hong Kong allows for exceptions to confidentiality for protecting or pursuing legal rights, enforcing, or challenging arbitral awards and disclosures to advisors and governmental authorities.[21]

C. Judicial Decisions

About confidentiality, courts have taken two approaches in determining parties' obligations. Firstly, the courts have adopted the viewpoint that in the absence of statutory principles, it is open to the parties to determine the extent and presence of confidentiality obligations, as was also held in the *Esso Australia*[22] *case*. This, in principle, means that confidentiality was held to not be an essential attribute of arbitration and therefore, in the absence of express party agreement, there is no right to confidentiality. A similar stance was observed in Sweden and the United States[23] wherein the private nature of arbitration was recognized, but the idea that confidentiality is essential to achieving privacy in arbitration was rejected.[24] Secondly, on the other hand, the English Courts are of the view that an implied duty of confidentiality exists in such cases.[25]

(Vienna: United Nations, 2008), available from www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

17. Arbitration and Conciliation Act 1996, s. 42A.
18. Ali Shipping Corpn. v. Shipyard Trogir (1999) 1 WLR 314.
19. France Code of Civil Procedure 1981, art. 1469.
20. International Arbitration Act 1974, arts. 23D(4) & (5).
21. Arbitration Ordinance 2011, s. 18(2).
22. Esso Australia Resources Ltd. v. Plowman (1995) 128 ALR 391.
23. (n 2).
24. *Id*.
25. Dolling-Baker v. Merrett (1990) 1 WLR 1205, 1213; Hassneh Insurance Co. of Israel v. Mew (1993) 2 Lloyd's Rep. 243; Ali Shipping Corpn. v. Shipyard Trogir (1999) 1 WLR 314.

In Dolling-Baker v. Merrett,[26] the Court of Appeal emphasized the significance of the private character of arbitration and held that all arbitration contracts must inevitably contain an implied duty not to disclose any information concerning the arbitration unless consent of the other party or leave of the court has been taken.[27]

Furthermore, in Hassneh Insurance Co. of Israel v. Steuart J. Mew,[28] the Court was of the view that the disclosure "*would be almost equivalent to opening the door of the arbitration room to a third party*," thus violating the sanctity of privacy in arbitration.

Ali Shipping Corporation v. Shipyard Trogir reinforced the rulings in *Dolling-Baker* and *Hassnehand* held that confidentiality is not based on custom or business efficiency but can be inferred to be an implied obligation.[29] However, it is pertinent to note that while *Ali Shipping* is viewed as the leading precedent on instituting the implied duty of confidentiality in arbitration, more recent cases such as City of Moscow v. Bankers Trust[30] and Emmott v. Michael Wilson & Partners Limited[31] appear to support a stance favoring a case-by-case approach.

Further, unlike English courts, courts in Australia, Sweden, and the United States do not recognize an implied duty of confidentiality in the absence of an express agreement to this effect.[32] These jurisdictions recognize the private nature of arbitration, but reject the idea that confidentiality is essential to achieving privacy in arbitration.[33] Thus, significant variations exist in the interpretation of principles of confidentiality by various courts and arbitral tribunals.

2. LAW CONCERNING ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE

Even though the exceptions to the principle of confidentiality discussed above may appear straightforward, parties are likely to face tricky

26. Dolling-Baker v. Merrett (1990) 1 WLR 1205.
27. Ibid.
28. Hassneh Ins. Co. of Israel v. Steuart J. Mew (1993) 2 Lloyd's Rep. 243.
29. Ali Shipping Corpn. v. Shipyard Trogir (1999) 1 WLR 314: (1998) 2 All ER 136, 146–47.
30. Department of Economics Policy and Development of the City of Moscow v. Bankers Trust Co. 2005 QB 207 : (2004) 3 WLR 533: 2004 EWCA (Civ) 314.
31. Emmott v. Michael Wilson & Partners Ltd. 2008 EWCA (Civ) 184.
32. (n 2).
33. *Ibid*.

situations. For instance, in parallel arbitration proceedings, where a party wishes to admit documents from another arbitration in the form of evidence in the current arbitration (thus breaching confidentiality), if the arbitral tribunal admits such evidence, it shall result in giving said party an unfair advantage by bending the rules in its favour. On the other hand, if the tribunal refuses to do so, it may result in a violation of the party's right to present its case.

In this part, in order to comprehend the nuances of this issue, the authors delve into the relevant provisions of institutional rules and further examine the law on admissibility of illegally obtained evidence in various jurisdictions, with a special focus on India.

A. Institutional Rules

One way of addressing this conundrum is that the parties must mutually decide on the rules of evidence that shall apply to the arbitral proceedings, for instance, the UNCITRAL Rules on Transparency in Investment Treaty Arbitration[34] and the IBA Rules on the Taking of Evidence in International Arbitration **("IBA Rules")**[35] amongst others. However, instead of addressing the specific situation of illegally obtained evidence, institutional rules adopt broad permissive admissibility powers.

For instance, the IBA Rules introduce the concept of "good faith" into the evidentiary process.[36] Furthermore, the IBA Rules, while vesting discretion with the tribunal to admit evidence obtained illegally, also empower the tribunal to impose costs on the party presenting such evidence to effectively deter such instances.[37] In international commercial arbitrations, not only the arbitral awards, but also decisions on admissibility, which are determined by the order, and often taken at an interim stage, are confidential. Thus, information on how tribunals address illegally obtained evidence is, at best, anecdotal rather than forensic. However, what is fairly settled is that in institutional arbitrations, tribunals are not bound by strict rules of evidence

34. UNCITRAL Rules on Transparency in Treaty-based Investment Treaty Arbitration, ('The UNCITRAL Rules') (2014).
35. International Bar Association Rules on the taking of evidence in International Arbitration, ('IBA Rules') (29 May 2010).
36. *Id.*, art. 9.8.
37. *Ibid.*

and are conferred with broad discretion to decide issues of admissibility, relevance, and weight of evidence.[38]

In any case, regardless of the parties agreeing upon such rules, tribunals are still likely to consider the law of the seat on the subject in order to render an enforceable award.

B. National Legislations

The law on the admissibility of illegally obtained evidence across jurisdictions is replete with inconsistencies. In the United Kingdom, it is widely recognized that an illegally procured evidence shall be admitted if the same is relevant and material, subject to the court's discretion.[39] The same is the case in Singapore,[40] Malaysia[41] and Ireland.[42] The approach adopted by Australia, however, is to weigh the desirability of admitting the evidence against the undesirability of doing so.[43] This is similar to the Indian position, i.e., illegally obtained evidence is not per se inadmissible.[44]

On the other hand, the United States[45] has a history of excluding such evidence in line with the doctrine of the "fruits of the

38. UNCITRAL Arbitration Rules 2014, art. 27(4); SIAC Rules 2016, r. 19.2; AIAC Rules 2018, art. 6(f); LCIA Rules 2020, art. 22(iv).
39. Civil Procedure Rules, part 32.1; Jones v. Warwick University (2003) 1 WLR 954: 2003 EWCA (Civ) 151, (2003) 3 All ER 760; Ras Al Khaimah Investment Authority v. Azima 2021 EWCA (Civ) 349; The courts have also taken to admitting such evidence while imposing costs on the party that seeks to present it, see Imerman v. Imerman (2010) EWHC 64 (Fam), 2010 All ER (D) 219.
40. Law Society of Singapore v. Tan Guat Neo Phyllis (2008) 2 SLR (R) 239.
41. Re Kah Wai Video Ipoh Sdn Bhd [1987] 2 MLJ 459.
42. People (Attorney General) v. O'Brien 1956 IR 142.
43. Uniform Evidence Acts 1995, s. 138.
44. Indian Evidence Act 1872; Ukha Kolhe v. State of Maharashtra AIR 1963 SC 1531: (1964) 1 SCR 926.
45. Sara Mansour Fallah, *The Admissibility of Unlawfully Obtained Evidence before International Courts and Tribunals*, Brill, 2020, https://brill.com/view/journals/lape/19/2/article-p147_2.xml?language=en; Nardone v. United States 1939 SCC OnLine US SC 151: 84 L Ed 307 : 308 US 338 (1939).

poisonous tree",[46] except where the evidence is obtained by a private individual.[47]

The Indian Evidence Act, 1872 postulates relevance as the only criterion for the admissibility of evidence.[48] Though the courts have uniformly adopted the position that illegal evidence is not per se inadmissible,[49] the development of an ascertainable trend in the context of arbitration proceedings in India is not deducible; the reason being that courts have had the opportunity to deal with the question of admissibility of evidence in breach of confidentiality principles only in a few cases.

In this regard, it is pertinent to refer to a crucial judgment on this issue, i.e., R.M. Malkani v. State of Maharashtra,[50] wherein the Supreme Court considered the admissibility of evidence obtained in contravention of Section 25 of the Indian Telegraph Act and held that even illegally obtained evidence is admissible. In several other cases such as State (NCT of Delhi) v. Navjot Sandhu (Afsan Guru)[51] and Umesh Kumar v. State of A.P.,[52] the Supreme Court has held that illegally obtained evidence is admissible so long as it is relevant, and its genuineness is proved. Thus, under Indian law, illegally obtained evidence is admissible so long as it is not prohibited by the Constitution or any other law in force.

More importantly, a key judgment which discussed the admissibility of illegally obtained evidence in context of confidentiality was the Rafale deal case.[53] In this case, it was contended by the Centre that the review petition challenging the Rafale judgment dated 14th December, 2018 ought to be dismissed since the documents relied upon by the review petitioners were protected under the Official Secrets Act, 1923, and illegally procured in

46. The Doctrine of "Fruits of the Poisonous Tree" states that evidence (fruit) obtained through illegal means, which is a tainted source (tree), would also be tainted, and thus, inadmissible. The term was first used by Justice Frankfurter of the Supreme Court of United States in Nardone v. United States, wherein it was held that evidence obtained by wiretapping was inadmissible as it violated the protection granted by the Fourth Amendment to the U.S. Constitution.
47. Burdeau v. McDowell 1921 SCC OnLine US SC 140: 65 L Ed 1048: 256 US 456 (1921).
48. Indian Evidence Act 1872, s. 5.
49. Yusufalli Esmail Nagree v. State of Maharashtra AIR (1968) SC 147; R.M. Malkani v. State of Maharashtra (1973) 1 SCC 471; Pooran Mal v. Director of Inspection (1974) 1 SCC 345.
50. R.M. Malkani v. State of Maharashtra (1973) 1 SCC 471: (1973) 2 SCR 417.
51. State (NCT of Delhi) v. Navjot Sandhu (2005) 11 SCC 600.
52. Umesh Kumar v. State of A.P. (2013) 10 SCC 591.
53. Yashwant Sinha v. CBI (2019) 6 SCC 1: 2019 SCC OnLine SC 518.

violation of the said Act. Said documents were published in certain news items in The Hindu.[54] As a result, the question before the Supreme Court was whether these documents can be considered while deciding the review petition. The Court observed that there exists no provision in the Official Secrets Act or any other statute vesting power in the Executive to restrain publication of documents marked as secret or prevent them from being placed before a Court of Law. The Court further held that Section 123 of the Indian Evidence Act applies to unpublished documents, and as said documents were already in public domain, the Court is not barred from relying upon them as evidence. The Court then referred to S.P. Gupta v. Union of India[55] and held that even in case of unpublished documents, the Court shall first assess the nature of the document, and then determine whether it can be placed on record. The Court further referred to Pooran Mal v. Director of Inspection,[56] wherein it was held that "…*in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search or seizure is not liable to be shut out*." On the basis of the abovementioned reasoning, the Supreme Court dismissed the objection of the Centre with respect to the maintainability of the review petition and allowed the leaked documents to be relied upon.

3. ILLEGALLY OBTAINED EVIDENCE IN BREACH OF PRINCIPLES OF CONFIDENTIALITY

One of the earliest examples of a Tribunal dealing with illegally obtained evidence is the *Corfu Channel case*[57] in which court admitted the evidence even though violation of territorial waters had enabled it to be collected. In this regard, the Court reasoned that the declaration of violation was considered sufficient sanction for the obtaining of evidence illegally.

Subsequent case law on this matter further shaped the nuances of confidentiality in international commercial arbitration.[58] Pertinently, even in cases where the duty of confidentiality in arbitration is implied by law, its content may depend on the context in which it arises, and the nature of the information or documents in question.

54. Yashwant Sinha v. CBI (2019) 6 SCC 1: 2019 SCC OnLine SC 518.
55. S.P. Gupta v. Union of India 1981 Supp SCC 87: AIR 1982 SC 149.
56. Pooran Mal v. Director of Inspection (1974) 1 SCC 345: AIR 1974 SC 348.
57. United Kingdom v. Albania 1949 ICJ Rep 4.
58. Emmott v. Michael Wilson & Partners Ltd. 2008 EWCA (Civ) 184.

Tribunals have also sought to evaluate the conduct of the parties in determining questions of admissibility. For instance, if the party is acting in good faith, the evidence would not be held to be inadmissible simply on the ground that it was obtained illegally. A case in point is Persia International Bank v. Council,[59] where the tribunal reasoned that if the party comes with clean hands and is not involved in the unlawful nature of procuring evidence, the disclosure cannot be held against it, and the evidence shall be deemed admissible. A similar reasoning was employed in Fusimalohi[60] and Adamu.[61]

Further, in Caratube International Oil Company and Mr. Devincci Saleh Hourani v. Kazakhstan,[62] which involved the production of documents obtained through a hack of the Respondent's computer systems, which were later leaked on a publicly available website known as "KazakhLeaks", the tribunal emphasized the materiality and relevance of the evidence, that it was then "widely, freely and lawfully available in the public domain", and that the wrongdoing was committed by a third party. Based on this reasoning, the Tribunal admitted the evidence.

However, tribunals have also rejected such evidence where the obligations of good faith were not met. For instance, in Methanex Corporation v. United States of America,[63] the tribunal declined to admit evidence obtained by acts of trespass and stated that such admission would amount to a violation of the general duty of good faith. Thus, arbitration entails a relatively larger scope to exclude evidence, and in fact, while deciding questions of admissibility, the general trend for Tribunals has been to prioritize the correctness and validity of their decisions over technical considerations.

Disclosure, however, may be permitted where it is necessary to protect a party's rights against a third party, or in other exceptional circumstances as justice may require.[64] A case in point is *Ali Shipping* where the plaintiff arbitrated a breach of contract dispute with Shipyard Trogir, and an award was passed in the former's favour. Later, Shipyard Trogir

59. Case T-493/10 Persia International Bank v. Council ECLI:EU:T:2013:398.
60. Fusimalohi v. FIFA Case No. CAS 2011/A/2425 (8 March 2012).
61. Adamu v. FIFA Case No. CAS 2011/A/2426.
62. Caratube International Oil Co. LLP v. Republic of Kazakhstan ICSID Case No. ARB/13/13.
63. Methanex Corporation v. United States of America Award (NAFTA Ch 11 Arb. Trib. 2005).
64. Ali Shipping Corpn. v. Shipyard Trogir (1999) 1 WLR 314, CA; Emmott v. Wilson & Partners, 2008 EWCA (Civ) 184.

had separate arbitration proceedings with other companies. In the second arbitration, Shipyard Trogir wanted to produce the arbitration award and other documents, i.e., the written opening submission of Ali Shipping and transcripts of the oral evidence given by certain witnesses for Ali in the first arbitration from its first arbitration with Ali Shipping as those were essential to establish an estoppel issue. The plaintiff objected to this. The Court then formulated certain exceptions[65] to the broad rule of confidentiality including when disclosure is reasonably necessary for the protection of the legitimate interests of an arbitrating party vis-à-vis a third party in order to set up a cause of action against or defend a claim or counter-claim brought by said third party or in the interest of justice.

Additionally, in Associated Electric and Gas Insurance Services Ltd. v. European Reinsurance Co. of Zurich,[66] the plaintiff sought to rely on an arbitration award made by a panel of arbitrators in a dispute between the same parties before another panel.[67] It was held that even in the presence of an exhaustive confidentiality agreement; the provisions of said agreement had to be evaluated against the surrounding circumstances, and the basic principles and purposes of arbitration, and could not be read in vacuum.[68] The reasoning adopted by the Court was that the "*legitimate use of the earlier award would not raise the mischief against which the confidentiality provision was directed, i.e., the risk of valuable information reaching third parties with adverse interests.*"[69] On this basis, the Court held that "*prohibiting any disclosure of the award would frustrate the fundamental purpose of arbitration by preventing the winner from enforcing the rights declared in its favour, and constitute a breach of the other party's duty to perform the award by recognizing and enforcing said rights.*"[70]

4. CONCLUSION

The law on confidentiality is still in a nascent stage in India. While the question was broached in *Yashwant Sinha*, the Supreme Court directed its attention to the authenticity and veracity of the materials produced, without addressing the very nature of the materials as being privileged.[71]

65. *Id.*, at 147–48.
66. Associated Electric and Gas Insurance Services Ltd. v. European Reinsurance Co. of Zurich (2003) 1 WLR 1041: 2003 UKPC 11.
67. *Id.*, at para 1.
68. *Id.*, at para 7.
69. *Id.*, at para 8.
70. *Id.,* at paras 11 and 13.
71. Yashwant Sinha v. CBI (2020) 2 SCC 338.

Further, the 2019 Amendment to the Arbitration and Conciliation Act, 1996 has introduced Section. 42A which imposes an obligation on the parties to maintain confidentially of all arbitral proceedings except that of award where its disclosure is necessary for the purpose of implementation and enforcement of award.[72]

It is also important to acknowledge the limitations that the principle suffers from and the grounds under which the information can be disclosed regardless of the confidentiality between the parties. Further, the nexus between the admission of illegally obtained evidence and breach of confidentiality is another paradigm which has been touched upon while discussing the limitations. Several jurisdictions base the admission of such evidence upon its relevance and discretion of the judges while other countries enunciate different parameters for such evidence to be admitted. In the Indian regime, such evidence is not per se inadmissible and the courts have, on some occasions, allowed for such evidence to be placed on record.[73]

The inherent inconsistency in this regard across jurisdictions can be a point of discourse for the stakeholders. Although there are several factors that guide the tribunals currently, it would be more fruitful if the admission of illegally obtained evidence and the consideration of confidentiality can be weighed against each other allowing the parties to choose the jurisdiction which is more conducive to their needs with respect to confidentiality.

72. Arbitration and Conciliation Act 1996, s. 42A.
73. Lotus Investments and Securities v. Promod S. Tibrewal 1998 SCC OnLine Bom 547: (1999) 2 Arb LR 428.

PUBLICATION OF ARBITRAL AWARDS: BALANCING CONFIDENTIALITY AND TRANSPARENCY IN ARBITRATION

—Binsy Susan[*] and Amogh Srivastava[**]

ABSTRACT

With the passing of the recent amendments to the Arbitration and Conciliation Act, 1996, the Indian legislature has turned its focus to strengthening institutional arbitrations and bringing India at par with other established arbitration friendly jurisdictions. The Arbitration and Conciliation (Amendment) Act, 2019 also incorporated a widely worded confidentiality provision under Section 42A), which only encompasses limited exceptions. Evidently, with arbitration becoming a popular mode of dispute resolution in the commercial world, there are compelling reasons to statutorily recognize and adopt the practice of publication of arbitral awards, while balancing the needs of confidentiality and improving predictability and transparency in arbitration procedures.

Though some arbitration institutions in India do prescribe rules for publication of awards, there is no uniformity and consistency in the manner in which awards are published. Furthermore, in the absence of any formal framework of arbitral rules, ad hoc arbitration, which is the preferred mode of arbitration in India, also lacks any mechanism that would allow for publication of awards. The article proposes that India should consider giving statutory recognition to publication of arbitral awards and formulate a robust mechanism for its implementation, without compromising the interests of the parties to maintain confidentiality. In doing so, this article analyses the rules of leading national and international arbitration institutions regarding publication of awards. The article proposes certain legislative amendments and solutions to adopt and statutorily recognize the practice of publication of arbitral awards. The

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aim of the article is to reconcile confidentiality obligations and the need for transparency in arbitral jurisprudence by publication of redacted awards.

1. INTRODUCTION

In 2017, the Department of Legal Affairs, Ministry of Law and Justice set up a high-level committee under the Chairmanship of Justice B.N. Srikrishna ("**Srikrishna Report**") to review the institutionalization of arbitration mechanism in India.[1] The Srikrishna Report noted that one of the advantages of institutional arbitration is its potential for the development of arbitral jurisprudence by publication of redacted awards.[2] However, despite these observations, no amendments were recommended to the Arbitration & Conciliation Act, 1996 ("**Arbitration Act**") regarding publication of arbitral awards. The Committee's report became the foundational basis of the Arbitration and Conciliation (Amendment) Act, 2019 ("**2019 Amendment**").[3]

Therefore, there is neither any formal recognition of the concept of publication of awards in the Arbitration Act, nor prescription of any mechanism for publication of redacted arbitral awards. There are only certain arbitral institutions that prescribe rules for publication of redacted arbitral awards. However, these rules differ and are not consistent. For instance, while some arbitral institutions like International Chambers of Commerce (ICC)[4], London Court of International Arbitration (LCIA)[5], Indian Institute of Arbitration and Mediation[6] require the consent of parties before publication of redacted awards, other arbitral institutions like Mumbai Centre for International Arbitration and Indian Council of Arbitration are silent on the issue of express consent by the parties. Further, arbitral institutions, which provide rules for the publication of redacted awards, do not publish them in practice as there is no prescribed mechanism or statutory law recognizing the publication of redacted awards. Furthermore, there is a complete absence of a database where these redacted awards may be published. In the absence of any uniformity in the rules of institutions, it

1. Committee Report, *Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (20 July 2017) https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf accessed 3 October 2021.
2. *Id*., 27.
3. The Arbitration and Conciliation (Amendment) Act 2019.
4. Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (1 January 2021) part IV(c), r. 59.
5. LCIA India Arbitration Rules 2016, r. 30.3.
6. Indian Institute of Arbitration & Mediation Rules 2021, r. 34(5).

is entirely up to the parties to submit their dispute to an institution, which may or may not allow for the publication of redacted awards.

While arbitral institutions provide for a well-defined set of rules to administer proceedings, *ad-hoc* arbitrations have to resort to the Arbitration Act for all procedural aspects. Where procedures are not specifically provided for in the Arbitration Act, it is for the parties[7] and the arbitral tribunal[8] to agree and formulate the procedure to be followed in the conduct of arbitration proceedings. In the absence of any express provision under the Arbitration Act, even if parties were to agree to the publication of redacted arbitral awards, *ad-hoc* arbitral tribunals are inherently incapable of publishing such redacted awards. This is because there are no corresponding statutory provisions, rules for redaction, mechanism, or a recognized depository to store and publish redacted awards issued by *ad hoc* arbitral tribunals, under the Arbitration Act.

There is no consensus even amongst the members of the arbitral community in relation to the practice and mechanism of publication of arbitral awards. While some give more weightage to maintaining confidentiality in arbitration,[9] others recognize the benefits of striking a balance between confidentiality and promotion of arbitral jurisprudence through publication of redacted awards.[10] Even at a global level, the issue of publication of arbitral awards is far from settled.

This article argues in favour of giving statutory recognition to the publication of redacted arbitral awards and laying down uniform and consistent rules for its implementation. In doing so, the article analyses the rules and mechanism of leading national and international arbitration institutions containing confidentiality provisions (**Section 2**), with particular focus on Section 42A of the Arbitration Act, which deals with similar confidentiality obligations (**Section 3**). The article next discusses the advantages and benefits of publication of redacted arbitral awards,

7. Arbitration Act 1996, s. 19(2).
8. Arbitration Act 1996, s. 19(3).
9. Jane Parsons, 'Publish and be Damned: Should we Embrace the Systematic Publication of Arbitral Awards?' (Thomson Reuters, Practical Law Arbitration Blog) http://arbitrationblog.practicallaw.com/publish-and-be-damned-should-we-embrace-the-systematic-publication-of-arbitral-awards/ accessed 3 October 2021.
10. M Florencia Villaggi, *International Commercial Arbitral Awards: Moving from Secrecy towards Transparency?* (Young ICCA Blog) http://www.youngicca-blog.com/wp-content/uploads/2013/01/Villaggi-confidentiality-vs-publication-of-awards-edited05_01_13.pdf accessed 27 October 2021.

and how it will contribute to the overall development of arbitration jurisprudence in India (**Section 4**). Lastly, the article proposes appropriate statutory amendments and solutions to adopt, recognize, and formulate uniform rules for publication of redacted arbitral awards in India (**Section 5**) before the concluding remarks (**Section 6**).

2. LAW WITH RESPECT TO PUBLICATION OF AWARDS

A. Under the Arbitration Act

The insertion of Section 43K[11] pursuant to the 2019 Amendment[12] requires the Arbitration Council of India to maintain an electronic depository of arbitral awards made in India. This need not be confused with the idea of having a centralized depository for the purpose of publication of arbitral awards. This new provision was inserted in light of the difficulty faced by courts in accessing authentic copies of arbitral awards in challenge proceedings.[13] The proposed centralized depository is where all arbitral institutions as well as *ad hoc* arbitral tribunals would be required to submit a copy of their respective arbitral awards. The courts would have limited access to the centralized depository only in cases of challenge proceedings. Furthermore, there is no provision for practitioners to access these awards.

The insertion of Section 42A to the Arbitration Act casts strict confidentiality obligations on the arbitrator, arbitral institutions, and the parties to the arbitration agreement. It mandates that all stakeholders shall maintain confidentiality of arbitral proceedings and the arbitral award may only be disclosed for the purpose of its implementation and enforcement. The provision is overarching and does not envisage any exception. Ironically, it does not contain any corresponding provision setting out the consequences of failure to abide by the confidentiality obligation. The newly introduced and widely worded Section 42A provides no leeway for the publication of redacted arbitral awards, and acts as an impediment to the publication of awards.

11. Part IA of the Arbitration Act which relates to the establishment of the Arbitration Council of India has not been notified and therefore, not in force yet.
12. Please note that Chapter IA (Arbitration Council of India) of the Arbitration and Conciliation Act, 1996 is not in force yet as these amendments have not been notified.
13. Committee Report, *Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (20 July 2017) https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf accessed 3 October 2021, 77, para 18.

B. Rules of Arbitration Institutions

Some arbitral institutions permit the publication of redacted awards. The rules of these domestic arbitral institutions, which allow for the publication of redacted awards, have not been subsequently amended in light of Section 42A of the Arbitration Act.

Rules of these arbitral institutions regarding the publication of redacted awards are not consistent and set out divergent mechanisms. These arbitral institutions maybe classified into three categories:

1. *Arbitral institutions which do not require any express consent of parties*

   The Mumbai Centre for International Arbitration (MCIA),[14] Indian Council of Arbitration (ICA),[15] Construction Industry Arbitration Council (CIAC),[16] Delhi International Arbitration Centre (DIAC),[17] and Nani Palkhivala Arbitration Centre (NPAC)[18] are some of the arbitral institutions that do not require or prescribe any express consent of the parties before publication of redacted awards. These institutions presume parties' consent to publish redacted awards, once parties agree to submit the disputes for resolution under their arbitration rules.

2. *Arbitral institutions which require express consent of parties*

   The London Court of International Arbitration, India (LCIA India),[19] Indian Institute of Arbitration & Mediation, Delhi (IIAM),[20] PHD Chamber of Commerce and Industry (PCIAC),[21] and International

14. Arbitration Rules of the Mumbai Centre for International Arbitration ('MCIA Rules') (2nd edition, 15 January 2017) r. 30.13.
15. Rules of Domestic Commercial Arbitration and Conciliation ('ICA Rules') (as mended on and with effect from 1st January 2021) r. 68(d).
16. Construction Industry Arbitration Council Arbitration Rules ('CIAC Rules') (2nd revised edition, 2013) rule 44.11(d).
17. Delhi International Arbitration Centre Arbitration Proceedings Rules ('DIAC Rules') (2018) r. 32.4.
18. Rules of Arbitration for Nani Palkhivala Arbitration Centre ('NPAC Rules'), r. 40(b).
19. LCIA India Arbitration Rules (1 June 2016) r. 30.3.
20. Indian Institute of Arbitration & Mediation Rules. 15 May 2021) r. 34(5).
21. Rules of Arbitration and Conciliation of PHDCCI Centre for International Arbitration & Conciliation ('PHDCCI Rules'), r. 30.1.

Chamber of Commerce (ICC)[22] are some of the arbitral institutions that require express consent of parties to publish redacted awards. For instance, the LCIA India generally prescribes that all awards in the arbitration proceedings are to be kept confidential.[23] Under the Rules of Arbitration of the LCIA India, the publication of award or any part thereof is therefore, an exception to the confidentiality provision, which can only be carried out with the written consent of all parties.[24]

The Singapore International Arbitration Centre (SIAC) Rules[25] were amended in 2016, and require express consent of parties and the arbitral tribunal before publishing of redacted awards. Prior to 2016, the 2013 SIAC Rules[26] allowed the SIAC Secretariat to publish redacted awards without the consent of parties or the arbitral tribunal.[27] The Rules of the Arbitration Institute of the Stockholm Chambers of Commerce (SCC)[28] provide an exception in their confidentiality provision,[29] whereby parties can agree on the publication of redacted awards. Furthermore, SCC has recently published 12 anonymized and redacted awards rendered under its Rules between May 2016 and November 2019 in the ICCA Yearbook[30] and Kluwer Arbitration database.[31] The Arbitration Rules of Hong Kong International Arbitration Centre (HKIAC),[32] Swiss Chambers,[33] and Asian International Arbitration Centre

22. Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (1 January 2021) part IV(c), r. 59.
23. LCIA India Arbitration Rules 2016, rr. 30.1 & 30.2.
24. LCIA India Arbitration Rules 2016, rule 30.3.
25. Benson Lim and Kent Phillips, *SIAC's Retreat from Publication of Awards without Consent Strikes the Right Balance* (Kluwer Arbitration Blog) http://arbitrationblog.kluwerarbitration.com/2016/10/05/siacs-retreat-from-publication-of-awards-without-consent-strikes-the-right-balance/?print=print accessed on 3 October 2021.
26. SIAC Rules (5th edition, 1 April 2013).
27. *Id.*, r. 28.10.
28. Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, adopted by the Stockholm Chamber of Commerce and in force as of 1 January 2017.
29. *Id.*, art. 3.
30. *ICCA Yearbook, Commercial Arbitration* (2020) vol. XLV.
31. *SCC Awards Now Released Online* (Arbitration Institute, Stockholm Chamber of Commerce, October) https://sccinstitute.com/about-the-scc/news/2020/scc-awards-now-released-online/ accessed on 3 October 2021.
32. Hong Kong International Arbitration Centre Administered Arbitration Rules 2018, r. 45.5.
33. Swiss Rules of International Arbitration 2021, art. 44(3).

(AIAC)[34] are some of the other arbitral institutions, which require express consent of parties before redacted awards can be published.

On the other hand, while the Rules of Arbitration of ICC ("**ICC Rules**") do not expressly stipulate a provision regarding publication of arbitral awards, the note to parties and arbitral tribunal published by the ICC[35] lays down an extensive procedure for the publication of redacted awards. The ICC goes a step ahead in terms of the requirement of consent of parties to publish redacted awards. It mandates that before the publication of redacted awards, the ICC Secretariat will send all the documents to the parties andthe parties will have the opportunity to object to the publication of any part of the award, or any related document.[36] It also gives the parties the flexibility to either mutually formulate and agree on the redaction or accept the proposed redaction of the ICC Secretariat. In addition, the parties can at any time, convey to the ICC Secretariat, that they do not wish to publish the redacted award or any part thereof.[37] The ICC, therefore, gives complete autonomy and control to the parties, and they can raise their objections, request for appropriate redaction, pseudonymisation and anonymization, and can even withdraw their consent at any point of time before the publication of the redacted award. The ICC also recently announced its collaboration with *Jus Mundi* to publish ICC arbitral awards, which would now be freely available.[38] In a sense, the mechanism of publication of redacted ICC awards is now well balanced and gives complete autonomy to the parties.

3. *Arbitral institutions which do not allow publication*

There are certain arbitral institutions, which do not allow publication of arbitral awards in any form, like the International Centre for Alternative Dispute Resolution (ICADR), New Delhi.[39] Furthermore, the Bangalore International Mediation, Arbitration

34. Asian International Arbitration Centre Rues 2018, art. 34(5).
35. Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration (1 January 2021) part IV(c).
36. *Ibid.,* 10 [58].
37. *Id.,* 10 [59].
38. *ICC & Jus Mundi Launch Partnership to Publish ICC Arbitral Awards* (Jus Mundi, 1 April 2021) https://blog.jusmundi.com/icc-and-jus-mundi-launch-partnership-to-publish-icc-arbitral-awards/accessed 15 September 2021.
39. The International Centre for Alternative Dispute Resolution Arbitration Rules ('ICADR Rules'), 1996.

and Conciliation Centre (BIMACC) completely rules out the possibility of publication of redacted awards, as its rules expressly provide that an arbitral award is to be treated as private and confidential and not open to public or media.[40]

3. CONFIDENTIALITY IN ARBITRATION VIS-À-VIS SECTION 42A OF THE ARBITRATION ACT

The limited carve-out from the rule of confidentiality[41] provided in the Arbitration Act applies only when the disclosure of the award is necessary for its implementation and enforcement. The non-obstante[42] clause imposes strict confidentiality obligation on the arbitral tribunal, arbitral institution and the parties to the arbitration agreement. It also undermines party autonomy, as it does not envisage a situation where parties may voluntarily consent to publish arbitral awards or disclose any document, by submitting their disputes to an arbitral institution, which permits publication of redacted awards.[43]

The provision fails to take into account the various possible situations where the disclosure of arbitral proceedings may be necessary for effective adjudication of the dispute. For instance, if parties wish to seek assistance from Indian courts in taking evidence,[44] or challenging an arbitral award,[45] or in obtaining interim reliefs[46] pending arbitral proceedings, the same would mandatorily require disclosure of arbitral proceedings.

Additionally, arbitral awards issued in India are, in any event, susceptible to becoming a part of the public record as they are routinely challenged by parties in court.[47] Thus, they eventually become a part of the court's record and the relevant paragraphs of the arbitral award (without any redaction) are often reiterated in judgments. It is important to highlight that the

40. Bangalore International Mediation, Arbitration and Conciliation Centre Rules ('BIMACC Institutional Arbitration Rules'), r. 34.01.
41. Arbitration Act 1996, s. 42A.
42. *Ibid.*
43. Gopal Subramanium, *Confidentiality under the Indian Arbitration & Conciliation Act of 1996* (International Bar Association), https://www.ibanet.org/article/015535e1-e477-42e7-a7cc-d6dc978975d5accessed 9 September 2021.
44. Arbitration Act 1996, s. 27.
45. Arbitration Act 1996, s. 34.
46. Arbitration Act 1996, s. 9.
47. Nicholas Towers, Expanding Horizons in Commercial Arbitration: The Case for the Default Publication of Awards' in Michael O' Reilly (ed), (2015) 81(2) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management.

Srikrishna Report also suggested the *"challenge* [to] *an award before a court or judicial authority*"[48] as an exception to Section 42A; however, it was eventually not adopted in the final text of the provision.

The UNCITRAL Rules on Transparency in Treaty based Investor State arbitration[49] seek to strike a balance between the access to key documents prepared during the course of arbitration proceedings and the adequate protection and redaction of confidential information.[50] India could also adopt and statutorily recognize a similar model, where arbitral awards can be published after due sanitization and redaction of all confidential and business sensitive information. In order to achieve this, legislative amendments would have to be carried out along with the recognition of publication of redacted awards as an exception to the confidentiality provision.

4. ADVANTAGES OF PUBLICATION OF ARBITRAL AWARDS

The arguments in favour of the publication of arbitral awards and the need for statutory recognition to this obligation, as set forth in the foregoing paragraphs, are equally relevant in the context of Indian arbitration law for the following reasons.

A. Development of arbitral jurisprudence

Confidentiality of arbitration proceedings is like a double-edged sword. Since arbitration is a private and a consent based system of dispute resolution, confidentiality, without a doubt, qualifies as one of its most standout features.[51] On the other hand, it poses limitations in the development of arbitral jurisprudence.[52] A systematic way to publish awards, where the

48. Committee Report, *Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (20 July 2017) https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf accessed 3 October 2021, page 6.
49. United Nations, UNCITRAL Rules on Transparency in Treaty- based Investor- State Arbitration (Resolution 68/109 adopted by the General Assembly on 16 December 2013).
50. *Id.*, art. 3, 7.
51. Srishti Kumar and Raghvendra Pratap Singh, *Transparency and Confidentiality in International Commercial Arbitration*, in Stavros Brekoulakis (ed), (2020) 86(4) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, 463, 470.
52. Paul Comrie-Thomson, 'A Statement of Arbitral Jurisprudence: The Case for a National Law Obligation to Publish International Commercial Arbitral Awards',

award is appropriately redacted to remove all confidential, sensitive, and commercial information, would benefit the arbitration community at large. Furthermore, it would help in the development of jurisprudence on many important issues of law, particularly commercial and contract laws.[53]

In the last decade, there have been substantial amendments to the Arbitration Act, with the objective of vesting wide powers in arbitral tribunals and bringing them at par with court proceedings. This begs the question, that when orders and judgments passed by courts are regularly published, why should there be any restriction on publication of appropriately redacted arbitral awards. Furthermore, unlike courts, where there is an appellate mechanism to review or rectify any misapplication of law, the scope of court's jurisdiction in challenge proceedings is limited. The court in a challenge proceeding cannot meddle with the award if the arbitrator has taken a possible view, even if not a plausible one.[54] Therefore, a court in a challenge proceeding cannot substitute its own interpretation[55] and can only either uphold or strike down the arbitral award.[56] Publication of redacted awards would therefore, deter arbitral tribunals from any misapplication of law. It would thus instil confidence[57] in parties and enhance transparency of the system.

As there is no formal system of binding precedents in arbitration, redacted awards would be helpful in guiding arbitral tribunals and even courts in case of similar disputes.[58] Furthermore, disputes arising out of most modern-day commercial contracts are usually resolved by way of arbitration. Therefore, it is important that awards are acquainted with, so that the public at large and particularly arbitration practitioners are acquainted with the wisdom of arbitrators and their interpretation of complex questions of commercial

(2017) 34(2) Journal of International Arbitration.

53. *Ibid.*
54. Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran (2012) 5 SCC 306 [29]; Leo Activation v. 49th All India Congress of Obstetrics and Gynecology 2020 SCC OnLine Ker 3737.
55. Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. (2019) 20 SCC 1 : 2019 SCC OnLine SC 1656 [13].
56. Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd. 2021 SCC OnLine SC 157.
57. Stefan Pislevik, *Precedent and Development of Law: Is it Time for Greater Transparency in International Commercial Arbitration?* in William W Park (ed), (2018) 34(2) Arbitration International 241, 249.
58. Joshua Karton, *A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards*, in William W Park (ed), (2012) 28(3) Arbitration International 447, 463.

laws.[59] It would also promote consistency in arbitral decisions and uniform interpretation and application of law to similar disputes.[60]

B. Grading of arbitral institutions and accreditation of arbitrators

The 2019 Amendment has proposed the insertion of Section 43I[61] and Section 43J,[62] which provide for norms for grading of arbitral institutions and accreditation of arbitrators, respectively. These amendments have been made in light of the increasing transparency and reliability of the system, so that parties are well informed while choosing arbitral institutions or while nominating their arbitrators. Barring a few exceptions, most arbitral institutions in India do not contain a depository where these redacted awards are saved or a database on which these redacted awards can be accessed.

If publication of redacted awards was statutorily recognized, arbitral institutions would be bound to publish redacted awards in a particular format and in a time-bound manner. It would then be possible to analyse the time taken by an arbitral institution for the disposal of domestic or international arbitration. It would also enable parties and arbitration practitioners to better assess the efficacy of an arbitral institution and make an informed decision while choosing an arbitral institution to administer their disputes. This could also possibly assist the Arbitration Council of India in the grading of arbitral institutions.

As far as nomination and appointment of arbitrators are concerned, there is no database or any source of information, which contains details of arbitrators including their experience and qualification. There is no way that a party can find out, (i) if its proposed nominee arbitrator is well versed with the subject area of the dispute; or (ii) what are the arbitrator's core or

59. Douglas S Jones, *Arbitrators as Lawmakers* (2017) VI (2) Indian Journal of Arbitration Law, 18, 19.
60. Alexis Mourre, *Arbitral Jurisprudence in International Commercial Arbitration: The Case for a Systematic Publication of Arbitral Awards in 10 Questions* (Kluwer Arbitration Blog, 28 May 2009) http://arbitrationblog.kluwerarbitration.com/2009/05/28/arbitral-jurisprudence-in-international-commercial-arbitration-the-case-for-a-systematic-publication-of-arbitral-awards-in-10-questions/ accessed 3 October 2021.
61. Arbitration Act 1996, s. 43I.
62. Arbitration Act 1996, s. 43J.

principal area of specialty or practice; or (iii) if an arbitrator has adjudicated similar disputes in the past.

Publication of redacted awards with the arbitrator's name would also enhance the reputation, credibility and integrity of arbitrators. Parties will then have the opportunity to analyse redacted awards passed by a particular arbitrator and assess the capability and suitability of the arbitrator for their disputes.[63] It would also presumably enhance the quality of arbitral awards, as arbitrators would be more careful about giving detailed reasons and justifications for their decisions.[64]

C. Transparency and legitimacy

Lord Hewart once rightly observed that *"Justice should not only be done but should manifestly and undoubtedly be seen to be done*".[65] Therefore, the publication of redacted awards would make the system more transparent and acceptable to the public at large. It would also enhance the legitimacy of arbitration as a mode of dispute resolution. Access to redacted awards would also be helpful for education and training purposes,[66] where practitioners and students would be able to get an insight into how arbitrators interpret law and apply those principles.[67]

If there are publicly available redacted awards on similar disputes or issues of law, parties would be able to evaluate the tenability of their success in a dispute depending on the foreseeability of outcome.[68] They would be in a better position to do a cost-benefit analysis of pursuing their claims (or not). This is likely to promote other methods of alternative dispute resolution like mediation once parties have made an informed assessment of their chances of success.

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63. Kenji Tashiro, *Quest for a Rational and Proper Method for the Publication of Arbitral Awards*, (1992) 9(2) Journal of International Arbitration, 97, 102.
64. Chang-fa Lo, *On a Balanced Mechanism of Publishing Arbitral Awards*, 1(2) Contemp Asia Arb J, 235, 243.
65. R. v. Sussex Justices (1924) 1 KB 256 (ex parte MCCarthy J).
66. Philip Wimalasena, *The Publication of Arbitral Awards as a Contribution to Legal Development – A Plea for more Transparency*, in Matthias Scherer (ed), (2019) 37(2) ASA Bulletin 279, 285.
67. Elina Zlatanska, *To Publish, or Not to Publish Arbitral Awards: That is the Question*, (2015) 81(1) The International Journal of Arbitration.
68. Philip Wimalasena, *The Publication of Arbitral Awards as a Contribution to Legal Development – A Plea for more Transparency*, in Matthias Scherer (ed), (2019) 37(2) ASA Bulletin 279, 287.

Furthermore, there is no consistency or clarity in the rules of arbitral institutions, and the manner in which confidential or sensitive commercial information is required to be redacted from arbitral awards. Statutory recognition of arbitral awards, along with some criteria or guidelines for redaction and publication, can bring about uniformity and consistency in the rules of arbitral institutions. It would also provide a statutory framework for *ad hoc* tribunals to publish redacted awards. It is important that the issue of publication of arbitral awards be addressed at the national level by statutorily incorporating and recognizing it in the Arbitration Act, irrespective of the mechanisms stipulated by different arbitral institutions.[69]

5. PROPOSED MECHANISM OF PUBLICATION

In light of the aforementioned, the article proposes the following amendments to the Arbitration Act:

A. Amendment to Section 42A:

(i) The *non-obstante* clause, i.e., "*notwithstanding anything contained in any other law for the time being in force*", should be replaced with "*unless otherwise agreed between the parties or provided for in the rules of the arbitral institution governing the arbitration proceedings.*"

(ii) The exceptions for disclosure of arbitral awards should also include challenge proceedings; and

(iii) The provision should also set out exceptions for disclosure of arbitral proceedings.

B. Insertion of a separate provision recognizing publication of arbitral awards:

(i) A new provision may be inserted recognizing the publication of arbitral awards after allowing for redaction of all identifying information, including any confidential and business sensitive information. However, the names of the members of arbitral tribunal and the arbitral institution should not be redacted.

69. Paul Comrie-Thomson, *A Statement of Arbitral Jurisprudence: The Case for a National Law Obligation to Publish International Commercial Arbitral Awards* (2017) 34(2) Journal of International Arbitration, 275, 300.

(ii) All arbitral tribunals, either constituted pursuant to the rules of an arbitral institution or in an *ad hoc* arbitration proceeding, would be required to issue two awards:

a) One, which would be the regular award containing everything, including names of parties, identifying information, confidential and other business sensitive information; and

b) The other one, which would be a redacted award, for the purpose of publication after removing names of parties and all confidential and business sensitive information. The redacted award should be limited to the issues involved, identification, application and analysis of relevant laws, and the dispositive section containing the conclusion and summary of findings.

(iii) After the issuance of redacted award, and within a period of three-months, parties will have the option to provide their consent to the publication of the redacted award. Parties may also review the redacted award and give their comments on the redaction/sanitization of confidential or business sensitive information to the arbitral tribunal. During the three-month period, parties can mutually agree not to publish the redacted award and convey the same to the arbitral tribunal.

(iv) The arbitral tribunal should encourage parties to agree on the publication of the redacted awards. The arbitral tribunal shall address and incorporate parties' comments on the issue of sanitization and redaction of confidential and business sensitive information in the redacted award.

(v) The redacted award would only be published when all the parties agree or give their consent for publication of the redacted award. Even if one of the parties does not give its consent for publication of the redacted award, then in such a situation, the redacted award would not be published and the arbitral tribunal would intimate the same to the Arbitration Council of India.

(vi) In case all parties agree on publication of the redacted award, but there is a dispute between the parties and arbitral tribunal on the redaction/sanitization of the arbitral award, the parties may jointly or individually address their concern and file a representation with

the Arbitration Council of India, who shall be the final authority to adjudicate upon the issue of redaction/sanitization of arbitral awards.

(vii) The arbitral tribunal, after the expiry of three months, would be bound to submit both version(s) of the award in the depository maintained by the Arbitral Council of India.

C. Insertion of a separate schedule containing a template of a redacted arbitral award:

A separate schedule should be inserted which would set out a template for publication of redacted arbitral awards. *Ad hoc* arbitral tribunals would be required to follow the template while submitting redacted awards to the Arbitration Council of India. Arbitral institutions would continue to maintain their autonomy to formulate its own format or template of a redacted arbitral award. However, these arbitral institutions would also be mandatorily required to submit the redacted awards to the Arbitral Council of India.

D. Amendment to Section 43D of the Arbitration Act:

Section 43D should be amended and the Arbitration Council of India be given powers to regulate the storage of redacted arbitral awards; decide on the issue of redaction/sanitization of arbitral awards in case of a dispute between parties and arbitral tribunal; and also frame guidelines for publication of redacted awards.

6. CONCLUDING REMARKS

As recognized by Lon Fuller in 'principles of legality',[70] the consistency, publicity, predictability, and congruence are some of the essential conditions that all purported legal rules must comply with. In that light, publication of arbitral awards would surely be a welcome step. It would promote transparency, contribute in the development of arbitral jurisprudence, and also bring India at par with other established arbitration friendly jurisdictions. A systematic way to publish redacted awards will not only be in harmony to the confidentiality obligation, but it will also promote arbitration as a preferred mode of dispute resolution, increase confidence of parties and transparency of the system as a whole.

70. Lon L Fuller, *The Morality of Law* (rev. ed. New Haven CT, Yale University Press, 1969) 33-38.

ARBI(TRAITOR)?: A CASE AGAINST AI ARBITRATORS

—Ghazal Bhootra and Ishan Puranik[*]

ABSTRACT

*This paper covers the notion of delegating the role of arbitrators to Artificial Intelligence (or '**AI**') Systems. In recent times, Artificial Intelligence has been permeable in almost every industry. The legal industry is no different. Researchers have wondered if Artificial Intelligence arbitrators can now replace arbitrators as a solution to the problem of arbitral bias. Several countries have also started testing AI in arbitration proceedings. In theory, the idea is intelligent given that the common perception of AI is that it is free of stereotypes and bias, and cannot let prejudice slip into its decisions. However, in other uses of AI, it has been found that the AI is only as unbiased as the ones writing its algorithms and the data upon which such programs are trained. This paper aims to delve into the existing regulatory frameworks, examine whether they can effectively govern an AI-powered arbitrator and see if such parties can truly be the antidote to arbitral bias. The authors will also explain how there is a need for human arbitrators, and why delegating complete responsibility is a bad idea. While AI comes with the promise of providing solutions, it is not risk-free. Therefore, the paper concludes with how AI can be used in some aspects of an arbitration, but it cannot replace human arbitrators directly. Unlike the existing literature, this paper focuses on AI-powered arbitrators and the belief that they can combat arbitral bias, it also highlights whether the Indian regulatory framework allows for the appointment of AI powered arbitrators. The conclusion provides lucid suggestions and the context behind them to make AI-based solutions more viable in the process of arbitration.*

1. INTRODUCTION

Legal Tech has recently exploded in popularity in the legal industry. A vast variety of products have been developed in this area to assist practitioners in streamlining existing human operations. Artificial intelligence has

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also aided in the increase of Legal Tech's popularity.[1] As Professor Roger Browns word stated, "*As technology disrupts society further, regulators turn away from the rules in favour of technological solutions or where historic regulatory objectives are simply taken care of by automation"*.[2] The automation referred to here is a product of Artificial Intelligence (AI) Systems, i.e., systems that can absorb data from their surroundings and use it to alter or form outputs. What this statement means is that as technology becomes more capable, many regulatory duties and responsibilities can be delegated to machines and technology systems. Solutions powered by AI include products that can help augment human review capabilities human review capabilities like reviewing documents and agreements (for example, predictive coding)[3] in the face of escalating volumes of unstructured data and tight deadlines. Some of these innovations face a huge demand, especially with relation to human language processing, inspiring a whole array of legal tech solutions in the areas of legal research, access to justice, and predicting cases' outcomes.[4]

The field of ADR has also experimented with AI programs. An example of such software is as follows-DRExM, a knowledge-based AI system that shows alternate resolution techniques, has been used in Egypt to resolve construction disputes. The software can recommend the most suitable

1. Aditya Singh Chauhan, *Future of AI in Arbitration: The Fine Line Between Fiction and Reality* (Kluwer Arbitration Blog, 26 September 2020) http://arbitrationblog.kluwerarbitration.com/2020/09/26/future-of-ai-in-arbitration-the-fine-line-between-fiction-and-reality/ accessed 29 September 2021.
2. Roger Brownsword, *Law and Technology: Two Modes of Disruption, Three Legal Mind-Sets, and the Big Picture of Regulatory Responsibilities* (2018) 14 Indian Journal of Law and Technology.
3. Claire Morel de Westgaverand Olivia Turner, *Artificial Intelligence, A Driver For Efficiency In International Arbitration – How Predictive Coding Can Change Document Production* (Kluwer Arbitration Blog, 23 February 2020) http://arbitrationblog.kluwerarbitration.com/2020/02/23/artificial-intelligence-a-driver-for-efficiency-in-international-arbitration-how-predictive-coding-can-change-document-production/ accessed 29 September 2021; Lucas Bento, *International Arbitration and Artificial Intelligence: Time to Tango?* (Kluwer Arbitration Blog, 23 February 2018) http://arbitrationblog.kluwerarbitration.com/2018/02/23/international-arbitration-artificial-intelligence-time-tango/ accessed 29 September 2021.
4. Ibrahim Shaheta, *The Marriage of Artificial Intelligence & Blockchain in International Arbitration: A Peak into the Near Future!!!* (Kluwer Arbitration Blog, 12 November 2018) http://arbitrationblog.kluwerarbitration.com/2018/11/12/the-marriage-of-artificial-intelligence-blockchain-in-international-arbitration-a-peak-into-the-near-future/ accessed 25 August 2021.

dispute resolution technique, depending on the nature of the dispute, the evidence, and the relation between the parties.[5]

One of the newer innovations, however, also uses AI to adjudge disputes. AI decision-making is also being used within the field of online dispute resolution (ODR). These systems are labelled expert systems, which are programmed by experts in the field and integrate rule-based algorithms to assist the program to make decisions based on information received from the parties. An advanced ADR tool called 'Rechtwijzer' in the Netherlands aids couples in the separation or divorce process. Rechtwijzer elicits information about the participants and their connection before presenting options depending on the answers. Legal information and AI systems may already generate extensive decision trees that can offer outcomes to conflicts using sophisticated "branching" and data searching techniques. This is accomplished using a system that mimics human intellect (neural networks).[6]

When it comes to AI that can, in theory, adjudicate matters, one of the most advanced technologies is being used in the Chinese 'Internet Courts'. The court is said to be the first Internet court in the world and focuses on hearing six kinds of civil and administrative Internet-related disputes, including online piracy and e-commerce. China's Internet courts have been experimenting with "AI judges" to help them adjudicate simple, non-complex cases like low-value contract and negligence disputes. These technologies are intended to improve judicial consistency across China while also addressing potential judicial expertise gaps. Such a machine can also perform deviation analysis on draught judgments in some courts by comparing relevant evidence to evidence in earlier court decisions.[7]

If these programs can predict outcomes, and give resolutions it leads to fundamental questions of whether such AI-powered dispute resolution systems can replace human arbitrators (or judges) or not. There is still some skepticism on the complete replacement of arbitrators with AI considering

5. AA Elziny and others, *An Expert System to Manage Dispute Resolutions in Construction Projects in Egypt* (2016) 7 Ain Shams Engineering Journal 57.
6. Tania Sourdin and Richard Cornes, *Do Judges Need to Be Human? The Implications of Technology for Responsive Judging* in Tania Sourdin and Archie Zariski (eds), *The Responsive Judge: International Perspectives* (Springer, 2018) https://doi.org/10.1007/978-981-13-1023-2_4 accessed 21 November 2021.
7. Mimi Zou, "*Smart Courts" in China and the Future of Personal Injury Litigation* (Social Science Research Network 2020) SSRN Scholarly Paper ID 3552895 https://papers.ssrn.com/abstract=3552895 accessed 21 November 2021.

the highly technical and confidential nature of commercial and international arbitration. Having said that, AI consistently has had breakthroughs that were unexpected for many years.[8]

If such a program is developed it raises the question: *"Are AI arbitrators better than human ones, and if they are, should they be allowed to operate at all?"* Some of the literature advocates that AI is free from prejudice, and therefore, it can do away with the problem of arbitral bias.[9]

The independence and impartiality of an arbitrator are indispensable to an arbitration proceeding. One of the pillars of natural justice is to conduct trials or any other proceedings in a fair and just manner. One cannot hear the cause they have an interest in (also known as *nemo judex in sua causa*). However, when partiality or prejudice is apparent in the way an arbitrator acts, it is termed as arbitral bias. Finding the contention of arbitral bias rising, many jurisdictions across the world,[10] including India,[11] have taken measures to grapple with this issue. There are increasing chances and attempts to delegate the entire process to electronic agents, a notion that may have some clear benefits at face value.[12] However, the ratio of the number of conversations hyping up AI systems and their capabilities to that of the implications of giving AI the reins to essential societal activities is skewed

8. See Prof Maxi Scherer, 'International Arbitration 3.0 – How Artificial Intelligence Will Change Dispute Resolution', *Austrian Yearbook of International Arbitration* (2018) https://plu.mx/ssrn/a/?ssrn_id=3377234 accessed 21 November 2021. The author explains the DeepMind incident with strong and weak AI which showcases an example of AI progressing faster than expected.
9. Mel Andrew Schwing, *Don't Rage Against the Machine: Why AI Maybe the Cure for the 'Moral Hazard' of Party Appointments* (2020) 36 Arbitration International https://doi.org/10.1093/arbint/aiaa033accessed 26 August 2021; Paul Bennett Marrow and Mansi Karol and Steven Kuyan, *Artificial Intelligence and Arbitration: The Computer as an Arbitrator—Are We There Yet?* (2019) 74 Dispute Resolution Journal 4 https://ssrn.com/abstract=3709032accessed 26 August 2021.
10. Atharva Kotwal and Isha Goel, *Unpacking Bias as Justification for Arbitrator Dismissal Across the World* (Jurist, 22 September 2020) https://www.jurist.org/commentary/2020/09/kotwal-goel-bias-arbitrator/accessed 25 August 2021.
11. Faranaaz Karbhari, *Arbitral Bias* (Mondaq, 27 November 2020) https://www.mondaq.com/india/arbitration-dispute-resolution/1010490/arbitral-bias accessed 25 August 2021.
12. See Lippe, Paul, Daniel Martin Katz, and Dan Jackson *Legal by Design: A New Paradigm for Handling Complexity in Banking Regulation And Elsewhere In Law* (2015) Oregon L Rev 4: 831. The author asserts that lawyers are ill-equipped to handle the complexities of 'the modern legal landscape' and 'new technologies and approaches borrowed from other fields, including the possible application of IBM Watson, law has the opportunity to dramatically increase its ability to manage complexity'.

towards the former.[13] The notion of providing these computer systems with the power to take legal decisions that will directly affect human life must be thoroughly examined and vetted before implementation, and such implementation must continuously go through checks. Keeping this in mind, it seems that AI's intention to provide a solution to this issue is good. However, there are many problems with this proposal. The authors of this paper aim to find out if AI-powered arbitrators are truly the vaccine to the infection of arbitral bias.

The first part of this paper will provide an overview of the regulatory framework of arbitral bias and discuss the appointment of an 'AI-Powered arbitrator.' The second part delves into the capability of and arguments against AI systems replacing human arbitrators.

2. PART 1: REGULATORY FRAMEWORK

A. A Brief Primer on Arbitral Bias

In 2010, Jan Paulsson started the much-commented upon debate of party-appointed arbitrators being biased, and the requirement of arbitrators to be selected by a neutral body, through a blog post.[14] The contentions raised by him include that the arbitrators appointed by parties were a moral hazard to international commercial arbitration and that it severely undermined the concept of impartiality in arbitration. For arbitration to serve as an actual substitute for litigation, the rule of natural justice, namely, *Nemo judex in causa sua,* must be applied.[15] Therefore, the concept of arbitral bias can be explained as the situation in which an arbitrator is prejudiced towards a party instead of being independent and impartial, which are the two requirements of a fair arbitration proceeding.

13. *AI Could Be a Critical Tool to Help Save the Planet* (*The Guardian*, 30 April 2019) https://www.theguardian.com/ai-for-earth/2019/apr/30/ai-tech-sustainable-planet accessed 21 November 2021; Rob Toews, *AI will Transform the Field of Law*, *Forbes* https://www.forbes.com/sites/robtoews/2019/12/19/ai-will-transform-the-field-of-law/ accessed 21 November 2021; *How AI Can Boost Your Company Results* | Scoro (31 October 2017) https://www.scoro.com/blog/how-ai-can-boost-company-results/ accessed 21 November 2021.
14. Jan Paulsson, *Are Unilateral Appointments Defensible?*, Kluwer Arbitration Blog (Wolters Kluwer, 2 April 2009) http://arbitrationblog.kluwerarbitration.com/2009/04/02/are-unilateral-appointments-defensible/ accessed 26 July 2021.
15. See Matthew Gearing, *"A Judge in His Own Cause?": Actual or Unconscious Bias of Arbitrators* (2000) 3 Int'l Arb L Rev.

Under Indian jurisdiction, looking into the history of recent amendments, it is found that the policymakers have worked towards solving the problem of arbitral bias.[16] The Arbitration and Conciliation (Amendment) Act, 2015,[17] gives considerable attention to aspects such as mutuality, independence, and impartiality. The Fifth Schedule also refers to the grounds on which an arbitrator's independence and impartiality can be questioned and therefore, the award so passed can be challenged under Section 12 of the Act.[18]

Sub-section (1) of Section 12 has been revised to require an arbitrator to furnish the parties with a written disclosure of any direct or indirect, past, or present relationship he may have had with any of the parties to the dispute. Furthermore, despite any prior agreement between the parties, Section 12(5) read with the Act's Seventh Schedule also specifies the various categories of persons ineligible to be chosen as arbitrators. In TRF Ltd. v. Energo Engg. Projects Ltd.,[19] a three-judge bench of the Supreme Court strengthened the statutory mandate of an independent, unbiased, and neutral arbitrator. The Supreme Court has ruled that if an arbitrator is rendered disqualified by law, he cannot appoint another arbitrator. The pure norm of adjudicative ethics is based on the idea that the arbitral tribunal authorized by law to try cases and disputes must not only be unbiased, but must also avoid even the appearance of prejudice.[20] As a result, it is critical to guarantee that the arbitration process adheres to the greatest levels of impartiality. However, the mere quality of being human gives rise to some intrinsic, subconscious,[21] latent bias in even the most equitable and ethical human arbitrators,[22] such biases may interfere with the quality of the verdict passed. Thus, it creates a space that some sort of unbiased system can fill.

The goal behind the development and application of Artificial Intelligence Systems is to make life easier and more efficient for humans and thus one

16. See Udian Sharma, *Independence and Impartiality of Arbitral Tribunals: Legality of Unilateral Appointments* (2020) 9 IJAL 121 http://ijal.in/sites/default/files/Vol9Issue1/Udian_Sharma-Independence_and_Impartiality_of_Arbitral_Tribunals_Legality_of_Unilateral_Appointments.pdf accessed 26 August 2021.
17. Arbitration and Conciliation (Amendment) Act 2015 (Act 3 of 2016).
18. Arbitration & Conciliation Act 1996 (Act 26 of 1996).
19. TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377.
20. State of Arunachal Pradesh v. Subhash Projects and Mktg. Ltd. 2006 SCC OnLine Gau 57.
21. See Divij Jain, *Changing Paradigm of the Arbitrator's Duty to Remain Impartial in the Social Media Age?* Kluwer Arbitration Blog (Wolters Kluwer, 5 July 2021) http://arbitrationblog.kluwerarbitration.com/2021/07/05/changing-paradigm-of-the-arbitrators-duty-to-remain-impartial-in-the-social-media-age/ accessed 26 July 2021.
22. Shwing (n 9).

of their fundamental requirements is to perform equitably[23] - this premise serves as an impetus for the argument of inclusion of AI into arbitration. However, while this requirement is being pursued relentlessly - the results so far do not work out in AI's favor.

B. Enhanced Adjudication Services: Appointment of AI-Powered Arbitrators

To understand the enhanced adjudication services, an example can be taken from international developments. In a 2017 study, Katz and others used data from US Supreme Court rulings to apply it to a machine learning software that involved the prediction of legal decision-making.[24] After learning from the dataset's sample, the algorithm was applied to the remaining, out-of-sample data and asked to predict two things: 1) whether the Court would affirm or reverse a ruling as a whole; and 2) how each Justice would vote. The model correctly predicted 70.2 percent of Supreme Court rulings and 71.9 percent of Justice votes, demonstrating a high rate of accuracy compared to its predecessors.[25] Looking at the success rates, the model can be treated as an enhanced adjudication system. Based on the data fed to it, of precedents, case laws, statutes, reforms etc. it can come to a decision. This, however, does not allow the system to take the place of a judge - because while 70% is a high rate of success, the 30% discrepancy seems much larger when we consider that it may contain verdicts by which citizens will be condemned or condoned and perhaps more importantly - the system is not capable for providing the 'judgment'[26] but merely a forecast of the verdict. Nevertheless, such models have been used to solve online disputes.[27] One of the main arguments against using AI

23. Ayanna Howard and Jason Borenstein, *Trust and Bias in Robots* (2019) 107 American Scientist 86.
24. Daniel Martin Katz and others, *A general approach for predicting the behavior of the Supreme Court of the United States* (2017) 12 PLOS ONE https://doi.org/10.1371/journal.pone.0174698accessed 26 July 2021.
25. N Sivaranjani and others, *A Broad View of Automation in Legal Prediction Technology* (Third International Conference on Electronics Communication and Aerospace Technology 2019).
26. As per Section 2(9) of the Civil Procedure Code (1908) – a Judgment is the reasoning behind a verdict.
27. Aditya Singh Chauhan, *Future of AI in Arbitration: The Fine Line Between Fiction and Reality* (Kluwer Arbitration Blog, 26 September 2020) http://arbitrationblog.kluwerarbitration.com/2020/09/26/future-of-ai-in-arbitration-the-fine-line-between-fiction-and-reality/ accessed 25 July 2021; Vivi Tan, *Online Dispute Resolution for Small Civil Claims in Victoria: A New Paradigm in Civil Justice* (2019) 24 Deakin Law Review 101.

in litigation or courts is that they do not possess the emotional intelligence that is required of judges in such scenarios. Categorically speaking, that is not required in international or commercial arbitrations.[28] However, the law is not noticeably clear on the appointment of such AI-powered arbitrators.

The appointment of a computer as an arbitrator is not expressly prohibited by any of the amended international arbitration regulations. The Convention on the Recognition and Enforcement of Arbitral Awards (The New York Convention) refers to arbitrators in two articles, Art. I(2) and Art. V (1)(b),[29] but does not provide or imply that the arbitrators must be human beings. Rather, every term pertaining to the arbitration agreement's legality solely refers to the submission of a dispute to the arbitrators. Parties may appoint a single arbitrator or a panel of arbitrators, according to the definitions of "arbitral tribunal." Because of this circular reasoning, both an arbitration agreement sending the dispute to a Machine Learning System arbitrator and a tribunal consisting entirely of such a machine, would be legal.[30]

However, S. 11(1) of the Arbitration and Conciliation Act, 1996 mentions "A person of any nationality may be an arbitrator." AI does not qualify as a "legal person."[31] Therefore, the inclusion of AI-Powered arbitrators as a substitute to human arbitrators is not under the purview of Indian legislation at present. There is always a chance of amendments to the sections as well as judicial pronouncements, in such a way that AI-Powered arbitrators can be included. Members of the European Parliament, for example, have proposed giving robots legal standing by classifying them as "electronic people" and making them accountable for their actions or omissions. This type of rule would potentially open new floodgates, allowing parties to appoint computers even in countries where "people" arbitrators are required.[32] These discussions however are in a very nascent stage and are not in the realm of dispute resolution. The personhood of machines and AI in particular is still a matter of contention in multiple jurisdictions (both

28. Sourdin and Cornes (n 6).
29. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed 10 June 1958) 330 UNTS 38 (1959).
30. José María de la Jara and Daniela Palma and Alejandra Infantes, *Machine Arbitrator: Are We Ready?* Kluwers Arbitration Blog (Wolters Kluwer, 4 May 2017) http://arbitrationblog.kluwerarbitration.com/2017/05/04/machine-arbitrator-are-we-ready/ accessed 26 August 2021.
31. Simon Chesterman, *Artificial Intelligence and the Limits of Legal Personality* (2020) 69 International and Comparative Law Quarterly 819 https://doi.org/10.1017/S0020589320000366 accessed 26 August 2021.
32. Jara (n 30).

territorial and subject-matter based) across the world – most progress seems to be made in the areas of Intellectual Property Rights,[33] this too however, is at a somewhat hesitant stage and subject to dispute.[34]

3. PART 2: ARGUMENTS AGAINST AI POWERED ARBITRATORS

At present, there are few areas where computer systems have been given the power to undertake the philosophical jobs[35] of decision making in the legal field. In Lodder and Thiessen, 2003 such a system that would be ideal to take on such a responsibility has been termed a 'Strong Agent'. They define a 'strong agent' as one which enjoys the qualities of autonomy, social ability (communication with other agents or humans), reactivity (taking input from outside environment), pro-activeness, mobility, rationality, veracity (will not knowingly endorse false information) and benevolence.[36] The paper takes a strong stance that if Artificial Intelligence Systems are to ever replace the roles of traditional arbitrators, then these qualities must be fulfilled.

Unfortunately, the systems that have already been deployed are by no means strong agents, and the absence of these qualities has had disastrous consequences.[37] *Lodder and Thiessen* have also defined another type of system – a weak agent – such an agent enjoys the qualities of autonomy, social ability, reactivity, and pro-activeness, but must only be used to assist the Arbitration process, and in no way should it take the decision itself. Such agents are at play and have been employed in the Arbitration process in the following ways:

- For the search and selection of Arbitrators or Mediators based on facts;[38]
- For the administrative work related to ADR;
- For the organizing, sorting and management of documents;

33. Rebecca Currey and Jane Owen, *In the Courts: Australian Court Finds AI Systems Can Be "Inventors"* https://www.wipo.int/wipo_magazine/en/2021/03/article_0006.html accessed 21 November 2021.
34. *AI Cannot Be the Inventor of a Patent, Appeals Court Rules* (*BBC News*, 23 September 2021) https://www.bbc.com/news/technology-58668534 accessed 21 November 2021.
35. Chauhan (n 27).
36. Arno R Lodder and Ernest M Thiessen, *The Role of Artificial Intelligence in Online Dispute Resolution* 18.
37. Julia Angwin and others, *Machine Bias* (ProPublica 2016) https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing?token=U6YPJH2o8tEdYqJTDehddU4i3TwLH1Jb accessed 25 July 2021.
38. 'Arbitrator Intelligence' https://arbitratorintelligence.com/ accessed 21 August 2021.

- For Legal Research;[39]
- For helping parties identify and structure issues during mediation.[40]

While Lodder and Thiessen's vision for the Strong Agent has not been achieved, there are calls for AI being given decision-making powers for the sake of efficiency and objectivity. However, the utilisation of AI in any form, other than a supportive or assistive one (with caveats), is undesirable, as argued below:

A. Because they are a black box that cannot be judged, monitored or corrected

In *The Trial* by Franz Kafka, the protagonist wakes up one morning and is told that he is being arrested, the reason is unknown to him, and even the police officers that are making the arrest.[41] While Kafka's story is a satire on the mindless bureaucracy of the legal system, and the common man's struggle with it, it also serves as a brilliant metaphor for one of the major problems that plague AI researchers and scientists: The Black Box Problem.

A black box is a system that can be observed by means of its inputs and outputs, however, its inner operations remain unknown. The inner workings of this system are left to the estimation of the observers. Current AI systems face this problem, and because of this problem, an AI system returns an output that cannot be objectively termed as free and fair.[42] It is important to understand that Machine Learning and Deep Learning AI systems are created with the intention to mimic human decision making.

The issue arises when the data from past human decisions were biased and prejudiced to begin with. An example of this issue is Amazon's recent fiasco with its internal hiring algorithm. Amazon was using an AI system to select candidates for interviews, the system was trained based on past employee data. Amazon's internal data reflected that male-employees enjoyed higher levels of success (i.e., more males fit the definition of success that

39. *AI May Help with Alternative Dispute Resolution* https://www.lawtimesnews.com/practice-areas/adr/ai-may-help-with-alternative-dispute-resolution/263579 accessed 19 August 2021.
40. Lodder and Thiessen (n 36).
41. Franz Kakfa, *The Trial* (1995).
42. Riccardo Guidotti, Anna Monreale and Dino Pedreschi, *The AI Black Box Explanation Problem* (*KDnuggets*) https://www.kdnuggets.com/the-ai-black-box-explanation-problem.html/ accessed 19 August 2021.

the machine was taught) than their female counterparts. This observation was inaccurate because the number of males in the company was much higher than the number of females. So even if every single female member qualified under a particular criterion, the overall result would still have more males than females. This led to the AI discarding the applications of women, and applications that mentioned things like 'Women's college,' 'Women's soccer team' etc.[43]

Illustration: This bias may manifest itself in arbitration matters as well, for example an AI-model trained on the economic and societal information of India will believe that male individuals earn more money than female individuals - if such a model is asked to take a decision in a divorce matter, where the wife is in an economically better position than the husband, the AI-model may still suggest a higher number of assets be allotted to the wife, even though she is better off.

Human life has historically been regulated through processes, our social teachings, civil liberties, and most endeavours are built around instructions and processes, but we have also historically had the power to challenge these processes & instructions through appeals, questions and other tools, an AI system does not allow this. Thus, the utilisation of an AI system to make legal decisions goes against the ethics of justice.

B. Because they can perpetuate human biases

AI Systems have been popularised as objective and reasonable decision-makers that, unlike humans, cannot succumb to fatigue, internal bias, and indecisiveness. However, the notion of an unbiased AI is a dream that has not been achieved yet, and will not be achieved soon because of a simple issue. Most decision-making AI systems are based on Machine Learning algorithms. These algorithms analyse past data and use it to predict what a human would do in a novel situation; this system encounters two main problems:

1. A lack of data results in the algorithm not being able to learn effectively.

2. Existing data being tainted with inherent biases.

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43. Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool That Showed Bias against Women* (*Reuters*, 10 October 2018) https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G accessed 20 August 2021.

While the first problem can be solved by getting access to more data and will correct itself in a few years of continuous usage, the second one poses a threat to justice everywhere. Although discussions are being carried out to rectify these issues, there are roadblocks on that path too.[44]

In 2016, an organization named ProPublica released a report that exposed unequal, unethical, and illogical sentencing schemes that were being made based on an output from an AI system. The AI System that was being used was a Machine Learning-based program that was tasked with predicting the likeliness of a convict committing a crime after being released from prison (recidivism). The output of this machine was in the form of a 'Risk Level' with 1 being the lowest, and 10 being the highest. ProPublica found that African American convicts were consistently being marked as higher-risk individuals, as compared to Caucasian counterparts with similar charges. In fact, Caucasian convicts that were charged with armed robbery were marked as a '3' while African American teenagers that were charged with minor misdemeanours were marked as '8'.[45] This happened because the datasets this Machine Learning System was trained from contained details of African American convicts from over-policed, over-regulated neighbourhoods. This resulted in the AI System believing that being African American or living in African American majority neighbourhoods increases the chances of committing repeated crimes. Thus, the validity of AI as a decision-maker is highly questionable today. Delegating the 'philosophical job' of judges, mediators and other decision-makers will lead to inequitable decision making in the absence of sufficient, unbiased data, or at least a uniform method of identifying and factoring out biased data.

While this may seem a problem that will only be encountered at a later stage, it is important to realise that AI being an inhuman and a non-cognitive being, cannot differentiate between things like tone, context and other non-explicit cues that create meaning, and this leads to an inherent bias that it may hold. For example, in 2016 a huge outcry was raised by netizens on discovering that when an individual would search for 'Professional Haircut' on Google's Image search platform – they would be greeted by images of Caucasian men in business suits, and if one were to search for 'Unprofessional Haircuts', they'd be greeted by images of African American men or women in their traditional natural hairstyles.

44. *Putting Responsible AI Into Practice* https://sloanreview.mit.edu/article/putting-responsible-ai-into-practice/ accessed 21 August 2021.
45. Julia Angwin and others (n 37).

Google was relentlessly shamed and questioned as many believed that this was a result of something the Tech Giant did, however the truth was that Google's AI algorithm was simply picking up images from photos used in articles or other user-generated web content. Google's algorithm uses the text surrounding an image to determine what is in the image itself, as a result the algorithm took images used in articles that protested racist attitudes towards hair and hair styles, and because these articles must have contained the word 'unprofessional' and 'haircut' several times, the algorithm tagged it as such. The context in which this image was used was extremely different – but the algorithm cannot tell that.[46]

A feedback loop problem is encountered when algorithms find correlations in a biased dataset and then predict outcomes without considering the fact that bias tainted the training data. The predictions then put back into the system make for a harmful cycle.[47] To discuss the implications of this on AI-Powered arbitrators, we can take this example. William Park reported on a case in which the arbitrator responded, "*Italians are all liars in these cases and will say anything to suit their books after one party cited a case involving Italians*."[48] This material, if it stood as an award, may be used by an AI arbitrator to educate itself that all Italians are liars, preventing new evidence from Italians to be considered by the machine. AI arbitrators can also be biased if the historical data is based on a pattern, for example, to be biased towards corporations instead of consumers or investors instead of host states.[49] Such bias due to the feedback loop problem,[50] may become systematic if not corrected.

46. *Do Google's "unprofessional Hair" Results Show It is Racist?* (*The Guardian*, 8 April 2016) http://www.theguardian.com/technology/2016/apr/08/does-google-unprofessional-hair-results-prove-algorithms-racist- accessed 30 August 2021.
47. Mark A. Lemley and Bryan Casey, *Remedies for Robots* (2019) 86 University of Chicago Law Review 5 https://chicagounbound.uchicago.edu/uclrev/vol86/iss5/3 accessed 26 August 2021.
48. William Park, *Arbitrator Bias* (2015) No. 15-39 Boston University School of Law, Public Law Research Paper https://scholarship.law.bu.edu/faculty_scholarship/15/ accessed 26 August 2021.
49. Gizem Halis Kasap, *Can Artificial Intelligence ("AI") Replace Human Arbitrators? Technological Concerns and Legal Implications* (2021) J Disp Resol 2, 223.
50. Ignacio N Cofone, *Algorithmic Discrimination is an Information Problem* (2019) 70 HASTINGS LJ 1389.

C. Because they propagate the letter of law, with disregard for the spirit of the law

The rule of law is an essential principle of any democracy. The rule of law makes sure that every single individual within the territory of the country is subject to the supreme rule of the land – that is the law. It instils equality between the people and encourages the development of virtues like justice within society.[51] To propagate the rule of law, many say that it is necessary to have an objective judiciary,[52] one that treats all those that it seeks to help and punish as equals, irrespective of who such person may be. However, the rule of the law is fundamentally based on the virtue of justice, and such justice is not an objective issue, it requires application and interpretation of the law to best suit the condition, and thus the rule of law prefers the *Spirit of Law* over the *Letter of Law*.[53] The same cannot be said about algorithmic agents.

The notion that Judges should be indifferent to the citizens they serve is not a good one. While an indifferent judge will be the best party to dispose of cases efficiently, such a judge will not be the best one to dispose of justice. Justice follows the Spirit of Law and not just the Rule of Law. Justice follows Constitutionalism and not just Constitutional Law. The law is an incredibly abstract and human concept, to have a computer system understand the nuance and technicalities of law is an impossible feat, no matter how far our technology develops, in such a situation.

Therefore, replacing any form of judicial authority, be it a court-based one or ADR-based one, Artificial Intelligence cannot be allowed to replace the role of Human judges.[54]

Illustration: In the case of Kelner v. Baxter,[55] the plaintiff had been denied payment for the products he had delivered because the contract had

51. Levine SJ, *The Law and the "Spirit of the Law" in Legal Ethics* (Social Science Research Network 2015) SSRN Scholarly Paper ID 2691710 https://papers.ssrn.com/abstract=2691710 accessed 29 September 2021.
52. Préfontaine DC and Lee J, *The Rule of Law and the Independence of the Judiciary* [1998] World Conference on the Universal Declaration of Human Rights https://biblioteca.cejamericas.org/bitstream/handle/2015/987/rule-law-independence.pdf?sequence=1&isAllowed=y accessed 29 September 2021.
53. Garcia S M, Chen P and Gordon MT, *The Letter Versus the Spirit of the Law: A Lay Perspective on Culpability* (2014) 9 Judgement and Decision Making 479.
54. *21 Fairness Definitions and Their Politics* https://fairmlbook.org/tutorial2.html accessed 29 September 2021.
55. Kelner v. Baxter (1866) LR & CP 174.

been made between the plaintiff and an unincorporated company – the respondents argued that since there was no valid contract (as the company was not 'born') the respondents could not be held personally liable for it as per the prevalent contract law. However, the court discarding the letter of the law and applying the reasoning behind such a law ruled that if there exists a pre-incorporation contract,[56] then the promoters[57] of the company would be liable in the event of any default. AI Arbitrators cannot be expected to exercise such reasoning, even if they are fed the whole history of the law.

D. Because they require substantial amounts of data

For a predictive/decision-making AI system to make decisions, a large amount of data needs to be fed to it. To accurately predict the outcome of arbitration cases, the required data set would ideally include:

- transcripts from actual arbitration proceedings and their awards,
- reported judicial opinions issued by courts embodying the complete state of arbitration jurisprudence,
- all relevant statutes and rules of the arbitration process,
- all relevant journal and law review materials.[58]

In reality, a model uses only prior examples such as data for predicting the result of actions.[59] As a result, existing awards and their internal content will remain relevant for prediction purposes until a thorough model is established and a database for it is produced.

The quantity and quality of data given to an AI arbitrator, like with other AI systems, will have a significant impact on its efficiency.[60] However, in terms of arbitration, especially international and commercial arbitration, such huge quantities of data cannot be found. This is because arbitration by its very nature is a private process. Compared to litigation, there is hardly

56. A pre-incorporation contract is a contract made on behalf of a company that has not been incorporated yet.
57. A promoter of a company is an individual that plays a large role in the incorporation of the company. This may consist of acts such as drafting or getting drafted the important documents required for incorporation, etc. From Probir Kumar Misra v. Ramani Ramaswamy 2009 SCC OnLine Mad 1427 : (2010) 154 Comp Cas 658.
58. Marrow (n 9) 36.
59. See Katz (n 12).
60. Karl Manheim and Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy* (2019) 21 Yale J L & Tech 106, 122.

enough awards openly published, the few that are accessible also tend to be heavily redacted.[61] Compiling the dataset in such limits, with the few numbers of awards also being divided into various fields of law,[62] would make for a very inaccurate data set.

Along with this, the individual facts of the case also must be submitted to the AI system. These facts may often be highly confidential and feeding them to an AI system may also create a risk of leakage or exposure. As we see increased parties opting for arbitration for the sake of protecting their confidential information, this situation becomes a bit precarious. It is important to realise that in the pursuit of efficiency, we must not compromise on one of the fundamental and most sought-after benefits of the arbitration process.

Illustration: Consider a patent dispute between two companies, where both companies are in the business of manufacturing pharmaceutical products, and there is an allegation by one party against the other of corporate espionage and leakage of trade secrets. In the event that the details of such a leak need to be shared with the arbitrator for effective decision making, such arbitrator can be required to maintain confidentiality. However, any data or information fed to an AI-powered arbitrator will inadvertently be stored on some memory device and may become visible to the eyes of an unintended third party, further because AI Machines learn as they act, the same information may resurface during another arbitration matter on similar facts.

4. CONCLUSION

At the current stage, it seems bringing in AI-Powered arbitrators as a replacement to human arbitrators would do more harm than good. While AI may make the process smoother, faster, and more organized, there are still many pertinent issues that can suppress the essence of arbitration altogether. There is no doubt that arbitral bias exists in human arbitrators as well but there still is a chance for improvement, transparency, and accountability; features missing from AI. As Cathy O' Neil puts it,

> *"But human decision making, while often flawed, has one chief virtue. It can evolve. As human beings learn and adapt, we change, and so do our processes. Automated systems, by contrast, stay*

61. Maxi Scherer, *Artificial Intelligence and Legal Decision-Making: The Wide Open?* (2019) 36 J Int'l Arb 539.
62. Kasap (n 49).

> *stuck in time until engineers dive in to change them… Big Data processes codify the past. They do not invent the future. Doing that requires moral imagination, and that's something only humans can provide."*[63]

Any technology that can lessen the burden of courts and lawyers is a welcome one. However, it is important to keep a balance between fairness and apparent profit. Replacing human arbitrators with AI-Powered ones that can make enforceable decisions - would open a Pandora's Box that the legal framework of the country is not yet adept to deal with. For instance, an arbitral award given by AI arbitrators can be challenged on the grounds of public policy[64] given that the award is not given by natural persons, or it may be that the impartiality and independence of AI-arbitrators is questioned because of data-drivenness of AI, or that the arbitral award lacks sufficient reasoning. Therefore, if AI is used, the traditional binding nature of an arbitral award can be set aside to allow for an appeal of the award.[65]

Regulation of AI technology, accountability of the creator, the enforceability of the awards, right to explanation and a lot of other hurdles stand in the way of AI-Powered arbitrations.

There is a need for more research, and development of the niche before this question can be revisited. The author recommends the following changes be implemented:

- Emphasis on responsible AI systems being developed;
- Creating standardised rules and regulations about when, how, and where AI can be used;
- Barring the use of AI as a sole position of authority;
- Creating standards for data quantity and quality that a system will use;

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63. Cathy O' Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Crown, 2016).
64. Guillermo Argerich and others, *Could an Arbitral Award Rendered by AI Systems Be Recognized or Enforced? Analysis from the Perspective of Public Policy* (Kluwer Arbitration Blog, 6 February 2020) http://arbitrationblog.kluwerarbitration.com/2020/02/06/could-an-arbitral-award-rendered-by-ai-systems-be-recognized-or-enforced-analysis-from-the-perspective-of-public-policy/ accessed 29 September 2021.
65. Gülüm Bayraktaroğlu-Özçelik & Ş. Barış Özçelik, *Use of AI-Based Technologies in International Commercial Arbitration* (2021) 12 EJLT 1.

- Improving the interpretability and explain-ability of AI systems to monitor bias.

It is not so that AI cannot be used in arbitration at all. There are other avenues for the use of such technology. The appointment of arbitrators, the drafting of the award, and the simulation of judicial review might all improve using AI. It might provide arbitration clause drafting ideas, assisting clients and attorneys in identifying blind spots and protecting their interests. To cut expenses, the parties might agree to employ AI for some elements of the arbitration, such as discovery. To save time involved, AI systems can be used to answer the queries of parties before arbitration begins, multiple times.[66] Case administration may be automated or simplified using the software. Longer awards (especially those involving investor-state arbitrations) might have synopses created automatically to aid readers in their decision-making.[67] This would allow the process of arbitration to be more efficient, building a balance between artificial and emotional intelligence and human arbitrators would do what they do best: arbitrate.

66. *AI May Help with Alternative Dispute Resolution* (n 39).
67. Lucas Bento, *International Arbitration and Artificial Intelligence: Time to Tango?* Kluwer Arbitration Blog (Wolters Kluwer, 2018) http://arbitrationblog.kluwerarbitration.com/2018/02/23/international-arbitration-artificial-intelligence-time-tango/ accessed 27 August 2021.

GROWING CONVERGENCE OF INTERNATIONAL ARBITRATION AND HUMAN RIGHTS

—*Meenal Garg*[*]

ABSTRACT

In spite of the growing popularity of international arbitration in resolving virtually all kinds of commercial disputes, one area of law that has largely remained untouched by arbitration is human rights violations. However, a proposal in form of a Working Group Report[1] *by a group of international lawyers has argued that international arbitration is a measure of 'great promise' to resolve business-related human rights disputes. This Working Group Report has prompted the global arbitration community to notice the overlap between human rights and arbitration. In an attempt to highlight this overlap, this paper firstly traces the history of such overlap to investment arbitrations where human rights claims are often raised before the arbitral tribunal. Then, the focus shifts towards international commercial arbitration where the author argues that there is no bar on the arbitrability of human rights disputes and throws light on the varied advantages of arbitrating human rights as against litigating human rights claims. Next, this paper recommends changes to the existing arbitral regime in light of the Working Group Report.*[2] *Lastly, this paper concludes on the note that arbitration has a huge potential to effectively adjudicate human rights claims and adoption of the same would result in a win-win situation for all the interested parties.*

1. INTRODUCTION: INVESTMENT ARBITRATION VIS-À-VIS HUMAN RIGHTS

Historically, arbitration and human rights have been viewed as two separate and incompatible branches of law. This is because arbitration was

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1. Claes Cronstedt, Jan Eijsbouts and Robert C. Thompson, *International Business and Human Rights Arbitration*, Lawyers for Better Business ('Working Group Report') (Lawyers for Better Business, 13 February 2017) https://www.cilc.nl/cms/wp-content/uploads/2018/03/INTERNATIONAL-ARBITRATION-TO-RESOLVE-HUMAN-RIGHTS-DISPUTES-INVOLVING-BUSINESS-PROPOSAL-MAY-2017.pdf accessed 28 September 2021).
2. *Ibid.*

largely considered to be a private resolution mechanism for the resolution of contractual or civil disputes. Furthermore, given the level of freedom that the parties enjoy in arbitration, there were palpable concerns regarding the resolution of disputes involving public interest through arbitration. However, with the growing notions of arbitrability of previously non-arbitrable disputes like competition law disputes[3] etc. and the introduction of concepts like the second look doctrine, the international arbitration community is becoming increasingly aware that the relationship between arbitration and human rights is much more than meets the eye. Furthermore, the Working Group Report has recommended the adoption of international arbitration as a means to resolve business-related human rights disputes which has brought into the limelight the potential for arbitrating human rights disputes. The relevant portions of this report are discussed in a later part of this paper.

Presently, human rights-related matters have been more frequently raised before arbitral tribunals in cases of investment arbitrations.[4] These claims have been brought before the arbitral tribunal in a variety of ways by the foreign investor and the host state as well. The foreign investor usually raises a human rights argument to highlight its weaker position vis-à-vis the host state. On the other hand, the human rights argument is used as a defence by the host state to justify its actions that are in conflict with its treaty obligations. This is illustrated in case of Suez, *Sociedad General de Aguas de Barcelona SA* v. *Argentine Republic*[5] where the Claimants had made an expropriation claim under Argentina-Spain BIT and Argentina-France BIT for a tariff freeze on drinking water supply awarded to the Claimants under concession agreements. Herein the tribunal had held that the BIT was silent in the context of exclusion or inclusion of human rights and therefore, the human right obligation to provide drinking water to its citizens triumphs its obligations under BIT. Consequently, on the basis of such human rights defences, the expropriation claims were rejected.

3. Meenal Garg, *Deciding Arbitrability of Competition Law Disputes: Making a Case for Adoption of Liberal Standards by National Courts* (The RMLNLU Law Review Blog, 1 February 2018). https://rmlnlulawreview.com/2018/02/01/deciding-arbitrability-of-competition-law-disputes-making-a-case-for-adoption-of-liberal-standards-by-national-courts/ accessed 18 November 2021.
4. Urbaser SA v. Argentine Republic ICSID Case No. ARB/07/26 (8 December 2016).
5. Suez, Sociedad General de Aguas de Barcelona SA v. Argentine Republic ICSID Case No. ARB/03/19, [262] (30 July 2010).

Similarly, in *David R. Aven* v. *Republic of Costa Rica*,[6] the tribunal, while relying upon Urbaser[7] case, has held that the investors cannot avoid their obligations of protecting human rights, liability for damages etc.[8] In this case, Costa Rica had preferred a counter-claim on account of environmental damage caused by the investor. It was held that while the tribunal has jurisdiction to decide such a counter-claim, Costa Rica failed to prove this claim and the same was ultimately rejected.

Another example in this context is *Bear Creek Mining Corporation*. v. *Republic of Peru*.[9] In this case, the investor had certain mining concessions which were effectively rendered useless because of protest and social unrest of local communities. When the investor raised claims on account of this act, Republic of Peru, in defence, had argued that mining would have led to adverse environment consequences which also led to social unrest. Therefore, Peru alleged that violation of these environment norms and fault of the investor leading to unrest amounted to contributory negligence. Although, ultimately the tribunal dismissed this defence as Peru failed to discharge its burden of proof, this case brings to light as to how human rights concerns can be used as a shield in investment arbitration.

In some cases, the tribunal has allowed some "non-disputing" parties to raise broader policy considerations including human rights issues before the tribunal.[10] Lastly, such an issue may come up as an ancillary issue that may be adjudicated by the arbitral tribunal to effectively adjudicate upon issues like Fair and Equitable Treatment etc.[11]

Though investment arbitration is meant to address the commercial disputes arising out of Investment Treaties, it has been opined:

> *The contrasting objectives of states and investors in relation to investment liberalization are most evident in investment disputes that touch upon non-commercial issues. The lack of an alternate*

6. David R. Aven v. Republic of Costa Rica ICSID Case No. UNCT/15/3 (18 September 2018).
7. See Urbaser (n 4).
8. See David Aven (n 6) [737-39].
9. Bear Creek Mining Corpn. v. Republic of Peru ICSID Case No. ARB/14/21(30 November 2017).
10. Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania ICSID Case No. ARB/05/22, [366] (24 July 2008).
11. Eric De Brabandere, *Human Rights Considerations in International Investment Arbitration* (2013) Grotius Centre for International Legal Studies Working Paper 001-IEL https://ssrn.com/abstract=2230305 accessed 14 September 2020.

> *mechanism to resolve the non-commercial aspects of an investment dispute has led to the scope of investment arbitration slowly expanding into the adjudication of non-investment issues.*[12]

Thus, it can be seen that the lack of an alternative forum to resolve investment treaty-related human rights issues and intermingling of human rights issues with the main dispute were the two reasons for the adjudication of human rights issues by arbitral tribunals.[13]

Today, human rights claims have become such an integral part of investment arbitration that it has essentially changed the character of investment arbitration. For example, Radi has opined that investment arbitration can now be considered as "public international law" because of the increasing reference by arbitral tribunals to public international law instruments and joinder of parties other than the host state and the investor to arbitration proceedings on humanitarian grounds. Drawing from this hypothesis, he has further argued that since a number of parties like NGOs, human rights activists, victims of human rights violations etc. are interested in the outcome of investment treaty arbitration, there is a need to evolve the norms for publishing arbitral awards to address this general public interest.[14]

Some commentators and scholars have also argued that investment treaty arbitration is not a proper forum for adjudication of human rights claims. In this respect, Fry has argued that it is incorrect to say that investment arbitration undermines human rights primarily because of two reasons: firstly, that the tribunal is under no obligation to consider human rights claims unless they have risen to the status of *jus cogens* and, secondly, that the tribunal is limited by its jurisdiction, viz. the relationship of the alleged violation to the investment.[15] Arguing on similar lines, Kube and Petersmann have extensively reviewed some popular international investment arbitration decisions and have opined that whether the arbitral tribunal has jurisdiction over the human rights violation is dependent upon

12. Barnali Choudhury, *Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights* (2009) 46 Alberta Law Review 983, 989.
13. Aceris Law, *Human Rights Law and Investment Arbitration* (Aceris Law, 25 April 2021) https://www.acerislaw.com/human-rights-law-and-investment-arbitration/ accessed 28 September 2021.
14. Yannick Radi, *The "Human Nature" of International Investment Law* (2013) Grotius Centre for International Legal Studies Working Paper 006-IEL https://ssrn.com/abstract=2278857 accessed 10 September 2020.
15. James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity* (2017) 18 Duke Journal of Comparative and International Law 77, 107.

the proximity of the relationship between the alleged human right violation and the investment.[16] This approach seems to be more logical and in support of the same; one may refer to the case of *Biloune* v. *Ghana*,[17] in which one of the issues argued before the arbitral tribunal was whether the tribunal could rule over the arrest and detention of one of the investors. The tribunal refused to rule on this issue and observed that it did not have the jurisdiction to rule over every human rights violation and its jurisdiction is limited to the claims arising out of the investment treaty. Another interesting case in this respect is *Mohd. Abdel Raouf Bahgat* v. *Arab Republic of Egypt*.[18] In this case, although the tribunal found itself inclined to award moral damages for illegal detention of the Claimant, the tribunal denied granting such damages as the BIT in question i.e. the Egypt-Finland BIT did not confer the jurisdiction on the Tribunal to award moral damages.[19] Thus, this discussion reveals that to decide a human rights violation claim, the tribunal would look into a variety of factors including the wording of the BIT, nexus of human rights violation with the treaty dispute, etc.

Another development which should be mentioned here is that certain States have started to recognize the interplay of human rights and investment arbitration regime and therefore, they have taken steps for a more explicit mention of human rights in investment treaties. For instance, recently, the European Union has proposed[20] to amend the denial of benefits of clause of the Energy Charter Treaty[21] to include violation of human rights as a ground to deny benefits of the treaty.

To sum up this part, it can be easily seen that notwithstanding the complexities pertaining to the arbitrability of human rights in investment arbitration, '*investment arbitrations have highlighted ways in which human*

16. Vivian Kube and Ernst-Ulrich Petersmann, *Human Rights Law in International Investment Arbitration* (2016) 11 Asian Journal of WTO and International Health Law and Policy 65, 73.
17. Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Govt. of Ghana [1989] 95 ILR 84.
18. Mohd. Abdel Raouf Bahgat v. Arab Republic of Egypt-Award [2019] PCA Case No. 2012-07.
19. *Ibid* [519]-[521].
20. *EU Text Proposal for the Modernisation of the Energy Charter Treaty* (European Union, 2020) https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf accessed 21 November 2021.
21. Energy Charter Treaty (entered into force 16 April 1998) 2080 UNTS 100 (ECT) art. 17.

rights issues can become enmeshed with business issues.'[22] In agreement with this observation, scholars have opined that the present arbitration clauses are sufficient enough to enable the investment treaty lawyers to raise human rights claims before an investment tribunal and there is no need to introduce stronger human rights clauses.[23] Furthermore, it would not be completely wrong to say that the increasing interference of human rights in international investment arbitration is perhaps an indication that investment arbitration is becoming more human rights friendly.[24] However, at the same time, this jurisprudence also raises the question with regards to the status quo of human rights claims in international commercial arbitration. This is because it is obvious that commercial arbitration and investment arbitration are very distinct by nature. Therefore, the following sections of this paper aim to analyse this interplay of international commercial arbitration and human rights claims.

2. MAKING A CASE FOR ARBITRATION OF HUMAN RIGHTS IN INTERNATIONAL COMMERCIAL ARBITRATION

A. Comparing Apples and Oranges: Distinction between Investment Arbitration and Commercial Arbitration

The distinguishing features of international commercial arbitration from investment arbitration pose an acute problem as far as arbitration of human rights claims is concerned. This is because investment arbitration involves state parties whereas international commercial arbitration involves only private parties. Therefore, the human rights obligations of states do not exist in commercial arbitration. Furthermore, investment arbitration arises from a bilateral or multilateral treaty between states whereas international commercial arbitration arises from a contract between the parties (containing an arbitration clause to this effect). Next, the purpose of investment arbitration is to provide remedy to an investor who has been offered certain incentives for making investment in the host State and the State has not fulfilled its obligations of providing those incentives whereas the purpose of commercial arbitration is to simply resolve the disputes

22. Barnali Choudhury, *Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements* (2017) 38 University of Pennsylvania Journal of International Law 425, 461.
23. Petra Butler, *Red Riding Hood- Is Investor-State Arbitration the Big Bad Wolf*? (2017) 5 Pennsylvania State Journal of Law and International Affairs 328.
24. Silvia Steininger, *What's Human Rights Got to Do with it? An Empirical Analysis of Human Rights References in Investment Arbitration* (2018) 31 Leiden Journal of International Law 33, 35.

arising from a contract. Lastly, human rights contentions may be raised in investment arbitration to highlight the weaker position of the foreign investor and the duty of the host State to ensure basic human rights to its citizens, whereas in international commercial arbitration the disputing parties are often private parties and are usually placed on an equal footing. Although the differences enumerated here are not exhaustive, they unambiguously illuminate the problem in adjudicating human rights claims in commercial arbitration when compared with investment arbitration.

It has been observed that foreign investors put forth their human rights claims before an investment arbitral tribunal where such submission tends to benefit the corporations and therefore, they would never consent to arbitrate human rights claim where there is a risk of creating a liability when no liability may exist under the national law.[25] To illustrate, let's assume there is a human rights dispute between a corporation and employees in country A which does not have very human rights friendly laws. Thus, there is a high chance of no liability being incurred by the corporation if such a human rights claim is raised before the courts of country A. On the other hand, imagine a scenario where such a claim is subject to international arbitration where the law of country B is applied which is very human rights friendly. Now, if the same issue is arbitrated by applying the laws of country B, the corporation may be held liable and be directed to pay huge compensations to its employees. Naturally, the corporation would choose the first alternative and refuse to arbitrate human rights claim to save itself from any future liability. Furthermore, traditionally human rights claims have been addressed to States and therefore it is not very problematic to raise such claims before an investment treaty arbitral tribunal to which the State is a party. However, such is not the case with international commercial arbitration where the dispute is between two private parties. Thus, it can be invariably stated that human rights claims cannot be brought in the same manner in international commercial arbitration as they have been brought before investment tribunals.

With respect to commercial arbitration, the first problem that arises regarding the arbitration of human rights disputes is the question of arbitrability of such disputes. In essence, the question of arbitrability of human rights disputes arises from the usage of the word '*commercial*' in

25. Gregory R. Day, *Private Solutions to Global Crises* (2015) 89 St John's Law Review 1079, 1106.

the New York Convention[26] which is generally known as the "commercial reservation"[27] requirement. In this regard, Eliasoph has opined that most of the signatories to the Convention have not recognized this commercial reservation. He further argues that even the States that have adopted this "commercial reservation" provide ample opportunities to negotiate arbitration agreements that fulfil both the commercial reservation as well as human rights obligations.[28] In conjunction with this observation, scholars and commentators of the states, that have rigidly recognized such reservations, have argued that such a distinction between commercial and non-commercial should be dropped. For instance, Chukwuemerie while referring to the arbitration practices prevailing in Africa has opined:

> *It is time for the law to drop the rigid classification of matters into 'commercial' and 'non-commercial' for purposes of arbitrability. It should suffice that a compromise is capable of being reached in that the parties have agreed to go to arbitration. The whittling down of party autonomy — one of the bedrocks and virtues of arbitration — in this area ought now to cease.*[29]

In this respect, it is noteworthy to mention here that the Working Group Report does not expressly refer to the arbitrability of human rights disputes. However, a thorough perusal of the Working Group Report clearly suggests that business related or only commercial human rights disputes can be arbitrated.[30] In other words, applying the principles of investment arbitration *mutatis mutandis* to international commercial arbitration, the question as to whether the arbitral tribunal has jurisdiction over a particular human rights claim would be directly dependent upon the fact as to the nexus between the alleged human rights violation and subject matter of the dispute. Additionally, as seen in investment arbitration, the wordings of the arbitration clause would also play a vital role in determining whether the

26. 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).
27. See Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th ed, OUP, 2015) paras 1.35-1.38; UNCITRAL, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (United Nations Publication, 2016) 33-35.
28. Ian H. Eliasoph, A Missing Link: International Arbitration and the Ability of Private Actors to Enforce Human Rights Norms (2004) 10 New England Journal of International and Comparative Law 83, 108-09.
29. Andrew I. Chukwuemerie, *Arbitration and Human Rights in Africa* (2007) 7 African Human Rights Law Journal 103, 138.
30. See Working Group Report (n 1) 3-4, 8-10.

tribunal can adjudicate upon allied human rights issues. The arbitration agreement has to be worded in such a way that confers wide jurisdiction on the arbitral tribunal so as to enable it to adjudicate upon any issue, including human rights disputes, arising from the contract. Furthermore, it is only obvious to say that only civil remedies like claiming damages etc. associated with the human rights claim shall be arbitrable and the criminal aspect of the same may be left to the courts or international agencies; as the case may be. This inevitably leads to the conclusion that only the civil aspect of a human rights claim is arbitrable. This is in line with the fact that most jurisdictions already provide separate forums for adjudicating civil aspects and criminal aspects of a claim arising from one transaction.

Another aspect noted by the drafting team of the working group is the "commercial reservation" impediment and has opined that the arbitration agreement should include complete safeguards so as to ensure the enforcement of human rights related awards in accordance with international conventions.[31] Such a carefully drafted arbitration agreement can fulfil the commercial reservation requirement of the New York Convention thereby ensuring its enforcement in all signatory states. This can be done in a number of ways. Firstly, specific damages that only arise in case of possible human rights violations like moral damages can be expressly incorporated in the principal contract by virtue of which the tribunal may adjudicate human rights claims. This may be done by including a clause in the contract wherein express powers to grant moral damages are conferred on the tribunal. Another way could be to expressly include the term "allied business and human right issues" in the arbitration clause. To illustrate, the arbitration clause may be drafted as "Any or all disputes including but not limited to related business and human rights issues arising out of this contract shall be decided by a sole arbitrator mutually appointed by both the Parties, whose decision shall be final and binding on both the Parties." Such a broad arbitration clause would confer ample power on the arbitral tribunal to adjudicate upon human rights claims.

31. *Business and Human Rights Arbitration Project Report* (Centre for International Legal Cooperation 2018) http://www.cilc.nl/cms/wp-content/uploads/2018/03/BHR-Arbitration.-Report-Drafting-Team-Meeting-25-26-January-2018.pdf accessed 7 September 2020; See also New York Convention 1958.

B. The Grass is Greener on the other side: Why Arbitration is better?

At the outset, it is necessary to mention that advocating international arbitration as a mechanism to resolve human rights disputes does not mean replacing the existing or rather the conventional dispute resolution mechanisms. In this respect, the Working Group Report notes that contemporary human rights monitoring agencies like European Court of Human Rights, the African Court on Human and Peoples' Rights, the Inter-American Court of Human Rights, etc. only come into picture when a State is accused of violating human rights. Therefore, any arbitration of private or business related human rights disputes would not trample on the authority of such institutions and rather complement such institutions in protecting human rights on a more private/individual level.[32] The main idea behind it is to introduce arbitration as an alternative mechanism and reasons as to why the same can be more effective than the former.[33] In summary, the parties may choose international arbitration because of the advantages offered by it such as neutrality, confidentiality, control over procedure and appointment of arbitrators, and of course, quicker resolution of disputes. Additionally, the Guiding Principles on Business and Human Rights also state that it is the duty of the State to ensure that an effective remedy is made available to human rights victims.[34] Though these principles do not expressly refer to arbitration but due to the varied advantages of arbitration, the same may be deemed to be included under the ambit of the phrase '*effective remedy*'.

The present trend seems to point to the fact that multinational enterprises and corporate houses are becoming increasingly aware that any human rights lawsuit adversely affects its reputation in the long run. Moreover, it is not uncommon to see that a disgruntled employee may fabricate a false lawsuit for the sole purpose of blackmailing or extorting his former employers. Arbitration can prove to be instrumental in such cases as companies can incorporate confidentiality of arbitration proceedings in the arbitration agreement to prevent any injurious publicity. A related concern to this confidentiality aspect raised by Human Rights NGOs and other activists is

32. See Working Group Report (n 1) 24.
33. Alison Berthet, *Arbitration: A New Forum for Business and Human Rights Disputes?* (Practical Law Arbitration Blog, 16 October 2017) http://arbitrationblog.practicallaw.com/arbitration-a-new-forum-for-business-and-human-rights-disputes/ accessed 2 September 2020.
34. *Guiding Principles on Business and Human Rights* (UN Human Rights: Office of the High Commissioner 2011) https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 3 September 2020.

that the arbitration proceedings should be made de facto transparent so as to ensure impartial and fair rulings. Rogers, while referring to such public interests, has opined that international commercial arbitration already encompasses plenty of transparency through mandatory disclosures.[35] In addition to this, it is argued that it would be better if the proceedings are kept confidential and it is only after the making of an award should the proceedings and the award be publicised. The reason for this suggestion is that it would protect the interests of good corporations from suffering any injury from bogus disputes and at the same time publishing awards would ensure a fair decision. Thus, publishing of awards after completion of arbitral proceedings would ensure appropriate balancing of conflicting interests. Moreover, in case the arbitral tribunal gives a wrong or biased decision, the same may be set aside by the enforcing court in accordance with international principles. At this juncture, one may argue that such appellate mechanisms are also available in national courts. However, it is a settled principle of law that under the New York Convention, limited grounds for refusing enforcement are provided which are much narrower than the grounds for appeal available before National Courts.[36] Logically, this implies that enforcing courts are less likely to set aside an award making arbitration more advantageous in enforcing remedies than pursuing claims before national courts.

Some commentators have opined that the transparency principles enshrined under UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration[37] may be used as a basis to devise similar transparency rules for business related human rights arbitration.[38] In this respect, while a detailed discussion on this suggestion can be saved for another time, it is evident that even if the draftsmen considers such rules as the basis of evolving transparency norms, the primary focus should be to balance the interests of the corporations as well as the victims while recognizing the fundamental differences between international commercial arbitration and international investment arbitration. This is because transparency in

35. Catherine A. Rogers, *Transparency in International Commercial Arbitration* (2006) 54 University of Kansas Law Review 1301.
36. New York Convention 1958, art. 5.
37. *UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (UNCITRAL 2014) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf accessed 28 September 2021.
38. Antoine Duval and Catherine Dunmore, *The Case for a Court of Arbitration for Business and Human Rights* (2018) ASSER Institute: Centre for International & European Law Policy Brief 2018-02 https://ssrn.com/abstract=3188102 accessed 25 August 2020.

investment arbitration assumes importance because of State's responsibility and accountability in protecting human rights. This accountability does not exist in case of corporations and individuals. Furthermore, in this author's opinion a corporation can be easily put in bad light for violating human rights even if the claims are false whereas this is not so in case of a State. Moreover, as a side note, lack of better transparency measures should not be viewed as a deal-breaker and at the most, these rules can be termed as a desirable attribute to increase the popularity of arbitration as a mode of resolving human rights claims.

With the emergence of globalisation, even the simplest of manufacturing activities takes place in multiple jurisdictions. In such cases, national courts may be limited by their territorial jurisdiction but this is not the case in arbitrations which have no cross boundary jurisdictional problems.[39] At this juncture, though human rights have acquired a universal definition (that is not disputed by this author for the purposes of this paper), involvement of multiple States may lead to jurisdictional objections, multiple proceedings etc. that would result in unnecessary delay. However, because of the fact that the jurisdiction of an arbitral tribunal stems from an agreement or a contract, such proceedings can take place virtually anywhere in the world irrespective of the fact as to where the cause of action arose or where the alleged violation took place. Therefore, the problem of choice amongst multiple territorial jurisdictions can be avoided by opting for arbitration.

Another advantage of arbitration is the joinder of parties. In reality, most of the international tribunals that are empowered to deal with human rights violations do not allow non-state parties to initiate proceedings before such tribunals[40] and even in cases where an individual may initiate proceedings, such proceedings can be initiated only against states.[41] However, the arbitration agreement gives a *locus standi* to the contracting parties and even to non-contracting parties, provided that the parties have consented to

39. Avnita Lakhani, *The Role of Citizens and the Future of International Law: A Paradigm for a Changing World* (2006) 8 Cardozo Journal of Conflict Resolution 159, 186.
40. *American Declaration of the Rights and Duties of Man*, OAS Res XXX (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 61(1) (1992); *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (adopted 10 June 1998, entered into force 25 January 2004), art. 5.
41. *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights*, as amended) (ECHR), art. 34.

their participation, irrespective of the fact whether the parties are state or non-state parties.[42]

Lastly, arbitration is well known for specialised arbitrators who can effectively resolve even the most complex disputes. This means that complex human rights claims such as those which also involve environmental issues, labour law issues etc. can be effectively adjudicated by a specialised arbitral tribunal.

Therefore, to sum up this section, it is submitted that as long as the dispute has a nexus to the subject matter of the contract, it can be effectively adjudicated by an arbitral tribunal.

3. AMENDING EXISTING PRACTICES: MAKING INTERNATIONAL ARBITRATION HUMAN RIGHTS FRIENDLY

Now that it has been established that human rights claims are more than capable of being arbitrated, the author now turns to the more crucial aspect of the problem. At the cost of repetition, it is reiterated here that in spite of all the advantages that arbitration has to offer, it is merely an alternative for dispute resolution as far as human rights claims are concerned. Therefore, it is necessary to incorporate certain changes in the present arbitration regime to ensure that arbitration enjoys a preferred position when the parties decide the dispute resolution forum in context of human rights violations. Furthermore, change is necessary as arbitrating human rights brings additional challenges and issues along with it. This is because originally, the system of international commercial arbitration was never meant to resolve human rights disputes that are of public law nature.

A. Pre-Arbitration Mechanisms

It has been opined that it is very difficult to imagine that the alleged oppressor and the victim whose human rights have been violated sit together and mutually agree to submit their disputes to arbitration.[43] While recognizing this impediment, the Working Group Report has suggested that the corporations incorporate clauses that allow third party beneficiaries like the victims etc. to institute arbitral proceedings.[44]

42. See Lakhani (n 39) 192-198.
43. See Chukwuemerie (n 29) 135-36.
44. See Working Group Report (n 1).

Alford has opined that most of the corporations are good citizens whose main concern is to promote their global image by utilising their position over their vendors, suppliers and other associates along the supply chain so that the latter are not involved in any human rights abuse matters.[45] He suggests that the good corporations can incorporate an arbitration clause with their associates to ensure compliance with human rights standards. Such arbitration clauses can also prove to be instrumental in countries where adequate human rights enforcement agencies do not exist. Whilst such a mechanism may appear to be lucrative, it has limited scope. First, Alford's argument is only applicable to good corporations. It has already been seen that the so called bad corporations or even some good corporations would not agree to arbitration of human rights disputes where the national law is not very human right friendly. Second, it can be employed only by powerful corporations with abundant bargaining power. Third, the mechanism is only a means of prevention of possible future human rights violations but does not strictly fall within the ambit of the phrase "arbitration of human rights disputes." This is because such a clause only gives a justifiable ground to the good corporation to terminate the contract so as to oust its liability at the onset of such disputes in order to protect its brand image and expose the actual violator. However, such arbitration clauses do not provide whether the claim arising from the alleged human right violation is arbitrable or not.

The discussions up to this point have been largely focused on drafting suitable arbitration clauses that empower arbitral tribunal to adjudicate upon human rights claims but the question arises what would be the position if there does not exist any such pre-dispute clause. The logical solution in such a scenario would be that the parties may agree to an ad hoc arbitration with the human rights victims. This can have multiple advantages for corporations. Firstly and most obviously, it can prevent erosion of the goodwill of the corporation resulting from the culpable actions of their business associates. Secondly, it can further benefit such corporations to gain additional goodwill and fulfil their corporate social responsibility.[46] On the other hand, genuine victims can enjoy the benefits of a speedy adjudication by a specialised body of experts in case they agree to arbitrate their human rights claims. Thus, it would be a win-win situation for all.

45. Roger P. Alford, *Arbitrating Human Rights* (2008) 83 Notre Dame Law Review 505, 529.
46. Juan Pablo Calderón-Meza, *Arbitration for Human Rights: Seeking Civil Redress for Corporate Atrocity Crimes* (2016) 57 Harvard International Law Journal 60, 63-64 https://harvardilj.org/wp-content/uploads/sites/15/Calderon-Meza_0615.pdf accessed 28 September 2021.

B. Applicable Law

Childress has pointed out that the working group report does not expressly state the applicable law while arbitrating human rights.[47] In other words, the question is whether the national law or the customary law pertaining to human rights would be applicable in arbitral proceedings. Leaning towards the latter, he argues that rather than completely giving up on national law, the courts of different jurisdictions need to bring in line their human rights norms or negotiate a multinational convention that singularly defines human rights violations across the globe.[48] In this respect, this author partly agrees with Childress in as much as it is indeed a shortfall of the working group report that it did not recommend the law applicable to the arbitral proceedings. This problem becomes more pressing considering the fact that different standards under different jurisdictions exist with respect to the liability of a corporation for human rights violation. One way this anomaly can be addressed is by relying on multilateral human rights conventions such as the European Convention on Human Rights,[49] etc. However, at the same time, it is argued that this is not exactly a fault in the arbitral regime but instead it is attributable to the failure in evolving universally acceptable human rights adjudication standards. To elaborate upon the same, it is realistic to assume here that it is very difficult that the nations are able to negotiate a multinational treaty or convention for uniform application of the human rights law. Now, this does not mean that human rights arbitration becomes impractical. At most, this lack of clarity can create a difference of opinion amongst the parties regarding the applicable law. But under no circumstances can this lacuna make the whole proposal of arbitration of human rights undesirable. Parties can easily reduce the ambiguities of applicable law while deciding upon the seat of arbitration and clearly specifying the applicable law in the arbitration clause itself.

C. Specialised body of Experts

On the other hand, a most crucial and urgent change which needs to be incorporated in the arbitral rules of various arbitration institutions is to set up a panel of arbitrators who are sensitive to human rights issues and

47. Donald Earl Childress III, *Is an International Arbitral Tribunal the Answer to the Challenges of Litigating Transnational Human Rights Cases in a Post-Kiobel World*? 19 UCLA Journal of International Legal and Foreign Affairs 31, 43.
48. *Ibid*, at 46-48.
49. *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights, as amended) (ECHR).

more specifically, have experience and expertise in business related human rights disputes. This lack of human rights arbitrators is a problem prevalent in both international commercial arbitration and investment arbitration. In the context of investment arbitration, it has been observed:

> *... [T]he large majority of... [investment arbitrators]... [have] a private or commercial law rather than a public law or public international law background and... thus [they] tend to see international human rights as a potential, or probable, cause of political disturbances, intruding in their 'purely legal', autonomous field, with its ground rules being determined by neo-liberal thought*.[50]

In an attempt to resolve this problem, the Working Group Report has suggested the appointment of arbitrators that have a strong human rights background.[51] In this respect, this author fairly concedes to the fact that there is a dearth of arbitrators who are well conversant with both commercial and human rights aspects of a dispute. This is obviously attributable to the traditional notions of viewing business disputes and human rights violations as unconnected branches of law. Nevertheless, this implies that it would take a long time to establish panels of such arbitrators in all the major arbitral institutions of the world. Similarly, some commentators have opined that instead of establishing specialist arbitrator panels in various arbitral institutions, a permanent body namely '*Court of Arbitration for Business and Human Rights*' may be established on lines of the already established Court of Arbitration for Sports.[52] Now, assuming that such an alternative is as viable as the creation of specialist benches, it would again take a lot of time to appoint qualified arbitrators that are competent to resolve or adjudicate on such types of disputes. Therefore, as per this author and as a short term solution, it is proposed that a human rights expert is appointed in all cases where human rights claim and contention is raised before an arbitral tribunaland such expert shall submit his expert opinion to the arbitral tribunal.[53] While recognizing party autonomy which is the underlying principle of arbitration, this author clarifies here that though it would be the prerogative of the parties as to whether they want to provide for such appointment in the arbitration agreement itself, or to bestow such

50. Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights*? (2011) 60 International and Comparative Law Quarterly 573, 576.
51. See Working Group Report (n 1).
52. See Duval and Dunmore (n 38).
53. See Choudhury (n 22) 480.

powers of appointment on the arbitral tribunal, it is imperative that a human rights expert is necessarily appointed.

D. Level playing field

Another contemporary problem is the inequality of arms between the victims and the respondent corporations. The Working Group has recommended the establishment of a fund to financially support the victims.[54] However, in this author's opinion, the creation of such a fund can only provide limited support or less than desirable support against the corporations that possess a huge army of highly qualified lawyers at their disposal. Therefore, alternatives like third party funding may be more suitable in such cases, but then again, it would be prudent to mention here that not all legal systems have accepted the practices of third-party funding or litigation funding. Another alternative could be that funds may be provided by the good corporation(s) in case they consent to join in on the arbitration proceedings as already discussed above. This may be done on the direction of the arbitral tribunal or willingly. In the first scenario, corporations have deep pockets and hence, they may be directed to bear the costs of arbitration. Since in arbitration, costs usually follow the event and therefore, good corporations would be able to recover their costs in case of frivolous claims. In the second scenario, if good corporations bear the expenses on their own initiative or even generally support such arbitrations, it would put such corporations in good light and project them as human right friendly which is a valued trait in today's business world.

E. Role of State

Lastly, the author urges here that nations around the world recognize the benefits that international arbitration has to offer as far as human rights violations are concerned and use their bargaining power to make it mandatory for all corporations to enter into a prescribed arbitration agreement that confers jurisdiction upon the arbitral forum regarding human rights adjudication as a precondition of doing business in its territory.[55] A more practical way would be that states incorporate human rights compatible arbitration clauses in contracts entered into between state owned enterprises and private entities. This could easily promote human rights arbitration and would also go a long way in reaffirming a state's commitment to protection of human rights. Furthermore, it would

54. See Working Group Report (n 1).
55. See also Day (n 25) 1116-20.

be upon the legislature and judiciary of the states to make their arbitration law compatible with human rights arbitration. This can be done by broadly interpreting the concept of arbitrability which would be the function of courts. However, if the judiciary is unable to broadly interpret the concept of arbitrability within the existing framework, then the burden would fall on the legislature to pave way for a human rights friendly arbitration regime by suitably amending its arbitration law.

4. CONCLUDING REMARKS

The research and the discussion have shown that much ink has been spilled to draw out the relationship between human rights and international arbitration. Arbitrating human rights is not entirely a new concept and its origin may be traced back to investment arbitration cases. In spite of this development, the global arbitration community is still somewhat resolute to hold on to the "taboo" of non-arbitration of human rights, at least in the context of international commercial arbitration. Though this taboo cannot be termed as baseless, it does not mean that there is no scope for arbitration of human rights claims.

It can be seen that there is no absolute bar on arbitrability of human rights disputes as far as the commercial reservation of the New York Convention is concerned. The real test to ensure arbitrability of human rights disputes is to draft the arbitration agreement or the investment treaty (as the case may be) in such a way that the alleged human rights disputes bear a direct or indirect nexus to the subject matter of dispute. Furthermore, the characteristics of international arbitration provide both the parties as well as the interested stakeholders with varied advantages that can help them to overcome the obstacles faced while litigating such claims before national or even international human rights disputes adjudicating bodies. Furthermore, it has been seen that most of the recommendations of the Working Group Report aim to strengthen arbitration as the primary forum for the resolution of business and human rights disputes.

Therefore, in conclusion, this author strongly believes and endorses that it would be unwise to cling on to outdated concepts of arbitrability and it is time to open the doors of international arbitration to human rights disputes arising from business or commercial relationships. It has been opined that arbitration of human rights would become the industry standard and those corporations that do not accept this notion will find it difficult to compete.[56]

56. Claes Cronstedt and Robert C. Thompson, *A Proposal for an International Arbitration Tribunal on Business and Human Rights* (2016) 57 Harvard International

Provided that suitable adjustments are made in the arbitration agreements and in the rules of various arbitral institutions, the distant future where all human rights claims arising out of commercial disputes are referred to arbitration does not seem to be too far-fetched.

Law Journal 66, 68 https://harvardilj.org/wp-content/uploads/sites/15/Cronstedt-and-Thompson_0615.pdf accessed 28 September 2021.

ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2021: THE FINAL WORD ON UNCONDITIONAL STAY ON ENFORCEMENT OF CHALLENGED DOMESTIC AWARDS?

—Naresh Thacker[*] & Samarth Saxena[**]

ABSTRACT

The newly enacted Arbitration and Conciliation (Amendment) Act, 2021 is the fourth change made in the Indian arbitration regime in the last six years. With amendments being made this frequently, one would expect them to iron out the ambiguities and make the arbitral process smooth. However, much like its predecessors, the 2021 Amendment Act seems to have distanced itself from this objective. The chief offender in this regard is the fresh introduction of the "fraud or corruption" standard allowing unconditional stay on the ever so difficult and exacting, enforcement of domestic awards pending challenge under Section 34 of the Arbitration and Conciliation Act, 1996.

This article critically analyses the effect of the 2021 Amendment Act on the enforcement of domestic awards and argues that the 2021 Amendment Act is cryptic and capable of being misused and thus, would require extensive judicial interpretation.

1. INTRODUCTION

Oscar Wilde once famously said: "*Experience is simply the name we give our mistakes*". Perhaps as a lesson from the constant horrors faced by the litigants while enforcing domestic arbitral awards, the Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment Act**") was enacted to bring about a major pro-enforcement evolution through cessation of automatic and unconditional stay on enforcement of domestic awards pending challenge proceedings under Section 34 of the Act.

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Circa 2019, the Arbitration and Conciliation (Amendment) Act, 2019 ("**2019 Amendment Act**") was brought into force. The 2019 Amendment Act caused a major uproar in the arbitration community for being a medley of wrong notes. Amongst the major stumbling blocks was the provision that made the 2015 Amendment Act only prospectively applicable, thereby, diluting the removal of automatic and unconditional stay on enforcement of domestic awards. Fortunately, this misadventure of the 2019 Amendment Act was short-lived and soon undone by the Supreme Court in Hindustan Construction Co. Ltd. v. Union of India[1] ("**HCC v. Union of India***")* wherein the relevant provisions of the 2019 Amendment Act were struck down as unconstitutional.

Just when it looked like the dust had settled on this debate, the legislature implemented the Arbitration and Conciliation (Amendment) Ordinance, 2020 ("**2020 Ordinance**") and thereafter replaced the same with the Arbitration and Conciliation (Amendment) Act, 2021 ("**2021 Amendment Act**"). The 2021 Amendment Act, which is identical to the 2020 Ordinance, introduced two key changes in Part I of the Act.[2] Firstly, it retrospectively amended Section 36 of the Act and introduced *"fraud or corruption"* as a standard to seek unconditional stay on the enforcement of domestic awards. Secondly, it deleted Schedule VIII of the Act which prescribed certain eligibility criteria for being an arbitrator. This article aims to elaborate on the constant back and forth in legislative amendments concerning the enforcement of arbitral awards in India, and to demonstrate that the uncertainties in this regard are far from over.

Part I of this article presents a brief conspectus of the different episodes in the Indian arbitration regime's tryst with unconditional stay on enforcement of challenged domestic awards. It also deals with the introduction of the 2021 Amendment Act and its effects on the 2015 Amendment Act. Part II of the article analyses the correctness of retrospective introduction of the *"fraud or corruption"* standard by the 2021 Amendment Act. In Part III, the authors put forth their closing remarks and describe the murky waters which still lie ahead when seeking enforcement of challenged domestic arbitral awards.

1. Hindustan Construction Co. Ltd. v. Union of India 2019 SCC OnLine SC 1520.
2. Part I of the Act concerns itself with only India seated domestic and International Commercial Arbitrations.

2. TO (UNCONDITIONALLY) STAY OR NOT TO STAY

Pursuant to the liberalization of its economic policies in 1991, India looked to bring about a sea change in its dispute resolution machinery.[3] By this time, the Arbitration Act, 1940 had already been in force for half a century and its inefficiency[4] in handling modern commerce had long rendered it a colonial relic. Thus, with the dream of building India into a robust arbitration jurisdiction, in 1996, the Act was enacted.

The Act is based upon the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**"). However, in enacting the Model Law as a municipal legislation, the legislature made certain modifications, one of which was the omission of Article 36(2) of the Model Law.[5] Pertinently, Article 36(2) of the Model Law provides the courts with the discretion to adjourn the enforcement of awards pending challenge proceedings and seek appropriate security whenever if such adjournment is granted.

The lack of a provision similar to Article 36(2)[6] of the Model Law ultimately resulted in the courts holding that there existed an implied prohibition on the enforcement of an award pending challenge proceedings under Section 34 of the Act.[7] In fact, in National Aluminum Co. Ltd. v. Pres steel & Fabrications (P) Ltd.,[8] while reiterating that the scheme of the Act provided for automatic and unconditional stay of domestic awards upon filing of a challenge under Section 34, the Supreme Court even noted that such an automatic stay of the award was against the very fundamentals of

3. Rohit Moonka and Silky Mukherjee, *Impact of the Recent Reforms on Indian Arbitration Law* (2017) 4 BRICS Law Journal.
4. Guru Nanak Foundation v. Rattan Singh and Sons (1981) 4 SCC 634.
5. UNCITRAL Model Law, Article 36(2) reads as: *"2. If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security."*
6. It also deserves mentioning that Article 36 of the Model Law is based on Article V of the New York Convention.
7. National Aluminum Company Ltd v. Pressteel & Fabrications (P) Ltd. (2004) 1 SCC 540; National Buildings Construction Corpn. Ltd. v Lloyds Insulation India Ltd. [2005] 2 SCC 367; Fiza Developers and Inter-trade (P) Ltd. v AMCI (India) (P) Ltd. (2009) 17 SCC 796.
8. *Ibid*.

arbitration and thus legislative measures ought to be taken to overcome this hurdle.

Taking this into account, the 246th Report of the Law Commission of India[9] recommended that Section 36 of the Act be amended appropriately. Accordingly, the 2015 Amendment Act inserted Section 36(2)[10] and 36(3)[11] into the Act which expressly forbade the grant of both an automatic and unconditional stay on the enforcement of a domestic award undergoing challenge under Section 34. Subsequently, when questions as to whether the 2015 Amendment Act applied prospectively or retrospectively arose, supporting the latter proposition, the Supreme Court observed that granting automatic stay of an award was incorrect and Section 36, even as originally enacted, was not meant to do away with Article 36(2) of the UNCITRAL Model Law.[12]

Unfazed by the fact that the Supreme Court was not in support of granting such unconditional stay on the enforcement of domestic awards,[13] the legislature has first by means of the 2020 Ordinance,[14] and then through the 2021 Amendment Act, devised a novel surrogate for allowing unconditional stays. Section 2 of the 2021 Amendment Act has inserted a new proviso to Section 36 of the Act,[15] which provides that an unconditional stay on

9. Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Law Com No. 246, August 2014) 43, 44, 45.
10. Arbitration and Conciliation Act 1996, s. 36(2), as inserted by the Arbitration and Conciliation (Amendment) Act 2015, reads as: *"(2) Where an application to set aside the arbitral award has been filed in the court under Section 34, the filing of such an application shall not by itself render that award unenforceable, unless the court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose."*
11. Arbitration and Conciliation Act 1996, s. 36(3), as inserted by the Arbitration and Conciliation (Amendment) Act 2015, reads as: *"(3)Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:*
Provided that the court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908)."
12. See (n 1).
13. National Aluminum Company Ltd. v. Pressteel & Fabrications (P) Ltd. (2004) 1 SCC 540 11.
14. Arbitration and Conciliation (Amendment) Ordinance 2020, s. 2.
15. Arbitration and Conciliation (Amendment) Act 2021, s. 2 reads as: *"In the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the principal Act), in section*

enforcement of a domestic award *"shall"* be granted where the Court is satisfied that either of the following suffer from fraud or corruption:

i. the arbitration agreement; or

ii. the contract which is the basis of the award; or

iii. the making of the award.

Essentially, the 2021 Amendment Act has resurrected the evil of unconditional stay that was put to rest by the 2015 Amendment Act albeit only on restricted grounds. In doing so, the 2021 Amendment Act has seemingly divested the courts of their discretion to grant a conditional stay and made it expressly mandatory upon them to grant an unconditional stay upon the fulfilment of the above conditions.

3. THE CONTROVERSY AROUND SECTION 36(3)

A mere look at the changes brought about by the 2015 Amendment Act and then by the 2021 Amendment Act raises an interesting question: when the legislature had, by way of the 2015 Amendment Act, done away with the unconditional stay doctrine, why exactly has it been brought back selectively by way of the 2021 Amendment Act?

As per the Hon'ble Minister of Law, the shift to selective unconditional stay, the doctrine propagated by the 2021 Amendment Act, is to prevent India from becoming *"the centre of procuring award through corrupt and fraud means."*[16]

Section 2 of the 2021 Amendment Act gives rise to certain ambiguities, in as much as the exact amplitude of the words *"fraud"* and *"corruption"*

36, in sub-section (3), after the proviso, the following shall be inserted and shall be deemed to have been inserted with effect from the 23rd day of October, 2015, namely: "Provided further that where the Court is satisfied that a prima facie case is made out that,—

(a) the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award, was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Explanation.—For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015."

16. Statement of Hon'ble Minister of Law before the Lok Sabha, Seventeenth Series, Vol. XI, Fifth Session (February 12, 2021/Magha 23, 1942) (Saka) pages 826 and 827.

remains undefined in the Act. The 2021 Amendment Act fails to expand upon the said terms and, therefore, leaves very little guidance for the courts in applying the said standards. Though the fraud and corruption standards have already been used in a limited manner in the Explanation to Section 34(2)(b)(ii) of the Act, there does not appear to be any conclusive judicial decision interpreting the same in the context of setting aside or enforcement proceedings under the Act. In fact, in Venture Global Engg. LLC v. Tech Mahindra Ltd.,[17] the Supreme Court has even observed that "fraud" has no universal definition in law. Thus, having such an expansive standard as a ground warranting unconditional stay on the enforcement of domestic awards undergoing challenge is indeed worrisome. There is no denying that allegations of fraud and corruption are difficult to be put into a straitjacket formula, however, it must also be appreciated that having such an elastic test as a ground for resisting enforcement is antithetical to the very idea of expeditious disposal of disputes through arbitration.

Furthermore, contrary to the Hon'ble Minister of Law's statement at the time of presenting the 2021 Amendment Bill in the Parliament,[18] the 2021 Amendment Act is not a simpliciter transformation of the "fraud" and "corruption" ground already available in Section 34 of the Act-into a ground under Section 36 that allows unconditional stay on the enforcement of awards. In this respect, the 2021 Amendment Act goes far beyond. Section 34(2)(b)(ii) of the Act, which only permits the raising of such grounds when the *"award"* is induced / affected by fraud or corruption. On the other hand, as per the 2021 Amendment Act, an unconditional stay on enforcement can be granted for an occurrence of fraud or corruption at any stage – be it while making the principal agreement, while making the arbitration agreement or while making the award.

Crucially, the 2021 Amendment Act also fails to explain the material which the court may refer to while deciding whether there exists a *"prima facie"* case of fraud or corruption. Does the court restrict itself only to the material available on record like an enquiry under Section 34 of the Act,[19] or can it go beyond the matters on record and look into additional evidence / records? Also, what happens if fraud or corruption, although in the knowledge of the concerned party, was not alleged during the arbitration proceedings?

17. Venture Global Engg. LLC v. Tech Mahindra Ltd. (2018) 1 SCC 656.
18. Statement of Hon'ble Minister of Law before the Lok Sabha, Seventeenth Series, Vol. XI, Fifth Session (February 12, 2021/Magha 23, 1942) (Saka) page 751.
19. Canara Nidhi Ltd. v. M. Shashikala (2019) 9 SCC 462; Emkay Global Financial Services Ltd. v. Girdhar Sondhi (2018) 9 SCC 49.

Would the court be empowered to go into such questions? Issues like these would invariably require fresh judicial review.

Another important concern that is likely to be raised is the interplay between the 2021 Amendment and Section 34 of the Act. For instance, under Section 34(2)(a)(ii), an award may be set aside if the arbitration agreement is invalid in law, possibly on account of fraud or corruption. Now, under the newly amended Section 36, enforcement may be stayed even where the contract containing the arbitration agreement was induced by fraud or corruption. The Supreme Court, in the cases of *Swiss Timing Ltd. v. Commonwealth Games*[20] and *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.,*[21] has noted that the arbitration agreement is severable in law from the contract in which it is contained, and thus, fraud in obtaining a contract shall not mandatorily affect the arbitration agreement. Thus, the court's discretion to stay enforcement under the now amended Section 36 clearly seems to exceed the limits of its dominant discretion to set aside awards under Section 34.

Additionally, the explanation to Section 34(2A) explicitly restricts courts from reviewing awards on merits or re-appreciation of evidence. The Supreme Court has held that no *prima facie* case of fraud can be made out without material evidence to substantiate the allegations.[22] Thus, how exactly will the amended provision be put into effect needs consideration. Furthermore, a bare reading of Section 34(2)(b), Explanation 1(i) clearly exhibits that an award may be set aside if the making of the award was induced by fraud or corruption as it would be against the public policy of India. This again raises the question as to why the 2021 Amendment was needed in the first place.

Apart from this, the 2021 Amendment also threatens to breach the protective wall of exclusivity erected around arbitration proceedings, to protect their sanctity and minimise court intervention. By introducing fraud and corruption in the formation of the main contract as grounds to circumvent enforcement of awards, the legislature has once again opened a door which can potentially frustrate proceedings. This is because an assessment of the main contract being vitiated by fraud is a category of non-arbitrability, one

20. Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee (2014) 6 SCC 677.
21. Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd. (2021) 4 SCC 713 : 2020 SCC OnLine SC 656.
22. Svenska Handelsbanken v. Indian Charge Chrome Ltd. 1994 SCR (1) 261.

that must be referred to arbitration and decided by the arbitral tribunal.[23] The Supreme Court, in the *Avitel Post Studioz* case, drew an exception to this principle only in cases of "serious allegations of fraud" that may cause damage in the public domain where the courts, and not the arbitral tribunal, would have the competence to decide.[24]

Therefore, the hazards of ambiguous phraseology of the 2021 Amendment are apparent since the lack of clarification regarding the terms "fraud" and "corruption" opens courts' discretion to decide any and all allegations and nature of claims raised under these grounds.

4. THE RETROSPECTIVE - PROSPECTIVE DEBATE

One of the most significant changes brought about by the 2019 Amendment Act was the introduction of Section 87[25] to the Act. The newly inserted Section 87 expressly made the application of the 2015 Amendment Act prospective. This amendment thus sought to undo the change introduced by the 2015 Amendment Act and more particularly the judgment of the Apex Court in BCCI v. Kochi Cricket (P) Ltd.[26] ("**BCCI v. Kochi Cricket**"). In BCCI v. Kochi Cricket, the Supreme Court held that Section 36 of the Act (as amended by 2015 Amendment Act) was applicable to Section 34 proceedings filed both prior to and pending on 23 October 2015, i.e., the date on which the 2015 Amendment was enforced.

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23. Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee (2014) 6 SCC 677.
24. Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd. (2021) 4 SCC 713 : 2020 SCC OnLine SC 656.
25. Arbitration and Conciliation Act 1996, s. 87, as inserted by the Arbitration and Conciliation (Amendment) Act, 2019 reads as:
    "87. Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall—
    (a) not apply to—–
    (i) arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;
    (ii) court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;
    (b) apply only to arbitral proceedings commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and to court proceedings arising out of or in relation to such arbitral proceedings."
26. BCCI v. Kochi Cricket (P) Ltd. (2018) 6 SCC 287.

Pertinently, while Section 87, as inserted by Section 13 of the 2019 Amendment Act, was already relied upon in a number of decisions[27] concerning the application of the 2015 Amendment Act prospectively, the validity of Section 13 of the 2019 Amendment Act itself came to be questioned before the Supreme Court in HCC v. Union of India.[28]

In the said case, it was argued on behalf of the petitioners that the erstwhile interpretation of the 2019 Amendment Act which provided for an automatic stay, was itself fallacious since the Act even prior to the 2015 Amendment, did not allow the award debtor to have two bites at the cherry i.e. one at the stage of challenge under Section 34 and the other at the stage of the enforcement under Section 36. It was also argued by the petitioners that the newly introduced Section 87 of the Act was arbitrary and thus violative of Articles 14, 19(1)(g), 21 and 300-A of the Indian Constitution as it recreated the mischief sought to be done away with the 2015 Amendment Act.

Agreeing with the petitioner's contentions, the Supreme Court held that no automatic stay or conditional stay was ever contemplated even in the Act as it stood prior to the 2015 Amendment Act and the judgments[29] prior to the 2015 Amendment Act, which allowed an automatic and unconditional stay of the award, had laid down the law incorrectly. Thus, the amendments made by the 2015 Amendment Act being merely clarificatory in nature, were held to have retrospective application. The Supreme Court therefore held that the introduction of Section 87 by the 2019 Amendment Act resurrected the mischief sought to be corrected by the 2015 Amendment Act. Accordingly, the introduction of Section 87 by Section 13 of the 2019 Amendment Act was found to be unconstitutional.

The failure of the 2019 Amendment Act to withstand scrutiny in HCC v. Union of India,[30] does not appear to have deterred the legislature in its attempts to attenuate the requirements of a conditional stay on the enforcement of domestic awards. In terms of the 2021 Amendment Act, instead of yet again making the 2015 Amendment prospective, the 2021 Amendment Act has creatively introduced the *"fraud"* and *"corruption"* grounds for unconditional stay retrospectively i.e., to *"all court cases*

27. Cabcom Cables Ltd. v. SBI Global Factors Ltd. 2019 SCC OnLine Bom 2272; Mangalam Chaudhary Co. v. Hindustan Construction Co. Ltd. 2019 SCC OnLine Bom 2054; Godrej Industries Limited v Darius Rutton Kavasmaneck 2019 SCC OnLine Bom 12124 ; Iqbal A. Parekh v. J.P.B. Developers LLP 2019 SCC OnLine Bom 8377.
28. See (n 1).
29. See (n 7).
30. See (n 1).

arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2021."[31]

It remains to be seen how the courts would interpret the introduction of fraud and corruption as grounds to allow unconditional stay from the perspective of the mischief test discussed in HCC v. Union of India. However, if considered solely from the propriety of retrospective application of above standards, the 2021 Amendment Act would be difficult to fault with considering the Supreme Court's own observations in BCCI v. Kochi Cricket[32] where in it has been clarified that execution of a decree pertains to the realm of procedure and procedural law can operate retrospectively.

5. CONCLUSION

Having originated amid uncertainty and leaning dangerously towards precariousness, it is difficult to predict whether, if at all, the 2021 Amendment Act furthers the intent of its drafters. The immediate aftermath of the 2021 Amendment Act and its retrospective assent to unconditional stays on all Section 34 proceedings appears to be recalcitrant award-debtors alleging frivolous grounds of fraud and corruption in order to protract enforcement of their respective awards regrettably, the hapless victim of this would be the Indian dream of being an arbitration friendly jurisdiction.

31. See (n 15).
32. See (n 18).

RECOGNITION AND ENFORCEMENT OF EMERGENCY ARBITRATION IN INDIA: A COMMENT ON THE SUPREME COURT'S RULING IN AMAZON- FUTURE DISPUTE

—*Ranjit Shetty*[*] *& Rahul Dev*[**]

1. INTRODUCTION

In a significant ruling that furthers Indian courts' recent pro-enforcement approach while dealing with international commercial arbitrations, the Hon'ble Supreme Court of India ("**Supreme Court**") in the matter of Amazon.com *NV Investment Holdings LLC* v. *Future Retail Ltd.*,[1] has recognised and allowed the enforcement of an "award" passed by an Emergency Arbitrator appointed under the Arbitration Rules of the Singapore International Arbitration Centre ("**SIAC Rules**"). The ruling assumes massive significance in the larger scheme of strengthening the Indian legal ecosystem and framework for international commercial arbitrations. Further, this could be one of the pioneering decisions granting recognition to Emergency Arbitrators around jurisdictions across the world, which may also prove to be pivotal for parties considering to be governed by the Indian law as the curial law of arbitration.

By way of this decision, the Supreme Court has approved the validity, recognition and enforcement of decisions/awards passed by an Emergency Arbitrator, despite the absence of an express statutory recognition to the concept of Emergency Arbitration (or Emergency Arbitrator proceedings) under the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). The Supreme Court laid great emphasis on parties' autonomy to subject themselves to the rules of the institution providing for an Emergency Arbitrator and held that in view of there being no interdict, either express or implied, against an Emergency Arbitrator, the awards/orders passed by such Emergency Arbitrator shall be covered under the Arbitration

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1. Amazon.com NV Investment Holdings LLC v. Future Retail Ltd. (2022) 1 SCC 209 : 2021 SCC OnLine SC 557.

Act.[2] Therefore, by filling the legislative void in respect of the legality of Emergency Arbitrations in the Indian scenario, the Supreme Court has also taken a progressive step towards cementing India's position as an international hub for resolving commercial disputes and arbitrations.

While the decision also concerns itself with an incidental question of whether an order passed under Section 17(2) of the Arbitration Act is appealable while enforcing the award of an Emergency Arbitrator, this case comment is restricted to analysing the decision on the issue of enforceability of an award delivered by an Emergency Arbitrator under Section 17(1) of the Arbitration Act.[3]

Through this case comment, the authors shall *firstly,* trace the historical development of the concept of Emergency Arbitrators around the globe; *secondly*, comment on the status accorded to Emergency Arbitrators in India prior to the *Amazon* ruling; *thirdly*, summarize the views expressed in the *Amazon* ruling; *fourthly*, analyse the decision and its relevance in the development of law; and *lastly*, opine on the unsettled issues and the way forward post the *Amazon* decision.

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2. *Ibid*, ¶ 35.
3. § 17 — **Interim measures ordered by arbitral tribunal** —(1) A party may, during the arbitral proceedings apply to the arbitral tribunal —
   (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
   (ii) for an interim measure of protection in respect of any of the following matters, namely:—
      (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
      (b) securing the amount in dispute in the arbitration;
      (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
      (d) interim injunction or the appointment of a receiver;
      (e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

   (2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.

2. EMERGENCY ARBITRATION – A CREATION OF NECESSITY

Historically, parties to international arbitration agreements had no recourse to arbitration to preserve the status quo, conserve assets, prevent tampering with evidence, or seek other provisional reliefs until an arbitral tribunal was validly constituted.[4] Thus, for seeking urgent interim or provisional reliefs before the constitution of an arbitral tribunal, the parties had to necessarily approach the national courts, which had the inherent down sides of loss of confidentiality, delays and dependence on the local procedural rules that the parties had sought to avoid in the first place by electing for arbitration.[5] The other option was to await the constitution of an arbitral tribunal, which, in cases requiring urgent reliefs, undermined the very utility of seeking an urgent relief.

Thus, to reduce the involvement of national courts in the arbitral process, international arbitral institutions in modern jurisdictions introduced (in various forms) an "arbitrator" to whom the parties could apply for emergency interim reliefs, prior to the constitution of an arbitral tribunal.[6]

The first institution to introduce Emergency Arbitrator provisions into its rules was the International Centre for Dispute Resolution ("**ICDR**"), the international division of the American Arbitral Association ("**AAA"**). The ICDR introduced the concept of an Emergency Arbitrator in the year 2006.[7] Thereafter, most notable arbitral institutions around the world, such as the International Chamber of Commerce ("**ICC**"),[8] the London Court of International Arbitration ("**LCIA**"),[9] Singapore International Arbitration

4. Grant Hanessian & E. Alexandra Dosman, *Songs of Innocence and Experience: Ten Years of Emergency Arbitration* (2018) ARIA, https://arbitrationlaw.com/sites/default/files/free_pdfs/aria_-_songs_of_access.pdfaccessed 15 September 2021.
5. Report of the ICC Commission on Arbitration and ADR Task Force on Emergency Arbitrator Proceedings, *Emergency Arbitrator Proceedings*, (April 2019) ¶ 4, https://iccwbo.org/publication/emergency-arbitrator-proceedings-icc-arbitration-and-adr-commission-report/ accessed 15 September 2021.
6. Lye Kah Cheong, Yeo Chuan Tat and William Miller, 'Legal Status of the Emergency Arbitrator under the SIAC 2010 Rules: Neither Fish nor Fowl', (2011) 23 SAcLJ, https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal/e-Archive/ctl/eFirstSALPDFJournalView/mid/495/ArticleId/569/Citation/JournalsOnlinePDF accessed 15 September 2021.
7. Originally ICDR International Arbitration Rules 2006, art. 37; Now ICDR International Arbitration Rules 2014, art. 6.
8. ICC Arbitration Rules 2017, art. 29, App. V.
9. LCIA Arbitration Rules 2014, art. 9B.

Centre ("**SIAC**"),[10] Stockholm Chambers of Commerce ("**SCC**")[11] and the Hong Kong International Arbitration Centre ("**HKIAC**")[12] introduced the concept of an Emergency Arbitrator to deal with urgent cases, that required the immediate intervention of an independent authority, pending the constitution of the arbitral tribunal. In India, the rules of arbitral institutions such as Mumbai Centre for International Arbitration ("**MCIA**")[13] and Delhi International Arbitration Centre ("**DIAC**")[14] (amongst others) provide for the appointment of an Emergency Arbitrator to deal with emergency situations requiring urgent interim reliefs.

As can be seen, the emergence of an Emergency Arbitrator is a fairly recent phenomenon which has found favor with the most prominent arbitration institutions around the globe due to the ability to provide immediate and efficient interim relief to parties to an arbitration agreement prior to the constitution of the arbitral tribunal. While certain shortcomings of an Emergency Arbitrator can be experienced on a case-to-case basis (such as, non-binding effect on third parties, non-availability of an *ex-parte* relief), there is no doubt that the concept of Emergency Arbitrator addresses various issues that are associated with approaching national courts, in cases where a party is desirous of obtaining interim reliefs on an urgent basis.

3. STATUS OF EMERGENCY ARBITRATOR IN INDIA PRIOR TO AMAZON RULING

Given the relatively recent emergence of Emergency Arbitration proceedings; with the exception of Hong Kong,[15] New Zealand,[16] and

10. SIAC Arbitration Rules 2016, r. 30, sch. 1.
11. Arbitration Rules of the Arbitration Institute of the SCC 2017, app. II.
12. HKIAC Administered Arbitration Rules 2018, art. 23, sch. 4.
13. Mumbai Centre for International Arbitration Rules 2016, r. 14.
14. Delhi International Arbitration Centre (Arbitral Proceedings) Rules 2018, r. 14.
15. § 22A of Hong Kong Arbitration Ordinance, reads as:
    § 22A Interpretation — In this part —
    emergency arbitrator means an emergency arbitrator appointed under the arbitration rules (including the arbitration rules of a permanent arbitral institution) agreed to or adopted by the parties to deal with the parties' applications for emergency relief before an arbitral tribunal is constituted.
    Also see, § 22B of Hong Kong Arbitration Ordinance dealing with enforcement of emergency relief granted by emergency arbitrator.
16. § 2(1) of New Zealand Arbitration Act 1996, as amended by Arbitration Amendment Act 2016 (2016 No. 53), reads as:
    § 2(1) Interpretation — In this Act, unless the context otherwise requires, —
    arbitral tribunal —
    (a) means a sole arbitrator, a panel of arbitrators, or an arbitral institution; and

Singapore,[17] there is currently no provision in the arbitration laws of any country (including India) expressly providing for the recognition and enforcement of orders passed by Emergency Arbitrators.[18]

A. Granting statutory recognition to Emergency Arbitration – So near, yet so far

In India, the 20th Law Commission of India ("**Law Commission**"), constituted in the year 2012, was entrusted with the task of reviewing the provisions of the Arbitration Act, in view of several inadequacies observed in the functioning of the Arbitration Act. The Law Commission *inter alia* made recommendations in its Report[19] to encourage the culture of institutional arbitration in India and to redress the institutional and systemic malaise that had seriously affected the growth of arbitration in the country.[20]

With a view of providing statutory recognition to emergency arbitration in India, the Report suggested broadening the definition of 'arbitral tribunal' under Section 2(1)(d) of the Arbitration Act[21] to include the "emergency arbitrator". However, this definition was not included in the Arbitration and Conciliation (Amendment) Act, 2015 ("**Amendment Act, 2015**"), which otherwise largely incorporated the suggestions recommended by the Law Commission.

Thereafter, in the year 2016, a High-Level Committee to Review Institutionalization of Arbitration Mechanism in India ("**Committee**") was set up by the Government of India to identify the roadblocks to the

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(b) includes any emergency arbitrator appointed under—
(i) the arbitration agreement that the parties have entered into; or
(ii) the arbitration rules of any institution or organisation that the parties have adopted.

17. § 2(1) of Singapore International Arbitration Act (ch. 143A), as amended by [Act 12 of 2012 w.e.f. 1 June 2012] reads as:
§ 2 (1) — In this Part, unless the context otherwise requires —
"arbitral tribunal" means a sole arbitrator or a panel of arbitrators or a permanent arbitral institution, and includes an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organization.
18. Report of the ICC Commission (n 5) [¶36].
19. Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996*, (246th Report) (August 2014).
20. *Ibid*, ch. II, [¶ 6].
21. § 2(1)(d) — In this Part, unless the context otherwise requires, —
"arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

development of institutional arbitration and examine specific issues affecting the Indian arbitration landscape. The Committee was given the responsibility to prepare a roadmap for making India "*a robust centre for international and domestic arbitration*".[22] The Committee noted that there is significant uncertainty in the Indian law regarding the recognition and enforceability of awards passed by Emergency Arbitrators. The Committee observed that India ought to permit enforcement of emergency awards in all arbitral proceedings and advised the adoption of recommendations made by the Law Commission to give statutory recognition to Emergency Arbitrators under the Arbitration Act.[23] However, once again, the Government of India chose to ignore the recommendation of the Committee in respect of Emergency Arbitrators and no provision thereof was made in the Arbitration and Conciliation (Amendment) Act, 2019.

Thus, despite recommendations made by the Law Commission, which were seconded by the Committee, no statutory recognition was granted to Emergency Arbitrators or the awards/orders passed by Emergency Arbitrators. Hence, the uncertainty as to whether the orders/awards passed by the Emergency Arbitrators would be enforceable in India continued, specifically in light of the non-acceptance of recommendations made by the Law Commission and the Committee.

B. Indian Courts' approach towards awards passed by Emergency Arbitrator

In the case of *Raffles Design International India (P) Ltd.* v. *Educomp Professional Education Ltd.*,[24] the Petitioner (Raffles), after having secured interim orders from the Emergency Arbitrator constituted under the SIAC Rules in a foreign seated arbitration, had approached the Hon'ble Delhi High Court for the grant of interim reliefs under Section 9[25] of the

22. Press Information Bureau Press Release, Ministry of Law and Justice, Government of India *Constitution of High Level Committee to Review Institutionalization of Arbitration Mechanism in India*, (December 2016), http://pib.nic.in/newsite/PrintRelease.aspx?relid=155959 accessed 15 September 2021.
23. *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India*, (July 2017, 76, https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf accessed 15 September 2021.
24. Raffles Design International India (P) Ltd. v. Educomp Professional Education Ltd. 2016 SCC OnLine Del 5521 : (2016) 234 DLT 349.
25. § 9 of the Arbitration Act deals with the Court's power to grant interim measures of protection to a party before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced as per the Arbitration Act.

Arbitration Act. The Delhi High Court held that the Arbitration Act does not contain any provision for enforcement of interim orders granted by an arbitral tribunal outside India and thus, the interim award passed by the Emergency Arbitrator (in foreign seated arbitration) could not be enforced under the Arbitration Act. However, the Delhi High also opined that while such interim awards/orders cannot be enforced in India, an Indian Court can independently apply its mind and grant interim reliefs under Section 9 of the Act, based on the same cause of action decided by the Emergency Arbitrator.[26]

Similarly, the Hon'ble Bombay High Court, in the case of *Avitel Post Studioz Ltd.* v. *HSBC PI Holdings (Mauritius) Ltd.*,[27] granted interim reliefs under Section 9 of the Arbitration Act, despite the emergency arbitrator having passed same interim reliefs under the SIAC Rules. The Bombay High Court held, "*merely because, in the present case such emergency or interim awards have been made by the Arbitral Tribunal at Singapore, that would make no difference, particularly when it comes to determination of the jurisdiction of the Indian Courts to grant interim measures by resort to section 9 of the Act. Ultimately, it has to be borne-in-mind that we are dealing with an international commercial arbitration, where perhaps the emergency or interim awards may be enforceable in other parts of the globe, without any further ado, on account of inapplicability of restrictions akin to those contained in sections 46 to 49 of the Act.*"

Thus, the Delhi and Bombay High Court alluded to the restrictions in India in enforcing emergency awards in a foreign seated arbitration, nevertheless granting interim reliefs by invoking Section 9 of the Arbitration Act.

In another case viz. *Ashwani Minda* v. *U-Shin Ltd.*,[28] the Emergency Arbitrator appointed in a foreign seated arbitration governed by the Japan Commercial Arbitration Association Rules ("**JCAA Rules**") had declined to grant interim reliefs by passing a detailed order. The Applicant (Ashwani Minda) then approached the Delhi High Court under Section 9 of the Act seeking similar interim reliefs as prayed before the Emergency Arbitrator. The Delhi High Court held that the Applicant, having unsuccessfully tried to obtain relief in an emergency arbitration, cannot have a second bite at the

26. *Ibid*, [¶ 103–105]. *See* also generally, Plus Holdings Ltd. v. Xeitgeist Entertainment Group Ltd. 2019 SCC OnLine Bom 13069, [¶ 6, 8].
27. Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd. 2014 SCC OnLine Bom 929.
28. Ashwani Minda v. U-Shin Ltd. 2020 SCC OnLine Del 1648 : AIR 2020 (NOC 953) 314.

cherry by asking for the same interim relief from a Court. The Delhi High Court went on to hold that that the Court, in a petition under Section 9 of the Act, cannot sit as a Court of appeal to examine the order of the emergency arbitrator.[29] Thus, the Hon'ble Court impliedly affirmed the competency of an emergency arbitrator to grant interim reliefs as an alternate forum to proceedings before courts under section 9 of the Arbitration Act.

It is pertinent to note that all the above cases were adjudicated in the context of orders/awards passed by an Emergency Arbitrator in foreign seated arbitrations. In the absence of any statutory provision allowing enforcement of interim orders passed in foreign seated arbitrations, the Courts granted similar reliefs by invoking the powers under Section 9 of the Arbitration Act.

Considering that there is no enabling provision allowing enforcement of interim orders in a foreign seated arbitration, the parties had to experiment and use alternate routes such as invoking Section 9 of the Arbitration Act to seek the exact same reliefs as granted by the Emergency Arbitrator. In such a scenario, even though the award passed by an Emergency Arbitrator could not be directly recognized in view of the legislative void, the Courts in India adopted a liberal and experimental approach to grant interim reliefs (based on such Emergency Arbitrators' award/order) within the legislative framework of the Arbitration Act. This, however, cannot not be said to be the ideal option, as the Courts had to re-examine the issue already decided by the Emergency Arbitrator, which, in turn, led to both - an increased burden upon the already clogged Courts and unnecessary delays to those who sought these reliefs.

4. THE AMAZON RULING – WHAT DID THE SUPREME COURT HOLD?

The genesis of the dispute arose out of an investment made by Amazon.com NV Investment Holdings LLC ("**Amazon**") in Future Coupons Private Limited ("**FCPL**") and indirectly in Future Retail Limited ("**FRL**"), whereunder certain rights were given to FCPL, in relation to the retail assets of FRL. The rights granted in favour of FCPL were to be exercised for the benefit of Amazon such that FRL could not have transferred its retail assets without FCPL's consent which in turn, could not be granted unless Amazon had given its consent.

29. *Ibid*, [¶ 55, 56].

Being aggrieved by certain actions of the Biyani Group,[30] Amazon initiated arbitration proceedings under the SIAC Rules against the Biyani Group and an application was filed under paragraph 1 of Schedule 1[31] of the SIAC Rules seeking emergency interim reliefs. The arbitration agreement between the parties contemplated the seat of arbitration to be New Delhi, India.[32]

The Emergency Arbitrator passed an "interim award" dated 25th October 2020 *inter alia* granting certain injunctions/directions against the Biyani Group. The Biyani Group took a stand that the interim award was a nullity as per the Arbitration Act and continued to act as if the interim award did not exist. Biyani Group did not challenge the interim award dated 25th October 2020. Being aggrieved by such conduct, Amazon proceeded to file an application under Section 17(2) of the Arbitration Act before the Delhi High Court, seeking enforcement of the interim award passed by the Emergency Arbitrator. The Ld. Single Judge of the Delhi High Court *inter alia* held that the Emergency Arbitrator's interim award was an order under Section 17(1) of the Arbitration Act and was accordingly, enforceable under Section 17(2) of the Arbitration Act.[33] On appeal, the Division Bench of

30. Biyani Group comprised of: Future Retail Limited, Future Coupons Private Limited, Mr Kishore Biyani, Ms Ashni Kishore Biyani, Mr Anil Biyani, Mr Gopikishan Biyani, Mr Laxminarayan Biyani, Mr Rakesh Biyani, Mr Sunil Biyani, Mr Vijay Biyani, Mr Vivek Biyani, Future Corporate Resources Private Limited and Akar Estate and Finance Private Limited.
31. SIAC Arbitration Rules 2016, sch. 1, ¶ 1 reads as:
    A party that wishes to seek emergency interim relief may, concurrent with or following the filing of a Notice of Arbitration but prior to the constitution of the Tribunal, file an application for emergency interim relief with the Registrar. The party shall, at the same time as it files the application for emergency interim relief, send a copy of the application to all other parties. The application for emergency interim relief shall include:
    a. the nature of the relief sought;
    b. the reasons why the party is entitled to such relief; and
    c. a statement certifying that all other parties have been provided with a copy of the application or, if not, an explanation of the steps taken in good faith to provide a copy or notification to all other parties.
32. § 25.1 and § 25.2 of the Shareholders' Agreement dated 22nd August, 2019 entered into between Amazon.com NV Investment Holdings LLC, Future Coupons Private Limited, Mr Kishore Biyani, Ms Ashni Kishore Biyani, Mr Anil Biyani, Mr Gopikishan Biyani, Mr Laxminarayan Biyani, Mr Rakesh Biyani, Mr Sunil Biyani, Mr Vijay Biyani, Mr Vivek Biyani, Future Corporate Resources Private Limited and Akar Estate and Finance Private Limited.
33. Amazon COM NV Investment Holdings LLC v. Future Coupons (P) Ltd. 2021 SCC OnLine Del 1279 : (2021) 280 DLT 618, [¶ 187].

the Delhi High Court stayed the judgment of the Ld. Single Judge.[34] Being aggrieved by the order of the Division Bench, Amazon challenged the same before the Supreme Court.

The two significant questions that arose in the matter before the Hon'ble Supreme Court of India were[35]:

1. Whether an "Award" delivered by an Emergency Arbitrator under the SIAC Rules can be said to be an order under Section 17(1) of the Arbitration Act?

2. Whether an order passed under Section 17(2) of the Arbitration Act in the enforcement of the award of an Emergency Arbitrator by a Single Judge of the High Court is appealable?

As stated above, the authors shall be restricting this case comment to the first question i.e. the enforceability of an award passed by the Emergency Arbitrator in India.

A. Party autonomy as grundnorm of arbitration: No interdiction against an Emergency Arbitrator

Biyani Group's contention was that an Emergency Arbitrator is not an "arbitral tribunal" but a person who only decides, at best, an interim dispute between the parties, which does not culminate into a final award. It was also argued that the scheme of Section 17(1) of the Arbitration Act made it clear that a party may, during arbitral proceedings, apply to the arbitral tribunal for interim reliefs.[36] Thus, an Emergency Arbitrator who is appointed before the arbitral tribunal is constituted, falls outside the scope of Section 17(1) of the Arbitration Act.

The Hon'ble Supreme Court, while referring to Section 21 of the Arbitration Act[37] and Rule 3.3 of the SIAC

34. Future Coupons (P) Ltd. v. Amazon.com NV Investment Holdings LLC 2021 SCC OnLine Del 4101, [¶ 12].
35. Amazon (n 1), [¶ 1].
36. Amazon (n 1), [¶ 21, 22].
37. **Commencement of arbitral proceedings** — Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Rules,[38] held that the arbitral proceedings under the SIAC Rules can be said to have commenced from the date of receipt of a complete notice of arbitration by the Registrar of SIAC. Thus, when Section 17(1) uses the expression "during the arbitral proceedings", the said provision would include Emergency Arbitrator proceedings, which commence only after the receipt of notice of arbitration by the Registrar under Rule 3.3 of the SIAC Rules.[39]

The Supreme Court held that in view of various sections of the Arbitration Act, which expound the concept of party autonomy in choosing to be governed by institutional rules, coupled with the fact that there is no interdict, either express or implied, against an Emergency Arbitrator, would mean that an Emergency Arbitrator's orders, if provided under the institutional rules, would be covered under the Arbitration Act. While referring to the judgement of *Centrotrade Minerals and Metal Inc.* v. *Hindustan Copper Ltd.*,[40] the Hon'ble Supreme Court held that the parties to the contract (i.e. Amazon and Biyani Group), by agreeing to the SIAC Rules and the award of the Emergency Arbitrator, have not bypassed any provision of the Arbitration Act.[41]

The Hon'ble Supreme Court further held that if a party has agreed to the concerned institutional rules, it cannot argue that it will not be bound by an Emergency Arbitrator's ruling after it participates in an Emergency Award proceeding. The Hon'ble Supreme Court observed that it does not lie in the mouth of a party to ignore an Emergency Arbitrator's award by stating that it is a nullity when such party expressly agreed to the binding nature of such award and promised to carry out such an interim award without delay.[42]

38. The SIAC Arbitration Rules 2016, r. 3.3 reads as:
    The date of receipt of the complete Notice of Arbitration by the Registrar shall be deemed to be the date of commencement of the arbitration. For the avoidance of doubt, the Notice of Arbitration is deemed to be complete when all the requirements of Rule 3.1 and Rule 6.1(b) (if applicable) are fulfilled or when the Registrar determines that there has been substantial compliance with such requirements. SIAC shall notify the parties of the commencement of the arbitration.
39. Amazon (n 1), ¶ 34.
40. Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd. (2017) 2 SCC 228. The importance of party autonomy in arbitration and commercial contracts was delineated in the judgement.
41. Amazon (n 1), ¶ 42.
42. SIAC Rules 2016, sch. 1 [¶ 12].

In essence, the Hon'ble Supreme Court reiterated the concept of party autonomy being the "brooding and guiding spirit in arbitration" where the parties are free to agree on the law of conduct of the arbitration.[43]

B. Interpreting the definition of "arbitral tribunal" under the Arbitration Act

The Biyani Group placed heavy emphasis on the definition of "arbitral tribunal" under Section 2(1)(d) of the Arbitration Act. They argued that an award of an Emergency Arbitrator, which is admittedly passed before an arbitral tribunal is constituted, cannot be treated as an order under Section 17(1) of the Arbitration Act. Section 17(1) can only be invoked by a party during the arbitral proceedings.[44]

The Hon'ble Supreme Court negated the aforesaid contention by referring to the words "*unless the context otherwise requires*" which the definition of "arbitral tribunal" is subjected to under the Arbitration Act. The Hon'ble Supreme Court, while relying on Sections (2)(1)(d), 2(6) and 2(8) of the Arbitration Act, held that the context of Section 17(1) of the Arbitration Act is unique and it "*otherwise requires*" the definition of "arbitral tribunal" to include an Emergency Arbitrator when institutional rules apply.[45] The Supreme Court held that a proper interpretation of Sections 2(1)(d) read with Sections 2(6)[46] and 2(8)[47] of the Arbitration Act makes it clear that even interim orders that are passed by Emergency Arbitrators under the rules of a permanent arbitral institution would be included in the ambit of Section 17(1) of the Arbitration Act. Further, there is nothing in Section 17(1) of the Arbitration Act to interdict the application of rules of arbitral institutions that the parties may have agreed to.

The Hon'ble Supreme Court gave a contextual interpretation to the definition of "arbitral tribunal" under the Arbitration Act. In ascertaining the true intention, the Hon'ble Supreme Court not only looked at the words used

43. Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. (2016) 4 SCC 126, [¶ 5].
44. Amazon (n 1), ¶ 43.
45. Amazon (n 1), ¶ 45.
46. § 2(6) — Where this Part, except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue.
47. § 2(8) —Where this Part—
    (a) refers to the fact that the parties have agreed or that they may agree, or
    (b) in any other way refers to an agreement of the parties,
    that agreement shall include any arbitration rules referred to in that agreement.

but also had regard to the context and the setting in which they occurred. The Hon'ble Supreme Court considered the aim, object and scope of the statute in its entirety to hold that in the absence of an interdiction under the Arbitration Act, the definition of "arbitral tribunal" shall have to be contextually interpreted to include even an Emergency Arbitrator, if rules of arbitration so provide.

C. Effect of non-implementation of the 246th Law Commission Report

The Biyani Group argued that despite the recommendation of the 246th Report of the Law Commission, the Parliament, in its wisdom decided not to grant statutory recognition to the concept of Emergency Arbitrator, thereby ousting Emergency Arbitrators from the scheme of the Arbitration Act.

The Supreme Court relied on the judgement of *Avitel Post Studioz Ltd.* v. *HSBC PI Holdings (Mauritius) Ltd.*[48] to discredit the above argument. It held that the mere fact that a recommendation of a law commission report is not followed by the Parliament would not necessarily lead to the conclusion that the suggestions of the law commission cannot form a part of the statute on its proper interpretation.[49] Additionally, the Supreme Court noted the observations made by the Committee, which had opined that even without statutory recognition, it was possible to interpret Section 17(2) of the Arbitration Act to enforce emergency awards for arbitration seated in India.

While the Hon'ble Supreme Court did not delve further into the possible reasons for non-acceptance of recommendations made by the Law Commission and the Committee, it was sufficiently indicated that development of the law cannot be thwarted merely because a certain provision recommended in a Law Commission Report is not enacted by the Parliament.

D. Tracing the legislative history of Section 17 of the Arbitration Act – A pro-enforcement approach

The Supreme Court, while tracing the legislative history of Section 17 of the Arbitration Act, noted that it was amended *vide* the Arbitration

48. Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd. (2021) 4 SCC 713.
49. Amazon (n 1), [¶ 54].

(Amendment) Act, 2015. This amendment clothed the arbitral tribunal with the same powers as a civil court in relation to granting of interim measures. The Supreme Court noted that by virtue of the aforesaid amendment, Section 17 of the Arbitration Act was brought on par with Section 9 of the Arbitration Act, such that the interim reliefs passed by the arbitral tribunal were enforceable in the same manner as if it were an order of the Court.

By referring to the legislative history of the amended Section 17 of the Arbitration Act, the Hon'ble Supreme Court opined that granting recognition and enforcement of Emergency Awards would result in advancing the dual objectives of decongesting the court system in India and increasing efficacy in granting interim reliefs in cases which deserve such relief. The Hon'ble Supreme Court held that an Emergency Arbitrator's award, which is exactly like an order of an arbitral tribunal, once properly constituted, would be covered by Section 17(1) of the Arbitration Act.[50]

In summary, the Supreme Court answered the first question in the affirmative and declared that the Arbitration Act gives parties the full autonomy to have a dispute decided in accordance with the institutional rules they choose, which in some instances include Emergency Arbitrators delivering interim orders during such proceedings, described as "awards". The Hon'ble Supreme Court went on to hold that orders passed by an Emergency Arbitrator are made under Section 17(1) of the Arbitration Act and as such, are enforceable under Section 17(2) of the Arbitration Act.

5. KEY TAKEAWAYS AND WAY FORWARD

Undoubtedly, the Supreme Court has broken new ground with the recognition and enforcement of an award passed by the Emergency Arbitrator, despite the lack of a corresponding statutory framework in the country. The Supreme Court has constructively and contextually interpreted the existing provisions in the law and while doing so has once again echoed the concept of 'party autonomy' as being the backbone and guiding spirit to arbitration. The Supreme Court laid great emphasis on party autonomy to hold that there is nothing in the Arbitration Act that interdicts the free choice of parties to be governed by the rules of an arbitral institution, which includes an Emergency Arbitrator. The Supreme Court reiterated that the essence of arbitration is the mutual agreement to voluntarily agree to a dispute resolution mechanism that may involve an Emergency Arbitrator. The Supreme Court further opined that when parties

50. Amazon (n 1), [¶ 62].

have voluntarily agreed to a dispute resolution mechanism that involves an Emergency Arbitrator, any relief granted by such Emergency Arbitrator should be mandatorily binding upon the parties.

The authors believe that the decision of the Supreme Court will inspire investor confidence and give huge impetus to international parties entering into agreements with Indian parties and to agreeing to Indian seated arbitration proceedings. Considering the limited number of jurisdictions that have expressly granted statutory recognition to Emergency Arbitrators and relatively limited judicial decisions across jurisdictions on enforcement of an award by the Emergency Arbitrator, the Supreme Court has the noteworthy distinction of being one of the pioneers in recognising the concept of Emergency Arbitrator. This should have a good signalling effect on international parties who may now consider India as an investor-friendly and international commercial arbitration-friendly jurisdiction.

The authors further believe that the decision shall also encourage institutional arbitration in India, as parties will now be more comfortable adopting the rules of an arbitral institution in the arbitration agreement. As mentioned above, rules of arbitral institutions in India such as MCIA and DIAC have provisions for Emergency Arbitrators, similar to that of international arbitration institutions such as ICC, SIAC, and LCIA. Thus, on a cost-effective basis, international parties may now seriously consider adopting the rules of Indian arbitration institutions/centres in the arbitration agreements without having to be concerned about recognition of emergency awards and their enforcement in India.

The Supreme Court laid heavy emphasis on the object sought to be achieved by the Arbitration (Amendment) Act, 2015, i.e. avoiding courts to be flooded with applications for interim reliefs, when an arbitral tribunal is constituted, for two main reasons: (i) decongesting the clogged court system and, (ii) timely and the efficacious manner in which arbitral tribunal is able to grant interim reliefs. The decision furthers the aforesaid objectives to decongest the court system in India by recognizing the appointment of an Emergency Arbitrator, which is an efficient and efficacious alternative of approaching Courts under Section 9 of the Arbitration Act. The decision is also extremely relevant in cases where the Courts hearing Section 9 applications are located in remote areas of the country having little or no exposure to commercial disputes and the possibly high-stake commercial considerations at play.

While there is no questioning the relevance and significance of the decision on the international arbitration landscape in India, there are still certain unsettled issues and/or interpretational gaps surrounding Emergency Arbitrators, particularly in the Indian scenario. Some of these could be:

A. Limits on court's availability to grant pre-arbitration reliefs

The amendments made *vide* the Arbitration (Amendment) Act, 2015 mandate a party to apply to the arbitral tribunal for seeking interim reliefs once such arbitral tribunal has been constituted, except in cases where the circumstances render this remedy to be inefficacious. Thus, by virtue of the amendment, a party cannot approach the court under Section 9 of the Arbitration Act once the arbitral tribunal is constituted as the arbitral tribunal now has the same powers as a civil court in relation to granting of interim reliefs.

The Supreme Court in the *Amazon* case has held that an Emergency Arbitrator's award is an order akin to orders passed by an arbitral tribunal under Section 17 of the Arbitration Act and enforceable in the same manner as if it were an order of the Court. Therefore, it would be interesting to note if the Indian courts would continue to entertain applications under Section 9 of the Arbitration Act, in cases where the parties have chosen to be governed by rules of institutional arbitrations providing for Emergency Arbitrators for granting urgent interim reliefs. If so, then what would be the effect of not granting an urgent interim relief by an Emergency Arbitrator? Would the Indian courts still maintain a Section 9 application even after the Emergency Arbitrator has denied the interim relief? The law on this will have to be tested over time.

B. Non-applicability to foreign seated arbitration

While Article 17 H of the UNCITRAL Model Law[51] provides for enforcement of interim measures irrespective of the country in which it is issued, the Arbitration Act, as it stands, does not contemplate enforcement

51. Art. 17 H – Recognition and Enforcement
    (1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.
    (2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

of interim orders granted by the arbitral tribunal having the seat of arbitration outside India. Thus, interim orders of foreign seated arbitral tribunals are not enforceable under Section 17 of the Arbitration Act as Part I is not applicable to foreign seated arbitrations (except provisions of Sections 9, 27 [clause (b)] of sub-section (1) and sub-section (3) of Section 37).[52] As a logical corollary, the awards passed by Emergency Arbitrators, as held to be akin to an interim order, are currently not enforceable under Section 17(2) of the Arbitration Act, in a foreign seated arbitration. This was also observed in the cases of *Raffles* (supra) and *Avitel* (supra), wherein the Courts had to invoke the provisions of Section 9 of the Arbitration Act to grant same interim reliefs as was granted by the Emergency Arbitrator in a foreign seated arbitration; instead of directly enforcing such Emergency Arbitrator's award. Since the *Amazon* ruling only settles the law so far as domestically seated arbitrations are concerned, the authors opine that the Parliament may consider adopting provisions similar to Article 17 H of the UNCITRAL Model Law, with necessary safeguards, in the Arbitration Act, to allow recognition and enforcement of interim orders passed by foreign seated arbitral tribunals (extending to awards passed by Emergency Arbitrator). In doing so, the Parliament shall have to necessarily carve out an exception to Section 2(2) of the Arbitration Actor insert provisions similar to Section 17(2) of the Arbitration Act in Part II thereof, to allow recognition and enforcement of awards passed by Emergency Arbitrator.

C. Emergency Arbitrators in ad-hoc arbitrations – Too early too soon?

As things stand today, it is no secret that currently most of India's arbitrations are *ad–hoc* arbitrations, where the parties are free to determine the rules of procedure. Since the *Amazon* decision is limited to recognition and enforcement of Emergency Arbitrators appointed under the rules of an arbitral institution, there is no clarity on whether parties can name an Emergency Arbitrator in *ad-hoc* arbitrations while entering into arbitration agreements. If so, the parties shall necessarily have to lay down the set of rules of procedure and timelines in the arbitration agreement with necessary safeguards to prevent abuse of the process. Another aspect of this is whether jurisdiction should be vested in a court to appoint an Emergency

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

52. Proviso to § 2(2) (as amended).

Arbitrator in *ad-hoc* arbitrations? However, in the opinion of the authors, the process of approaching the Court for the appointment of an Emergency Arbitrator will be counter-intuitive to the entire concept of an Emergency Arbitration. The authors are of the view that in the absence of a legislative framework, some issues may arise while contemplating the applicability and validity of Emergency Arbitrators in *ad-hoc* arbitrations.

6. CONCLUSION

The *Amazon* ruling is a shot in the arm towards making India a robust center for international and domestic arbitration. The decision is a landmark judgment in the area of international commercial arbitration, not just for India but for jurisdictions across the globe. The striking feature of the decision is the dynamic, purposive, contextual and constructive interpretation of the existing provisions of the Arbitration Act to recognize the award of an Emergency Arbitrator in the absence of an express statutory framework of the law. The Supreme Court through this decision has upheld the fundamental principle of party autonomy while at the same time acknowledging the efficiency of arbitral tribunals (including Emergency Arbitrators) to grant urgent interim reliefs in appropriate cases. While the decision is certainly revolutionary in terms of its importance for global arbitration practice, the relatively recent phenomenon of Emergency Arbitrator still poses a host of issues that need to be identified, debated and addressed. Some of the issues that require to be addressed include the need to: (i) provide legislative framework for recognition of Emergency Arbitrators by amending definition of "arbitral tribunal"; (ii) strike a balance between the Court's power to grant interim relief vis-à-vis grant of interim relief by Emergency Arbitrators, in cases where the rules of arbitration provide for appointment of such Emergency Arbitrators; (iii) allow enforcement of awards/orders passed by an Emergency Arbitrator in a foreign seated arbitration, (iv) provide legislative framework for recognition and enforcement of Emergency Arbitrators in ad-hoc arbitrations. Thus, even though the Supreme Court has opened the doors to recognition and enforcement of Emergency Arbitrators in India, in practice, it remains to be seen if the concept of Emergency Arbitrator can find its place in the Indian legal/commercial ecosystem.

ARBITRATION OF DEBT RECOVERY MATTERS

—*Shaunak Choudhury*[*]

ABSTRACT

In recent judgments of the Supreme Court and High Courts,[1] *the position about the conflict between the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBA) and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), and the Arbitration and Conciliation Act, 1996, (ACA) has led to inconsistent and convoluted interpretations concerning arbitration in debt recovery matters. The opinion of the Apex Court*[2] *had been that arbitration proceedings would not bar the financial institution from a proceeding under SARFAESI, but now, such matters have been declared non-arbitrable. All matters covered under the RDDBA have been deemed to be non-arbitrable as well. This may lead to further trepidations with regards to the fidelity and value of the arbitration clause or agreement, alongside the recoverability of certain categories of debts. This paper investigates the relationship between the RDDBA, SARFAESI, and the ACA, interpretation of the said law with respect to the doctrine of election and arbitrability, consequences of said interpretations, and provides suggestions accordingly.*

1. INTRODUCTION

The advent of arbitration in India has been spreading to all sectors of industry and business due to the prolific efforts of individuals and the government in creating an infrastructure and environment for arbitration.[3] The judiciary has, time and again, highlighted the importance of arbitration and other forms of alternate dispute again, resolution to relieve the weight of case backlogs on the civil courts, High Courts and the Supreme Court.[4] The Apex court has also taken a positive approach towards arbitral awards

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1. Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1; HDFC Bank Ltd. v. Satpal Singh Bakshi 2012 SCC OnLine Del 4815.
2. M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd. (2017) 16 SCC 741.
3. The New Delhi International Arbitration Centre Act 2019 (Act 17 of 2019).
4. Salem Advocate Bar Assn. v. Union of India (2003) 1 SCC 49.

by taking a stance of non-interference in some very recent Judgments.[5] But there have also been Judgments acting detrimental to the proliferation of a culture of arbitration.[6]

The issue that this paper is concerned with is one of such cases where arbitration was put in the back seat while restricting the conflict resolution to litigation for a whole category of cases, those being debt recovery by banks and financial institutions (FIs). The primary law for debt recovery by banks and FIs is the Recovery of Debts Due to Banks and Financial Institutions Act, 1993[7] (RDDBA). As given in its preamble, the RDDBA was enacted to create a timely system for recovering debts from defaulters by creating debt recovery tribunals and Debt Recovery Appellate Tribunals. In 2016, their responsibilities were expanded to handle matters about individual and partnership bankruptcy and insolvency.[8] But even after the implementation of the same, the Debt Recovery Tribunals (DRTs), were unable to provide relief to creditors in a timely fashion. Hence, when the RDDBA did not suffice, in 2002, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI)[9] was enacted as an enforcement mechanism to recover debts from secured loans taken from banks and FIs. The purpose of this legislation was to create a fast, non-adjudicatory mechanism to enforce secured interests of non-performing assets. As of 2019-2020, it has been more efficient and effective than the Debt Recovery Tribunals (DRTs) in recovering monies from defaulters.[10]

One may question why it matters that arbitration be allowed if SARFAESI is an easy way forward? It is because of Section 17 of the SARFAESI, which gives power to the borrower (or anyone) aggrieved by the measures taken under Section 13 (enforcement of security) to appeal to the Debt Recovery Tribunal, which further slows down the process again. In 2019-2020, matters worth Rs. 1,96,582 Crores were being handled through SARFAESI,

5. Amazon.com NV Investment Holdings LLC v. Future Retail Ltd. (2022) 1 SCC 209 : 2021 SCC OnLine SC 557; Noy Vallesina Engg. SpA v. Jindal Drugs Ltd. (2021) 1 SCC 382 : 2020 SCC OnLine SC 957; Vijay Karia v. Prysmian Cavi E Sistemi SRL (2020) 11 SCC 1 : 2020 SCC OnLine SC 177.
6. Bina Modi v. Lalit Kumar Modi 2020 SCC OnLine Del 1678; Vimal Kishor Shah v. Jayesh Dinesh Shah (2016) 8 SCC 788.
7. Recovery of Debts Due to Banks and Financial Institutions Act 1993 (Act 51 of 1993).
8. The Insolvency and Bankruptcy Code 2016, sch. V (Act 31 of 2016).
9. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (Act 54 of 2002).
10. Reserve Bank of India, Report on Trend and Progress of Banking in India (2019-2020), 64.

but the amount recovered was only Rs. 52,563 Crores (26.73%), which is far better than the recovery rate for DRTs (4.07%) but it is evident that this is not perfect.[11] Banks and NBFCs also happen to be some of the highest users of arbitration in India.[12] If the borrower and lender wish to enter into arbitration as per their agreement, they should be allowed to, not only for the sake of their conflict but also to relieve the burden on courts and tribunals. Moreover, if the creditor wishes to continue the relationship with the debtor, SARFAESI or litigation may not be the best option. It should ultimately be upon the parties to decide what is best for them.

The analysis of this paper shall be focused on three cases, *HDFC Bank* v. *Satpal Singh Bakshi*,[13] *M.D. Frozen Foods* v. *Hero Fincorp*,[14] and *Vidya Drolia* v. *Durga Trading Corpn*.[15] The reason behind focusing solely on these three case laws is that they create a fundamental pathway for the interpretation of whether arbitration shall take precedence over SARFAESI, or whether such matters shall even be arbitrable. The RDDBA, SARFAESI and the Arbitration and Conciliation Act, 1996[16] (ACA) shall be analysed specifically with respect to the doctrine of election and the question of non-arbitrability.

Chapter 2 of this paper deals with firstly, the applicability and meaning of the doctrine of election and secondly, the arbitrability of debt recovery matters. Chapter 3 provides suggestions to resolve the incoherency in the present framework and Chapter 4 concludes the paper.

2. ANALYSIS

A. Doctrine of Election

The doctrine of election does not directly pertain to arbitration or debt recovery instead has its roots in Section 35 of the Transfer of Property Act.[17] The relevance of it lies in the general principle it creates. It arises out of the rule of estoppel and imposes a restriction upon a party having two

11. Reserve Bank of India (n 10).
12. Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (Chaired by Justice B.N. Srikrishna, 2017), 28.
13. HDFC Bank Ltd. v. Satpal Singh Bakshi 2012 SCC OnLine Del 4815.
14. M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd. (2017) 16 SCC 741.
15. Vidya Drolia (n 1).
16. Arbitration and Conciliation Act 1996 (Act 26 of 1996).
17. The Transfer of Property Act 1882 (Act 4 of 1882) s 35.

or more contradicting alternative rights or claims to choose from; only one right can be claimed, the rest must be renounced fully.[18]

The option in our hands is going either to the DRT, or arbitration. This issue is pertinent when discussing the arbitrability of debt recovery because between the *HDFC Bank case* and the *Vidya Drolia case*, the doctrine of election in this situation poses a question about which path towards debt recovery is open to the FI. If a party opts for arbitration, will the rights of the banks and FIs be stalled till the arbitration proceedings come to an end? this question is applied to both, DRTs and SARFAESI. It may seem counter-intuitive to discuss this matter before the issue of arbitrability of debt recovery because if these matters are indeed non-arbitrable, this question is rendered infructuous. But this question must take chronological precedence over the other because it creates a necessary groundwork for further discussion.

Under the doctrine of election, one must first and foremost, decide whether the alternatives available to the party are indeed conflicting or not. If they are conflicting, the doctrine shall apply, and the parties shall have to act accordingly. It is the first way that arbitration may get side-lined or propelled, before getting extinguished in toto.

1. *RDDBA v. SARFAESI*

It is worth taking a brief look at a particular case before moving on to the doctrine of election for arbitration because this case has been used as a precedent for arbitration matters as well. The case of *Transcore* v. *Union of India*[19] sets the precedent that the doctrine of election shall not apply to banks and FIs when it comes to selecting a mode of recovery between the RDDBA or SARFAESI. The two statutes were found to be complementary. While SARFAESI is an enforcement mechanism, the DRTs under the RDDBA act as adjudicatory bodies. Section 19(1) of the RDDBA provides that a bank or FI may proceed against the borrower under SARFAESI after an application has been made from the DRT to withdraw the case in the tribunal.[20] But the court found that since the application may also take

18. National Insurance Co. Ltd. v. Mastan (2006) 2 SCC 641; Nagubai Ammal v. B. Shama Rao AIR 1956 SC 593 : 1956 SCR 451; C. Beepathumma v. Velasari Shankaranarayana Kadambolithaya AIR 1965 SC 241; Prashant Ramachandra Deshpande v. Maruti Balaram Haibatti 1995 Supp (2) SCC 539.
19. Transcore v. Union of India (2008) 1 SCC 125.
20. RDDBA (n 7) s. 19(1) reads as "Provided that the bank or financial institution may, with the permission of the Debts Recovery Tribunal, on an application made by it,

a long time to be disposed of, the bank may proceed under SARFAESI, while the case is ongoing in the tribunal. This is allowed since the whole point of SARFAESI is to act as a speedy debt recovery mechanism to avail the full value of the security.[21] Moreover, Section 13(10) of SARFAESI explicitly provides that a bank or FI may approach the RDDBA again to recover any outstanding amount left after the sale of the collateral. Section 37[22] read with 35 (non-obstante clause)[23] only means that in the event of any inconsistencies between SARFAESI and RDDBA, the former shall prevail. This was then followed in *Mathew Varghese* v. *M. Amritha Kumar*[24] as well. All in all, the laws are not contrasting alternatives, thus the doctrine of election is not applicable in this situation.

2. *SARFAESI v. Arbitration*

Coming to the main matter at hand, the applicability of the doctrine of election on the debt recovery mechanisms and arbitration. The *Deccan Chronicles Holdings* v. *Union of India*,[25] an Andhra Pradesh High Court judgment is an important case that gives its opinion on this matter. Contrary to what is considered good in law today, the Andhra Pradesh judgment ruled in favour of the doctrine of election. The logic behind this conclusion was that Section 8 of the ACA says that instituting other proceedings is

withdraw the application, whether made before or after the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 (30 of 2004) for the purpose of taking action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), if no such action had been taken earlier under that Act:

Provided further that any application made under the first proviso for seeking permission from the Debts Recovery Tribunal to withdraw the application made under sub-section (1) shall be dealt with by it as expeditiously as possible and disposed of within thirty days from the date of such application:

Provided also that in case the Debts Recovery Tribunal refuses to grant permission for withdrawal of the application filed under this sub-section, it shall pass such orders after recording the reasons therefore".

21. Mardia Chemicals Ltd. v. Union of India (2004) 4 SCC 311.
22. SARFAESI (n 9) s 37 reads as "Application of other laws not barred - The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force".
23. SARFAESI (n 9) s. 35 reads as "The provisions of this Act to override other laws - The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained".
24. Mathew Varghese v. M. Amritha Kumar (2014) 5 SCC 610.
25. Deccan Chronicles Holdings Ltd. v. Union of India 2014 SCC OnLine AP 104.

prohibited if an arbitration agreement exists. Moreover, SARFAESI cannot be put at a higher pedestal thus, the enforcement mechanism could not be initiated by IBFSL since it had initiated arbitration proceedings under its agreement with Deccan Chronicles Holdings. This matter was reversed by India bulls Housing Finance v. Deccan Chronicles Holdings.[26] But we shall come back to Indiabulls after we take a look at M.D. Frozen Foods.

M.D. Frozen Foods sets the initial tone for arbitration in debt recovery matters. Once the lender had invoked the arbitration clause, could it also proceed against the borrower with SARFAESI and have both run side by side; this was the first issue and the most relevant one for this paper. This Division Bench of the Supreme Court unequivocally agreed with the decision of the Delhi High Court in the HDFC Bank[27] case which had held that debt recovery matters which are covered under the RDDBA will be arbitrable.[28] The judgment clearly stated that the case law provided support to the FI's argument (Hero Fincorp) and not that of the borrower and taking that premise in hand went on to confirm that between SARFAESI and the arbitration, there lies no doctrine of election. Arbitration is an alternative to adjudication in the courts, and in this case it is an alternative to the RDDBA. It uses the Transcore and Mathew Varghese judgments to support its reasoning. On the face of it, the analogy seems like a false equivalency. M.D. Frozen Foods is talking about SARFAESI and arbitration, whereas Transcore and Mathew Varghese talk about RDDBA and SARFAESI. But the Court interpreted the matter in a way that, since SARFAESI was put above RDDBA in the event of a conflict, as per Mathew Varghese, the logic would extend to the ACA. Nothing is above Section 35 of SARFAESI, not even Section 5 of the ACA[29] which is limited in nature. But since Section 37 of SARFAESI does not act in derogation to laws, whatever is not inconsistent shall survive.[30]

26. Indiabulls Housing Finance Ltd. v. Deccan Chronicles Holdings Ltd. (2018) 14 SCC 783.
27. HDFC Bank (n 13).
28. M.D. Frozen Foods (n 14), 753 para 31.
29. ACA (n 16) s 5 reads as: "Extent of judicial intervention - Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."
30. Madras Petrochem Ltd. v. Board of Industrial and Financial Reconstruction, (2016) 4 SCC 1.

Indiabulls[31] continues this trend. As mentioned before, Indiabulls reversed the Deccan Chronicles Holdings case, but the principle was overturned in M.D. Frozen Foods itself.[32] The judgment is in complete agreement with M.D. Frozen Foods and reiterates Transcore and Mathew Varghese. Thereby, it reaffirms HDFC as well. The Judgment treads into some new ground by stating that since the ACA is a general law and SARFAESI a special law, the latter must prevail over the former. This sets the solution to the dilemma between SARFAESI and ACA in concrete.

3. *Practical Implications*

There are two ways to look at the consequences of M.D Frozen Foods. One way to see it is in a celebratory manner, enjoying the freedom of the parties to cherry-pick the mode of conflict resolution, RDDBA, SARFAESI or ACA. But practically speaking, when given the option between SARFAESI and arbitration, even if the lender opts for arbitration, SARFAESI hangs over the borrower. Moreover, a consequence of SARFAESI and arbitration going hand in hand would lead to the conflict of which solution shall prevail. It is all well and good that the choice has been handed to the parties, but in the event of the arbitral award being passed, can the lender still proceed with SARFAESI? The question of whether matters falling under the RDDBA can be arbitrated was answered in the affirmative in the HDFC case, thus, under Section 8, a referral can be made, and the matter would be arbitrated [33] (but this shall change in Vidya Drolia). So till now the issue in the practical sense would lie between SARFAESI and arbitration.

Such a matter came to the Delhi High Court in *Lalit Mohan Madan* v. *Reliance Capital*.[34] A petition under Section 9 of the ACA asked for relief against a notice sent under Section 13(2) of SARFAESI. An arbitration award had already passed for an amount much lesser than the amount sought by the notice. But since an application under Section 34 of the ACA had been filed by the respondent (the NBFC), the award was not enforceable. And no remedy shall lie under Article 226 or 227 of the Constitution against the notice filed under SARFAESI; for that, the remedy shall be Section 17 of the enforcement mechanism (application against measures to

31. It is interesting to note that Justice A.K. Sikri presided over and authored the HDFC case and the Indiabulls case. He happened to be Acting Chief Justice of the Delhi High Court during the HDFC case.
32. M.D. Frozen Foods (n 14), 754 para 34.
33. HDFC Bank (n 13), 14 para 579; M.D. Frozen Foods (n 14), 753 para 30.
34. Lalit Mohan Madan v. Reliance Capital Ltd. 2017 SCC OnLine Del 12188.

recover secured debts). But after the amendment to the ACA in 2016 which took force from the 23rd of October 2015,[35] an application under Section 34 of the ACA would not render the award unenforceable unless the court is granting a stay under Section 36(3). There is no mention of a stay on the arbitral award in this case. In any way, the question is not dealt with in its finality in this case. However, in *Carnet Elias Fernandes* v. *District Magistrate*,[36] the Madhya Pradesh High Court stated that the rights under Section 14 of SARFAESI will continue to exist even after the arbitration award has been granted but is pending adjudication under Section 34 of the ACA. The arbitration agreement was also unilaterally changed in this case, so perhaps this is no model precedent.

Whether SARFAESI proceedings can take place after an arbitral award has been passed, or even after it has been executed but the amount in the award was insufficient, is a pertinent question that seems to be left open to interpretation because of M.D. Frozen Foods. How shall the switch from arbitration to SARFAESI be realised is not very clear either. Suggestions for the same shall be provided in Chapter 3 of this paper. The authors will now discuss arbitrability of debt recovery matters.

B. Arbitrability of Debt Recovery Matters

1. *HDFC Bank*

The full bench of the Delhi High Court in HDFC Bank had one question to decide: whether proceedings initiated under RDDBA can be arbitrable or not. The High Court answered it in the affirmative. It used the Booz Allen[37] case to determine whether such matters can be arbitrable. Three rubrics of arbitrability were raised in that case; whether the matter can be resolved in a private forum, whether the arbitration agreement covers the dispute between the parties, and whether the parties have referred the disputes to arbitration through a joint list of disputes. The first facet is the only important one. The High Court determined that issues relating to debt recovery are matters of "right in person am" and not "right in rem". Even though the amount may be huge, but the same would not mean that it is an action against society as a whole.[38]

35. The Arbitration and Conciliation (Amendment) Act 2015, s. 19 (Act 3 of 2016).
36. Aditya Birla Finance Ltd. v. Shri Carnet Elias Fernandes Vemalayam 2018 SCC OnLine MP 1317.
37. Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. (2011) 5 SCC 532.
38. HDFC Bank (n 13), 578, 579 paras 13, 14.

This conclusion is supported by the fact that there are criminal laws specifically created for incarcerating or penalising defaulters.[39] In those situations, the matter would certainly not be arbitrable, but when the dispute is only between the bank and borrower, debt recovery matters would easily pass the first facet. It upheld the freedom of the parties to choose a forum, and stated that by restricting the debt recovery matters to the DRT, that freedom would be lost.[40]

The amicus curiae, who supported the case of the bank, argued that Section 17 read with Section 18 of the RDDBA would mean that no authority would have the jurisdiction to decide matters about debt recovery of loans forwarded by banks and FIs.[41] This question was not answered in a detailed manner in the Judgment since its main focus was on the principles laid down in Booz Allen. The Court agreed with the argument that other courts will not be able to decide matters given in Section 17(1) of the RDDBA, but the Court specified that the question is about whether arbitration tribunals can decide the matters. If we look into the relevant portion of Section 18 of the RDDBA, it says:

> *On and from the appointed day,* ***no court or other authority*** *shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the matters specified in Section 17.*
>
> *(Emphasis added)*

The key terms would be as highlighted above. The Delhi High Court agreed with the submission that courts cannot decide matters or exercise powers, but whether "other authorities" would include arbitration or not was not discussed. *Allahabad Bank* v. *Canara Bank* held that as far as adjudication of debt recovery goes, the DRTs shall have exclusive jurisdiction ousting the power of any other authority which would otherwise have had jurisdiction. *Kohinoor Creations* v. *Syndicate Bank*[42] explicitly lays down that the arbitration agreement or clause shall not oust the jurisdiction of the DRT

39. Fugitive Economic Offenders Act 2018 (Act 17 of 2018); Indian Penal Code 1860, ss. 403, 415.
40. HDFC Bank (n 13), 575 para 8.
41. Id., 572 para 5.
42. Kohinoor Creations v. Syndicate Bank 2005 SCC OnLine Del 650 : ILR (2005) 2 Del 69; Berhampur Cold Storage v. ICICI Bank 38 ILR (2011) 1 Cut 371; Neelesh Anand, 'The Overriding effect of RDB Act over Arbitration and Conciliation Act', (2015) PL June 64.

because the RDDBA is a special statute and ACA is a general statute. The case says that the non-obstante clause of the RDDBA shall prevail over the non-obstante clause of ACA because Section 18 of the RDDBA gives confers exclusive jurisdiction over debt recovery matters. Reading Section 34 of the Recovery Act along with Section 18 would mean that the RDDBA shall have an overriding effect on any laws inconsistent with it, including the ACA. Thus, a DRT may reject an application made under Section 8 of the ACA. Meaning that as per this Judgment, arbitration shall be considered under the banner of "other authorities". This is a rather vague approach since the case does not discuss the difference between judicial authorities (something that the legislation may have intended with "no court or other authority") and the authority of an arbitration tribunal.

2. *Vidya Drolia*

The case does not pertain to debt recovery, RDDBA, or SARFAESI. Its main issue was about the arbitrability of landlord and tenant disputes and whether it would be against public policy to allow arbitration in such matters. But it covered other matters under the wide net of arbitrability, thus, debt recovery got included. It mentions Transcore at length, M.D. Frozen Foods and Indiabulls, and does not show any dissent against them. But when it comes to HDFC Bank, it overrules it, because;

> *To hold that the claims of banks and financial institutions covered under the DRT Act are arbitrable would deprive and deny these institutions of the specific rights including the modes of recovery specified in the DRT Act. Therefore, the claims covered by the DRT Act are non-arbitrable as there is a prohibition against waiver of jurisdiction of the DRT by necessary implication. The legislation has overwritten the contractual right to arbitration.*[43]

That is the extent of the analysis done on this matter. The Judgment also mentions that the M.D. Frozen Foods decision did not examine the Delhi High Court's Judgment in light of the legal principles of non-arbitrability.[44] It overrules HDFC Bank but not M.D. Frozen Foods and Indiabulls. As mentioned before, the Delhi High Court Judgment was the premise on

43. Vidya Drolia n (1) 64, 65 para 58 (It is to be noted that there is no mention of the whether the Judgment shall act in a retrospective manner or prospective manner, whether all such arbitration agreements signed before the date of the Judgment shall still be valid or would they too be declared void. The fate of ongoing arbitration proceedings is also unknown).
44. Id., 64 para 58.

which M.D. Frozen Foods gave its verdict about SARFAESI and arbitration going hand in hand. That extends to Indiabulls. To uphold the two Division Bench Judgments and overrule M.D. Frozen Foods creates an incoherent conclusion and has inadvertently overruled the former two. The question of SARFAESI and arbitration going hand in hand becomes infructuous as soon as we say that those very matters that are covered under the RDDBA become non-arbitrable in toto.

In the opinion of the Court, when arbitration has been prohibited expressly or by necessary implication, such matters would be outside the purview of the ACA. This was also held in Booz Allen.[45] In the context of the RDDBA, the Court says that the statute prohibits arbitration by necessary implication. However, no provision or procedure gives such an impression. The point that arbitration can only come about through an agreement between the parties is lost to the Judgement, but this has been specifically mentioned at the end of HDFC Bank.[46] The RDDBA was indeed created to institute DRTs that would specialize in debt recovery adjudication and speedily resolve matters. But one of the reasons that SARFAESI came about and why arbitration is prevalent among banks and FIs is because even the DRTs became slow. Moreover, in a world where all matters of the RDDBA are deemed non-arbitrable, secured creditors can still fall back on SARFAESI (although this too is flawed), but unsecured creditors are left to wait in the DRTs and DRATs.

Justice D.Y. Chandrachud in *A. Ayyasamy* v. *A. Paramasivam*[47] states that where the ordinary civil court jurisdiction is excluded by a special statute, it is done so as a matter of public policy and is thus outside the jurisdiction of the arbitral tribunal. But the matters that have been identified as non-arbitrable time and again have been;

(i) Disputes relating to rights and liabilities which give rise to or arise out of criminal offences,

(ii) Matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody,

(iii) Matters of guardianship,

(iv) Insolvency and winding up,

45. Booz Allen (n 37), 546 para 35.
46. HDFC Bank (n 13), 580 para 16.
47. A. Ayyasamy v. A. Paramasivam (2016) 10 SCC 386, 411 para 38.

(v) Testamentary matters, such as the grant of probate, letters of administration and succession certificates, and

(vi) Eviction or tenancy matters governed by special statutes where a tenant enjoys special protection against eviction and specific courts are conferred with the exclusive jurisdiction to deal with the dispute.[48]

The nature of the above matters is either right in rem or special rights granted to people. The RDDBA, as rightly pointed out by the Delhi High Court, in HDFC Bank does not grant any special powers to the DRT or the persons involved. The reason why the statute was introduced was for expeditious proceedings and after proceedings, not for conferring special rights.

We must consider Emaar MGF as well where the doctrine of election (although not expressly mentioned) was applied. The Judgment held that the National Consumer Disputes Redressal Commission was right in rejecting ACA Section 8 applications since there is no obligation put upon it to refer the matter to arbitration. But at the end of the Judgment, it is also stated that;

> *[I]n the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/ special remedy and he is a party to an arbitration agreement,* ***there is no inhibition in disputes being proceeded in arbitration****. It is only the case where specific/special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration.*[49]
>
> *(emphasis added)*

Thus, even though the Consumer Protection Act, 1986 provided special rights, the matters were not barred in toto from arbitration,[50] unlike Vidya Drolia. This aligns with the verdict of the Delhi High Court in Kohinoor Creations. Thus, by no means can any argument be made to reject the arbitrability of debt recovery matters for all situations.

48. Id., 409, 410 para 35; Booz Allen (n 37), 546, 547 para 36; Emaar MGF Land Ltd. v. Aftab Singh (2019) 12 SCC 751, 773 para 39; Vidya Drolia (n 1) 55 para 37.
49. Emaar MGF Land Ltd. v. Aftab Singh (2019) 12 SCC 751.
50. Criticism can be levied against the Emaar MGF Judgment as well but for the sake of brevity this paper shall not look into the details of the case.

3. SUGGESTIONS

After the analysis in Chapter 2, three questions arise. First, about arbitrability, second, about the referral to arbitration under Section 8 of the ACA, and third, the state of the arbitral award against SARFAESI enforcement. The first suggestion shall only pertain to the current legal regime, it shall be an exercise in interpretation, not legislation, and the second shall be for legislation.

A) It has been clearly shown in the above analysis that considering past precedents and the legislation as it is, in no way can the law be construed as declaring debt recovery matters as non-arbitrable in toto.

B) For arbitration to be fully realised without provisions of the RDDBA being a hurdle to the dispute resolution, we must have a cogent sense of the interpretation that must be adopted, so that; first, arbitral tribunals are allowed to hear matters on debt recovery and pass awards, and second, DRTs may refer the matters to arbitration when a Section 8 ACA application is made.

i) **Jurisdiction** – Section 18 of the RDDBA and Section 5 of the ACA are the provisions that need to be considered here. "Other authorities" in Section 18 of the RDDBA should ideally not include arbitration tribunals because the nature of arbitral tribunals is quite different from that of courts and tribunals set up by statutes. Section 5 of the ACA does state that no judicial authority will intervene in the matters of Part I of the Act unless otherwise stated; ideally, the DRTs should also be considered under that banner. And when speaking of the "other authorities," Section 18 of RDDBA intends to exclude other judicial authorities like Courts. In *Bhagwandas Auto Finance* v. *HDFC Bank*,[51] the contention of the appellant that arbitral tribunals shall be included under the banner of "other authorities", under Section 18 of RDDBA was rejected. *Amrit Jal* v. *Ventures Pvt. Ltd.* v. *SREI Infrastructure Finance Ltd.*[52] also holds that "other authority" shall not include arbitration as the Act speaks of bodies given statutory existence, whereas arbitral tribunals are birthed through their agreements. On the other hand, the DRTs being a body created from a statute would be considered as a judicial

51. Bhagwandas Auto Finance Ltd. v. HDFC Bank Ltd. 2010 SCC OnLine Cal 187; Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd. (2009) 8 SCC 520; Paramjeet Singh Patheja v. ICDS Ltd. (2006) 13 SCC 322.
52. Amrit Jal Ventures (P) Ltd. v. SREI Infrastructure Finance Ltd. 2016 SCC OnLine Cal 4245.

authority, being restricted by Section 5 of the ACA. This would thus mean that debt recovery matters can be determined through arbitration.

ii) **Referral** – There is a chance that the parties wish to get the matter referred to arbitration as per their pre-existing arbitration clause or agreement. If we observe Section 8 of the ACA which speaks about referring parties to arbitration, we shall find that the section says, "*A judicial authority, before which an action is brought in a matter which is the subject matter of an arbitration agreement…*". If the legislation wanted to limit this mandate on referral, the section would have mentioned "court" and not "judicial authority". As explained previously, the DRTs being a creation of a statute and adjudicating matters as per the powers given to them by the statute, they are considered as judicial authorities. This would mean that DRTs would have to refer the matter to arbitration if the agreement exists. But the hurdle here is the non-obstante clause of the RDDBA. It is a matter of perspective if we wish to give the ACA more importance or the RDDBA. If we are to look at the purpose with which the RDDBA was instituted, it was because debt recovery matters were not being dealt with in a speedy fashion, thus separate tribunals had to be formed. If we see why parties would opt for arbitration, one of the reasons is that DRTs are slow as well. Giving precedence to arbitration would thus be more purposeful and in line with the intention of the legislature and practices that prevail in the industry. This would be a departure from *Emaar MGF and Kohinoor Creations*, but seeing that the former was about another legislation, the latter was a case before HDFC Bank, and the overall purpose of the legislations is being served through this interpretation, it would not be too difficult to realise it.

A) For future legislation, it would be pertinent to provide an order of preference for the parties when it comes to debt recovery. Parties to a contract should indeed have the freedom to choose the forum of dispute, that is one of the fundamental principles of alternate dispute resolution. But at the same time when one of the parties, (here the lender), has powers under a special statute to act against the other, we would lose the point of settlements. Parties should also be bound by the path they have selected but should be able to avail of other options with the appropriate procedure for the same.

When arbitration has been initiated by the lender, it should be the only path available until such time that the proceedings are not terminated under Section 32 of the ACA. This is also given credence with the fact that Section 19(1) of the RDDBA requires that the application be withdrawn before proceeding with SARFAESI (although the same need not be disposed

of). Thus, allowing the borrower one path to follow at a time. Once the proceedings are terminated the parties, may move with the DRTs or with SARFAESI.

We have seen in the cases discussed above that the lenders were the ones who initiated the arbitration proceedings and then backed away because of SARFAESI (seen in HDFC Bank, M.D. Frozen Foods, Carnet Elias Fernandes). Thus, the option of SARFAESI will be open but not in an arbitrary manner. It goes without saying that once an arbitration award has been passed, in light of it being treated as a decree under Section 35 and 36 of the ACA, the parties would be bound by it unless set aside by a court. (The paper is not arguing the non-obstante clause of SARFAESI versus Section 5 of the ACA since SARFAESI does not involve any judicial authority and hence there would be no point in the discussion, the paper only argues for the exception to be made for arbitration when an award has been passed since that is the final solution for the dispute).

B) In a situation where the award has been passed and the court has stayed the award, pending a Section 34 ACA order, the bank should not be able to proceed with SARFAESI because the stay is not an automatic one[53] and as per Section 36 of ACA, the application shall not render the award unenforceable. This means that the stay would have been given for a prominent reason that would have to be recorded by the court. In such a circumstance if something prima facie is found to warrant a stay it would be rare if the proceedings have gone on without illegalities. In pursuance of this understanding, stay on such awards should also be scarcely given since the purpose of the whole system is to recover the debt as soon as possible.

C) The DRTs already have the mandate to deal with debt recovery along with the requisite specialised resources; referral, interim orders and execution should be done through the tribunal itself, instead of taking it to any other Court. This maintains the jurisdiction of the DRTs in relation to other courts. This can only take place with an amendment that clearly directs DRTs to refer the matter to arbitration when the clause or agreement exists, making it mandatory and not discretionary to refer to arbitration.

D) It is also recommended that the arbitration clause or agreement specifically state that it shall not be in derogation of the rights under RDDBA or SARFAESI, thereby maintaining the rights under those statutes. This would essentially be a sole option hybrid agreement, that

53. Hindustan Construction Co. Ltd. v. Union of India AIR 2020 SC 122; National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd. (2004) 1 SCC 540.

would clearly lay down that the rights of the bank would not be affected under the two aforementioned legislations if it engages arbitration. The path to switch from arbitration to litigation or enforcement as laid down above would additionally ensure that this movement is not arbitrary.

4. CONCLUSION

There should either be no arbitration for debt recovery matters, or the agreement must be given priority. Vidya Drolia took the former view, M.D. Frozen Foods took the middle path and HDFC Bank, although correct in its view, did not analyse the issue enough to give a cogent process. We are not sure of the fate of Vidya Drolia or even if its decision on debt recovery will be held as a precedent, but if it is considered as one, it would be an arbitrary ruling that was not analysed fully since its main subject matter did not deal with this issue and hence, heard no arguments about it.

M.D. Frozen Foods erred in its decision by referring to Transcore. The RDDBA has a procedure to deal with circumstances where the bank or FI wants to move with SARFAESI; the ACA does not. Section 19(1) of the RDDBA allows a clear path for the party to switch methods of debt recovery yet the same cannot be said about the ACA. Thus, it is not just Vidya Drolia that did not appropriately interpret the law, the HDFC Bank and M.D. Frozen Foods had their shortcomings as well.

This paper has argued for the choice of the parties, embodied in the arbitration clause or agreement. The purpose of RDDBA and SARFAESI was to speed up the process for debt recovery due to the piling of non-performing assets over the years. The purpose of having alternate modes of dispute resolution, such as arbitration, exists to alleviate the burden on the judicial system. Both principles go hand in hand, but the procedures may not. Parties should get to choose their forum to decide what form of dispute resolution suits them the most. Moreover, arbitration acts as the only alternative to the sluggish DRT proceedings when it comes to unsecured creditors. This paper has thus provided a cogent line of interpretation to not only allow the arbitrability of debt recovery matters but also the referral of it along with methods of switching from arbitration to DRTs or proceeding under SARFAESI.

The legislature has so far ignored this issue and the interpretations have not been too kind either, it would be in the best interest of banks, FIs and borrowers that these positions are clarified with legislation, hopefully in favour of arbitration.

APPRAISING REMOTE ARBITRATIONS ARISING FROM THE PANDEMIC: REALITY CHECK AND THOUGHTS ON KEEPING ARBITRATION GOING

—*Steve Ngo*[*]

ABSTRACT

The COVID-19 pandemic is a life-changing calamity that has affected many spheres of our lives including the arbitral industry. When seized by the pandemic, we turned to technology for refuge. With the onset of the pandemic, technology for arbitration was propelled to the forefront when its adoption was lethargic previously. Referred to as virtual or remote arbitration, it is a tool that simplifies, through automation, processes that were previously arduous to undertake and, in some instances, impossible. Given the cross-border nature of international arbitration proceedings, the digital setup has been crucial in keeping arbitration going. However, with the pandemic, the international arbitral community seems to have become both willing and unwilling test subjects of technology and product applications on an unprecedented global scale. There are potential issues that have arisen with the growth of digitizing arbitration.

This article will review the current state of affairs relating to the conduct of virtual arbitration since the start of the pandemic by analysing key empirical evidence from leading organisations. It will also examine the topic of due process in arbitration, which has attracted intense discussion in recent times. This discourse hopes to provide some indications as to the road ahead for the international arbitral community.

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1. INTRODUCTION - THE ARBITRATION WORLD REBOOTS

Though a lot has been written and published on the topic of virtual or remote arbitration, this article stands apart as it deals with the fundamentals and the 'hard truths' facing us today as regards virtual arbitration following COVID-19 ("**the pandemic**"). The core theme of this article is not to be merely fixated on the pandemic but an appraisal of the essence of arbitration in times of 'crisis.' The lessons and experiences of this time are of a versatile nature that will continue to guide us in the near future as well, as arbitration continues to remain an essential cross-border dispute resolution mechanism. In recent times, questions have arisen as to whether or not virtual or remote hearing is here to stay. Indeed, at the outset of the pandemic, arbitration practitioners around the globe may have been sceptical as to how parties would proceed with arbitration in a virtual mode. The pandemic was the 'tipping point' which made many, who were not in favour of virtual hearings or on the fence, accept that technology and law together could work wonders if used correctly.

Starting off with a short reflection on this journey, there is no doubt that technology has played a rather central role in the evolution of arbitration and dispute resolution. In stating the obvious and ubiquitous, for instance, the extensive use of electronic communication for the transmittal of documents, electronic hearing applications or video conferencing is commonplace today. Those from an era or generation before smartphones may not know that video conferencing was a costly set of hardware put together, comprising a cathode-ray tube television, communication box and camera connected to a telephone line. Those who began their professional careers at the turn of the century could relate to the fact that the cost of technology for business communication was prohibitively expensive[1] at that time, so only large and international corporations could invest in video conferencing equipment, while others would need to rent its use for a high price. Today, individuals can conduct or participate in video conferencing using their hand held devices anytime, anywhere. Even commencing the process of arbitration by way of a paper notice was common in the 1990s but is considered outdated today. They are now transmitted electronically in a much cheaper, faster, and reliable way.

1. Matt Rosoff, *Why Is Tech Getting Cheaper?* (The World Economic Forum, 16 October 2015) https://www.weforum.org/agenda/2015/10/why-is-tech-getting-cheaper/ accessed 2 September 2021.

Evolution and progress in the use of technology have been noticed in arbitration proceedings over time. For instance, the UNCITRAL[2] Notes[3] which first came into being in 1996, then updated in 2016, has seen major transitions in its development. The first version of the UNCITRAL Notes suggested non-physical case management meetings such as the use of telefax, conference telephone calls or other electronic means, including electronic means of transmittal of documents. The 2016 version of the UNCITRAL Notes is progressive in addressing the use of 'technological means of communication' in the holding of hearings and meetings as well.[4] This demonstrates how dynamic the international arbitration practice is; it is not trapped in the past and is adjusting to the needs of users globally. Therefore, the advent of technology in arbitral proceedings from the pandemic is perhaps acceleration of not only the process of transition to technological means but also of methods alternative to physical proceedings, such as documents-only arbitration.

The union between technology and law is not incompatible. However, there are pre-existing issues within the law and practice of international arbitration. These issues are carried forward into the present circumstances where we are still coping with the effects of the pandemic. The cornerstone of arbitration is that full opportunity is given to the parties to present their cases and be heard. Any discussion on international arbitration in this respect would be incomplete without mentioning the instruments promulgated by the UNCITRAL. More than forty-five years ago, the first version of the UNCITRAL Arbitration Rules was promulgated in 1976, and then the UNCITRAL Model Law[5] followed in 1985. Both contain provisions pertaining to 'full opportunity' for the parties to present their case.[6] The deprivation of such an opportunity can lead to the serious repercussions of setting aside of an arbitral award, as will be discussed further below.

The use and adoption of computer technology is only one part of the discourse here. The other equally important part concerns the legal aspects of conduct in virtual arbitral proceedings. To put simply, issues relating to arbitration proceedings have been plaguing us since even before the

2. United Nations Commission on International Trade Law.
3. UNCITRAL Notes on Organizing Arbitral Proceedings ('UNCITRAL Notes') (2016).
4. UNCITRAL Notes, para 31.
5. UNCITRAL Model Law on International Commercial Arbitration ('Model Law') (1985).
6. UNCITRAL Arbitration Rules 1976, art. 15(1) and Model Law, art. 18.

pandemic. For instance, due process paranoia,[7] dilatory tactics,[8] and how these may impact the conduct of arbitration in present circumstances. More recently, it is also suggested that virtual arbitration hearings might pose a threat to fair hearing, potentially breaching natural justice, as will be discussed further below.

2. VIRTUAL ARBITRATION AND THE PANDEMIC – A REALITY CHECK

A. The use of information technology in the conduct of arbitration

We will look at the current adoption and use of computer technology in arbitration by analysing available empirical evidence and comparing its findings. The two annual Queen Mary University of London ("**QMUL**") international survey reports for the years 2018 and 2020 are of relevance and importance here. The 'pre-pandemic' 2017 survey[9] (the "**QMUL 2018 Survey**") sought the views of 922 respondents from 6 continents[10] and very appropriately touched upon the use of information technology in arbitration. The QMUL 2021 international survey[11] (the "**QMUL 2021 Survey**")[12] involved the widest ever pool of respondents, 1,218 in number,

7. Remy Gerbay, *Due Process Paranoia* (Kluwer Arbitration Blog, 6 June 2016) http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/ accessed 2 September 2021.
8. Christoph Bruckschweiger, *Possibilities of Arbitral Tribunals to Sanction 'Guerrilla Tactics' by Counsel in the Absence of a Respective Agreement by the Parties* https://wgb-law.li/sites/default/files/news/2018-04/Possibilities%20of%20Arbitral%20Tribunals_CAS%20Research%20Paper_0.pdf accessed 2 September 2021, and, *Guerrilla Tactics in International Arbitration* in Günther Horvath and Stephan Wilske (eds), (Kluwer Law International 2013).
9. Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018) QMUL 2018 Survey https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF accessed 3 September 2021.
10. *Id.,* 41. Comprising of private practitioners (47%), full-time arbitrators (10%), in-house counsel (10%), "arbitrator and counsel in approximately equal proportion" (12%), and others (21%). As for the latter, this included, for example, academics, judges, third party funders, government officials, expert witnesses, economists, entrepreneurs, law students and respondents who did not specify their position.
11. Queen Mary University of London, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World'* (2021) QMUL 2021 Survey https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf accessed 3 September 2021.
12. The World Health Organization declared Covid-19 a pandemic on 11 March 2020.

and was conducted between October, 2020 and December, 2020; a very crucial time frame insofar as the pandemic is concerned.[13]

According to the QMUL 2018 Survey, 78% of the respondents 'never and rarely' utilised virtual hearing rooms,[14] but 60% of the respondents 'frequently and always' used video conferencing. Most strikingly, the interviewees explained that 'to make better use of technology in arbitration is to make arbitration a more efficient process'. Apart from this, interviewees stressed that 'one of the most notable advantages of technology in international arbitration is the ability to conduct hearings and meetings via video conferencing, or through any other means of communication that does not require physical presence.'[15] This also translated into substantial savings in terms of time and money.[16] Therefore, it may not be surprising that there is a rise in the endorsement of information technology particularly in the pandemic surveys as compared to the pre-pandemic ones, for reasons like necessity, etc., as elaborated upon earlier. For instance,in the QMUL 2021 Survey, only 26% of the respondents had 'never and rarely' utilised virtual hearing rooms[17] but there was a modest increase, upto 63%, in the number of interviewees who 'frequently and always' used video conferencing.[18]

Further, the QMUL 2021 Survey made a significant observation. When compared with the QMUL 2018 Survey, the results showed that use of some of the forms of information technology has 'remained relatively consistent'. In other words, there was no marked increase in the usage when compared to the pre-pandemic times. Although people would have thought that the pandemic would 'hasten the adoption of these tools.'[19] The QMUL 2021 Survey persuasively offered the possible explanation that those who were already using IT tools in arbitration before the pandemic would continue to do so even during the pandemic. Whereas the infrequent or occasional users of such tools may remain the same way; however, there is a stark increase in the use of virtual hearing rooms in 2021 with 73% of respondents now using it at least 'sometimes', 'frequently' or 'always' as compared to 2018

13. Respondents comprised of consisted of counsel (private practitioners) (43%), full-time arbitrators (15%), in-house counsel (private sector) (7%), in-house counsel (government or state entity) (2%), 'arbitrator and counsel in approximately equal proportion' (11%), arbitral institution staff (5%), and others (17%).
14. QMUL 2018 Survey (n 9) 32.
15. *Id.,* 32.
16. *Id.,* 32.
17. QMUL 2021 Survey (n 11) 21.
18. *Id.,* 21.
19. *Ibid.*

where 78% people reported to have 'never and rarely' used it.[20] It has been quite succinctly summed up with the help of survey conducted in 2020 that 'the pandemic has served as a catalyst to hasten the wider awareness and acceptance for a principle of adaptation'[21] that some users of arbitration had already begun to adopt even before the pandemic. The finding in another survey[22] revealed that since 15 March 2020, out of 350 hearings, only 27 were in-person hearings.[23]

All these findings do not come as a surprise especially to arbitral practitioners who have a first-hand account of the situation on the ground. Those who were involved in arbitration proceedings after 11 March 2020 can recall how they had to put their quick-thinking skills to use, finding alternatives and solutions. It is likely that a majority of those who were prepared for physical hearings might have been shocked. But upon postponement of physical hearings and realizing limited possibility of travel they would have perceived the need for exploring virtual means. The survey discussed above also showed that 38% of hearing dates were not postponed. In 41% of the cases, dates were postponed and new dates were given. While in only 15% of the cases, hearing dates were postponed and no new dates were allotted.[24]

Based on the above data, reasonable conclusions can be drawn that many arbitral hearings are still taking place during the pandemic, either according to pre-pandemic original plans or, modified plans due to postponement of hearing dates. In case of the latter, there is a possibility that the parties were either adopting a 'wait and see' approach or had to eventually figure out a solution. Most likely, parties had to consent to the proposed solution of remote hearings in absence of preparation and experience to deal with such an unprecedented crisis.

20. *Ibid.*
21. *Id.,* 21-22.
22. Gary Born, Anneliese Day QC and Hafez Virjee, *Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views* in Maxi Scherer, Niuscha Bassiri and Mohamed S Abdel Wahab (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer 2021).
23. *Id.,* 143.
24. *Id.,* 142.

B. Virtual hearing protocols, tools and guides – much fuss about nothing?

The pandemic was also a time for contemplation; in part due to work-from-home arrangements which spurred creativity and innovation. People got together and suggested protocols, guides and notes for the conduct of virtual or remote hearings. However, how many have adopted or adhered to them? One protocol[25] sighted goes to the extent of specifying not commonly understood technical specifications for video conferencing, etc. This is not to downplay the usefulness of protocols, but in today's world simplicity is a welcome gesture, and the last thing desired in an increasing complicated arbitration world is more complexity. A survey[26] on the preferred video conferencing technology for hearings identified the following five most preferred platforms: Zoom, followed by Microsoft Teams, Cisco Web Ex, Go To Meeting and Blue Jeans. These are 'plug and play' platforms, and are very helpful because they are very easy to use without the need to know anything about computer engineering and coding to operate. They are designed to be 'fuss free'.

On the other hand, non-binding virtual hearing protocols are no doubt useful but if the parties have agreed for virtual hearings, it is unlikely that it would become a contentious issue to agree on the formalities to be adopted for their virtual hearing. The procedures to be adopted should be pragmatic since parties may not welcome more rules to adhere to; already having to master and comply with a number of arbitral rules or procedural laws. Depending on the parties and counsels and based on general enquiries and observations, it has been noticed that arbitrants tend to be pragmatic. They are concerned only with key issues such as the availability of reliable video and audio infrastructures, as long as all participants can be seen and heard satisfactorily. Popular video conferencing platforms now provide adequate security and only invited participants can access the virtual hearing space.

Protocols have been adapted for this new online platform. In some instances, counsels for the parties may insist on a 360-degrees 'room sweep' to ensure that witnesses are alone or not receiving any help hidden

25. Seoul Protocol on Video Conferencing in International Arbitration, Annex 1, Technical Specifications.
26. Gary Born, Anneliese Day QC and Hafez Virjee, *Videoconferencing Technology in Arbitration: New Challenges for Connectedness (2020 Survey)* (Kluwer Arbitration Blog, 8 July 2021) http://arbitrationblog.kluwerarbitration.com/2021/07/08/videoconferencing-technology-in-arbitration-new-challenges-for-connectedness-2020-survey/ accessed 2 September 2021.

out of the camera's view. The counsel will then attempt to 'sterilize' the room by scrutinising everything in the office (e.g., documents on the work desk or the texts written on the whiteboard in the office). Such pre-hearing steps can consume time and be intrusive towards witnesses. Yet, some counsels appear to consider this step crucial in virtual arbitration, and in any regard, the practice of sizing up witnesses for their credibility is typical in criminal trials. Nevertheless, such an exercise can present procedural impracticability. What if a witness refuses to co-operate, say, the request from the opposing party's counsel to clear the desk or clean up the whiteboard? The possible recourse would be to request the arbitral tribunal to make an order, however, would the arbitral tribunal be prepared to release such a non-compliant witness? Whilst the oral hearing is important, the oral hearing stage alone does not decide the outcome of the entire dispute, nevertheless, protocols and arbitral procedures need to be carefully managed by tribunals.

C. Reluctance towards virtual arbitral hearings

A young lawyer once said to the author that the draw to international arbitration is the opportunity to travel overseas. This is not an inaccurate perception because the nature of cross-border disputes means parties are located in different countries and the place of hearing could be in a foreign location – thus the necessity to physically travel to foreign places. In-person evidentiary hearings are not necessarily dispensable if circumstances permit but, as in the case of the pandemic, parties may have no choice but to proceed with virtual hearings. According to the QMUL 2021 Survey, a clear majority of 79% said they would proceed at the scheduled time as that of the virtual hearing, as compared to 16% who would postpone the hearing until it could be held in person.[27] However, virtual hearings may not be the preferred option, and only Hobson's choice for the parties– the arbitral proceedings could have been commenced before the pandemic, thus the parties would like to conclude the arbitration sooner than later due to vast uncertainty that the pandemic is likely to pose. Further, according to the QMUL 2021 Survey, 45% of the interviewees preferred in-person format for substantive hearings, 48% preferred a mix of in-person and virtual format but only a minority of 8% preferred fully virtual format, post-pandemic.[28] Practitioners were also surveyed for their views about the primary disadvantages of virtual hearing. The three most expressed views

27. QMUL 2021 Survey (n 11) 22.
28. *Id.,* 25.

were that a) counsel and clients have restrictive opportunities to confer during the hearing sessions, b) challenges of time zone, and c) the difficulty in controlling the witnesses and assessing their credibility.[29]

A conclusion cannot be drawn yet given that the pandemic is unprecedented and a developing situation. From the survey, it would appear that arbitral practitioners would prefer returning to normalcy with in-person interaction, or a hybrid, instead of purely a remote set-up. The reality is that the arbitration world has been largely reactive to the pandemic with finding solutions and options, rather than taking a stand about preference for policy choices that will set to govern the industry in times to come. Also, there are other variable factors to be considered in deciding the type of hearings, such as the value of the dispute, case complexity, and geo cultural elements of the parties. Incidentally, virtual hearings can be useful in reducing potential 'friction' between cross-examiners and first-time witnesses. The witnesses are likely to feel less pressured because testifying behind computer screens provide some sense of security and comfort. Nevertheless, what many would agree on at least is that the pandemic has triggered an awakening to the idea that there are alternatives, largely using digital technology, to conduct arbitration, resulting in time and costs savings. After all, these are also the two common disadvantages of arbitration as a method of dispute resolution in recent times. However, these factors alone may not decide the future of arbitral hearings; many a times, when parties have exhausted all avenues and options and turn to arbitration, costs may no longer be a major deterrent.

3. OPPOSING VIRTUAL HEARING– LEGAL AND PRACTICAL PERSPECTIVES

A. In-person hearing as of right?

Having dealt with the technological perspective of virtual arbitration during the pandemic, it would be imperative for us to look at the *lexarbitri* perspectives which are crucial in determining the legality of dispensing with in-person hearings. A research project was undertaken by the International Council for Commercial Arbitration (ICCA) which compiled

29. *Id.,* 23-24. The biggest disadvantages of virtual hearings were found to be 'difficulty of accommodating multiple or disparate time zones' and the impression that it is 'harder for counsel teams and clients to confer during hearing sessions, i.e., other than in breaks', each chosen by 40% of respondents. Almost as many respondents thought it might be 'more difficult to control witnesses and assess their credibility' (38%).

reports from reporters from New York Convention[30] jurisdictions on the core legal questions arising from the use of remote arbitral hearings due to the pandemic. As of May 2021, 77 country reports have been produced and in summary, none of the surveyed jurisdictions contains any express provision granting a right to a physical or in-person hearing.[31] Notably, in the Netherlands, temporary national legislation[32] enacted to deal with the issues arising from the pandemic contains a provision[33] that if it is not possible to hold a physical hearing in civil and administrative legal proceedings due to the outbreak of the pandemic, the oral hearing can take place by utilising electronic means of communication.[34]

This project is highly commendable and opportune for not only the findings are valuable to clarify doubts on the legality of virtual hearing but also because it charts the future trend for the use of remote hearing method, post-pandemic. The UNCITRAL Model Law does not yet have provisions specifically dealing with remote hearing but neither does it have provisions impeding the same. It already incorporates consideration of electronic means for the arbitration agreement.[35] Thus, in the spirit of its design to be a 'vehicle for harmonization and modernization and in view of the flexibility, it gives to States to prepare new arbitration laws'.[36] We can sanguinely expect the future amendments to provide perhaps provisions for

30. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('New York Convention').
31. *Right to a Physical Hearing Project: Newly Released Reports Confirm Core Trends and Divergences* (International Council for Commercial Arbitration, 26 May 2021) https://www.arbitration-icca.org/right-physical-hearing-project-newly-released-reports-confirm-core-trends-and-divergences accessed 5 September 2021.
32. The Temporary Covid-19 Act Justice and Security, Kingdom of the Netherlands.
33. *Id.,* art. 2(1) in official Dutch text:
Artikel 2 (mondelingebehandeling in burgerlijkeenbestuursrechtelijkegerechtelijke procedures)
Indien in verband met de uitbraak van COVID-19 in burger lijkeenbestuursrec htelijkegerechtelijke procedures het houden van eenfysiekezittingnietmogelijk is, kan de monde lingebeh and elingpla atsvinden door middel van eentweezijdigelektronischcommunicatiemiddel.
34. Bas van Zelst, *The Netherlands* (International Council for Commercial Arbitration, 18 March 2021). https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Netherlands-Right-To-A-Physical-Hearing-Report.pdf accessed 5 September2021.
35. UNCITRAL Model Law 1985, art. 7(4) (Option I).
36. *UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006* (UNCITRAL, 25 March 1985) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf accessed 2 September 2021.

remote hearing, potentially making its way into the future revision work of the UNCITRAL Model Law.

B. Due Process Paranoia – a tale of two cases

As an introduction, even before the pandemic, arbitration was already plagued by Due Process Paranoia (commonly referred to as 'DPP'). Depending on the circumstances, DPP can have quite a dominant effect in delaying or paralysing the arbitral proceedings. With the onset of the wide use of remote arbitration and virtual hearing during the pandemic, an apprehension of DPP remains. In the push for efficiency, allegations that the tribunal has deprived a party of its due process right might have arisen sometimes. From a practical standpoint, prudent arbitral tribunals will always bear in mind the fundamental principle of treating each party with 'equality' and giving them the 'full opportunity of presenting their cases',[37] a tenet in the UNCITRAL Model Law which has found its way into the *lex arbitri* of many countries which have adopted it.

The basic idea is that arbitral tribunals, unlike national court judges, are appointed by the parties in disputes for their own selves and they have made an informed choice while choosing this method of private dispute resolution. The decision is made with the implied expectation of 'fairness' in the proceeding which would include an opportunity to present their case fully. If a party is, or the believes that it is, deprived of the opportunity to present its case, allegations of violation of its due process rights could be levelled against the arbitral tribunal. In practice, a prudent tribunal would avoid getting embroiled in such a situation.[38] However, a party, through the ingenuity of its counsel could employ dilatory tactics intended to derail the arbitral proceedings, masquerading as seeking to exercises its right to due process.

What constitutes fairness and fair process vis-à-vis 'equality' and 'full opportunity' must be examined. Firstly, the *travaux préparatoires* could be analysed to understand the intention of the drafters of the UNCITRAL Model Law which can be found in the Analytical Commentary on Draft Text.[39] It is stated that the fundamental requirements of fairness under

37. Model Law 1985, art. 18.
38. E.g., ICC Rules of Arbitration at art 42 states that '[The] court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law'.
39. United Nations, 'Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration (A/CN.9/264,25 March 1985)' on (what is now)

the provision 'adopts basic notions of fairness requiring that the parties be treated with equality and each party be given a full opportunity of presenting his case'[40] and the principles make it clear that:

> *"[F]ull opportunity of presenting one's case" does not entitle a party to obstruct the proceedings by dilatory tactics and, for example, present any objections, amendments, or evidence only on the eve of the award."*[41]

Whilst tribunals need to be protected from the constant fear or threat of DPP, it is also equally important for the parties to be safeguarded against unfair treatment by tribunals, as will be discussed below.

1. *The 'Shield' – arbitral tribunal fending attacks by parties*

The Singapore Court of Appeal ("**SGCA**") recently dealt with an application to set aside an arbitral award in China Machine New Energy Corpn. v. Jaguar Energy Guatemala LLC[42] ("**China Machine**") on grounds of breach of natural justice. The subject matter dispute pertained to a Singapore seated arbitration; therefore, Art 18 of the Model Law was applied. The SGCA held that the drafters of the Model Law did not intend to create a right of unlimited scope by the use of the word "full" (opportunity) in Article 18. On the contrary, they were conscious of the need to limit its scope so that it could not be abused by parties seeking to delay and prolong the arbitral proceedings.[43] The SGCA also held that the parties' right to be heard is impliedly limited by considerations of reasonableness and fairness and this has especial relevance in *China Machine*, where the complaint was that the failure of the tribunal to grant certain procedural accommodation to a party adversely impacted that party's due process rights'.[44] The SGCA also referred to a Singapore High Court decision in Triulzi Cesare SRL v. Xinyi Group (Glass) Co. Ltd.[45] ("**Triulzi**") that 'the right of each party to be heard does not mean that the Tribunal must 'sacrifice all efficiency in order to accommodate unreasonable procedural demands by a party.'[46]

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art. 18 of the Model Law (art. 19 at para 7). It was picturesquely described as the "Magna Carta of Arbitral Procedure".

40. *Id.*, art. 19 para 7.
41. *Id.*, art 19 para 8.
42. China Machine New Energy Corpn. v. Jaguar Energy Guatemala LLC 2020 SGCA 12.
43. *Id.* [96].
44. *Id.* [97].
45. *Triulzi Cesare SRL v Xinyi Group (Glass) Co. Ltd.* 2015 1 SLR 114.
46. *Id.* [151].

Furthermore, the SGCA also noted that the same view holds in non-UNCITRAL Model Law jurisdictions—ASM Shipping Ltd. of India v. TTMI Ltd. of England[47] ("**ASM Shipping**") and PT Reasuransi Umum Indonesia v Evanston Insurance Company, Utica Mutual Insurance Company and AMP United[48] ("**PT Reasuransi**"). In *ASM Shipping*, one of the grounds on which the applicant sought to vacate the arbitral award was the tribunal's refusal to grant the requested adjournment of the proceedings after the requesting party's lead counsel became unavailable. The English High Court refused to set aside the arbitral award and held that the test was whether the decision to refuse adjournment was "so far removed from what could reasonably be expected of the arbitral process that it must be rectified."[49] Morison J also noted that arbitration is supposed to be speedy and whilst tribunals comprising professional arbitrators are often difficult to convene, the 'other party has an interest in the proceedings coming to a timely end'. He saw nothing wrong with the decision of the tribunal to refuse the adjournment which also seemed to have been the right decision in the circumstances.[50] Additionally, the US Southern District of New York Court in *PT Reasuransi*, in assessing whether the arbitrators were guilty of misconduct for refusal to grant an adjournment, applied a test focussing on the reasonableness of the tribunal's decisions and held that '*[w]here there is a reasonable basis for the arbitrator's decision not to grant a postponement, courts are reluctant to interfere with the arbitration award*.'[51]

The *China Machine* case is timely under the current international commercial arbitration practice, as it seeks to clear doubts on increasingly common situations where parties request for extension or adjournment, perhaps more frequently so during the pandemic time and remote hearing. As rightfully stated by the SGCA:

> *This appeal presents us with the opportunity to clarify this important area of arbitration law, so that tribunals may be guided as to the sorts of concerns that may undermine their awards. In our judgment, this should ultimately reduce the opportunity for those attempting to abuse the doctrine of due process.*[52]

47. ASM Shipping Ltd. of India v. TTMI Ltd. of England 2005 EWHC 2238 (Comm).
48. PT Reasuransi Umum Indonesia v. Evanston Insurance Co. Utica Mutual Insurance Co. and AMP United, 1992 WL 400733 (SDNY, 23 December 1992).
49. ASM Shipping Ltd of India v TTMI Ltd of England 2005 EWHC 2238 (Comm) at [38].
50. *Id.* [45].
51. *China Machine* (n 42) [97 d].
52. *Id.* [4].

Separately, the High Court of Malaya's decision of Allianz General Insurance Company Malaysia Berhad v Virginia Surety Company Labuan Branch,[53] decided before *China Machine* is also to be noted. It dealt with the issue of the losing party's complaint about breach of due process in arbitration where the Court held that 'Natural justice does not demand that a party is entitled to receive responses to all submissions and arguments presented for only the right to be heard is fundamental.'[54] The Court noted that the tribunal cannot be expected to be obliged 'slavishly' to all of the parties' demands in arbitration proceedings. Indeed, just because a party failed to get all of its requests granted or accommodated by the tribunal would not mean that it had been denied a fair opportunity of presenting its case. This decision may have a far-reaching impact on the landscape of the Malaysian position as regards due process paranoia, now and in the future.

2. *The 'Sword' – when the arbitral tribunal erred*

Arbitrators are not infallible and they can err with their judgement in so far as the conduct of the proceedings is concerned. This is precisely the measure by which there may be a refusal of the enforcement of arbitral awards such as those under the New York Convention.[55] Such a case arises where arbitrators have conducted themselves in such a way that the party's due process rights have been violated, and where the aggrieved party seeks the setting aside of awards. Once again, fortuitously, the SGCA dealt with another application in the case of CBS v. CBP[56] ("**CBS**"), circumstances being diametrically opposite to that of the *China Machine.* Given the case's novel circumstances and legal issues, the key background will be set out below.

In *CBS*, CBP ("**Buyer**") the purchaser of coal, and CBS ("**Bank**") the bank, entered into an assignment of trade debts arrangement with the coal seller. The underlying commercial transaction involved two shipments of coal which resulted in a dispute with the second shipment. The Bank sought to recover payment due from the Buyer under the trade financing arrangement. However, the Buyer alleged grounds of incomplete shipment and a meeting with the coal seller that gave rise to an oral agreement to reduce the price

53. Allianz General Insurance Co. Malaysia Berhad v. Virginia Surety Co. Labuan Branch Originating Summons No. WA-24NCC (ARB)-13-03/2018.
54. *Id.* [31].
55. New York Convention on the Recognition and Enforcement of Arbitral Awards 1958, art. V.
56. CBS v. CBP 2021 SGCA 4.

of the coal. The dispute was referred to arbitration under the rules of arbitration of the Singapore Chamber of Maritime Arbitration ("**SCMA Rules**") before a sole arbitrator. The Buyer's original jurisdictional object to the arbitration failed, and they subsequently breached the procedural timelines set by the arbitrator. Eventually, the Buyer filed its defence and counter claim along with a list of seven witnesses it would like to call for oral testimony. However, the arbitrator requested the Buyer to provide its 'position/reasons for calling 7 witnesses and/or the need for their oral testimony', a request unsurprisingly objected by the Buyer stating that an oral hearing was 'required and necessary'.[57]

About nearly a month later, the arbitrator wrote to the parties maintaining his insistence that the buyer provides a detailed written statement from each of the witnesses it planned to call so that the arbitrator could decide if they had substantive value to convene a hearing. The buyer maintained its right to a hearing and examining the witnesses without condition. The arbitrator proceeded to convene a hearing for oral submissions only, which the Buyer chose not to participate in. This resulted in the arbitrator conveying that by virtue of the Buyer failing to submit its witness statements it would be construed as waiving any right to submit witnesses in the event of an oral hearing.[58] A Final Award was eventually rendered in favour of the Bank and the Buyer challenged the award successfully, claiming among others, a breach of natural justice. The SGCA upheld the decision from the Singapore High Court.

CBS examined the extent of the rights and opportunities of parties to present its case in arbitral proceedings. Central to the case was also the issue of whether witness-gating[59] or the arbitrator's decision to prohibit the presentation of witness relevance to the issue at the arbitral proceedings was tantamount to a breach of natural justice. The SGCA reaffirmed that parties' right to be heard in legal proceedings is a fundamental rule of natural justice. That this is protected in the arbitration context and is enshrined in Article 18 of the Model Law which accords to the parties the 'full opportunity' of presenting its case and equality.

The Court also tempered this with caution that the threshold for finding a breach of natural justice is a high one, and hence, courts would be slow to

57. *Id.* [19].
58. *Id.* [25].
59. CBS (n 56) [35].

intervene in cases of technical and inconsequential breaches.[60] As previously held by the Court in *China Machine*, 'full opportunity' of presenting one's case is not an unlimited one and must be balanced against considerations of reasonableness, efficiency and fairness. What constitutes 'full opportunity' is a fact-sensitive inquiry that can only be meaningfully assessed within the specific context of the particular facts and circumstances of the complaint, where the overarching inquiry is whether the proceedings were conducted in a fair manner. The test asks what a reasonable and fair-minded tribunal in those circumstances might have done and in asking that question, the court places itself in the position of the tribunal at the material time.[61]

In *CBS*, the breach of natural justice occurred when the arbitrator proceeded with the oral hearing without all of the Buyer's witnesses despite repeated requests. Further, according to the SCMA Rules, unless the parties agree to a documents-only arbitration or to dispense with a hearing, the tribunal shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral submissions.[62] Whilst the arbitrator has general and broad case management powers (i.e. to ensure the just, expeditious, economical and final determination of the dispute),[63] those procedural powers are not unfettered and must be balanced against the rules of natural justice.[64] It is crucial to note the SGCA's view that it did not approve the Buyer's dilatory tactics and acknowledged that the Buyer was less than cooperative in the proceedings[65] – perhaps the arbitrator acted out of exasperation due to the Buyer's uncooperative attitude.[66]

In conclusion, *CBS* is under no circumstances a *carte blanche* for any parties in arbitration to chart their next dilatory tactic in arbitration proceedings. Experienced arbitrators can spot when a dilatory tactic is at play especially amongst respondents to an arbitral claim. It is also common that respondents will refuse to contribute towards the institution deposit payment. However, all is not lost as it is common for a party to request for costs to be ordered against another who had been disruptive in the proceedings. *CBS* is a cautionary tale for arbitrators to restrain themselves from getting carried away by a party's conduct, whether dilatory or

60. CBS (n 56) [50].
61. *Id.* [51].
62. SCMA, r. 28.1.
63. SCMA, r. 25.1.
64. CBS (n 56) [35].
65. *Id.* [78].
66. *Id.* [71].

otherwise. In the conduct of arbitration during the pandemic time where delays are inevitable, the tribunals may wish to conduct the proceedings efficiently and expeditiously. For instance, the tribunals may order for documents-only arbitration or to abbreviate the procedures potentially resulting in objections by the other party. The tribunals may also err on the side of caution when deciding on ordering the conduct of evidentiary hearings virtually to consider extraordinary circumstances amidst potential objections by a party.

C. Issues faced by stakeholders: Arguments and excuses

There are several conceivable arguments by arbitrants on how remote hearing could disadvantageously impact their cases, potentially depriving the parties of a full opportunity of presenting their case. Some potential arguments can be found in the recent QMUL 2021 Survey[67] where interviewees were asked what they thought were the main disadvantages of virtual hearings. The table below tabulates the most reasons collected and possible responses:

	Reasons	Response/ Potential Remedy
i	Difficulty in accommodating multiple time zones	Time zone difference results in largely causing inconvenience to one's natural sleep-wake cycle only rather than potential breach of natural justice. It is possible for parties sitting in Europe and Asia to compromise on suitable timing that can accommodate each other.
ii	Difficulty in controlling witnesses in cross-examination as well as the inability to assess their credibility	Much has been said in recent times about 'body language' in arbitration. It is possible to cross-examine witnesses virtually although in-person cross-examination is much preferred as a matter of long-standing practice only.
iii	The difficulty for counsels and parties to confer during the hearing if they are located in different physical locations and time zones.	It is indeed a challenge when counsels and parties could not confer during the hearing. However, this is a weak argument for a party to reject virtual hearing.
iv	Technical malfunction and unreliable technology	Virtual conferencing platforms have improved tremendously in recent times.

67. QMUL 2021 Survey (n 11) 24.

	Reasons	Response/ Potential Remedy
v	The difficulty for participants to maintain concentration due to 'screen fatigue'	Appropriate breaks or intervals can and should be given by the tribunal.
vi	Difficulty in 'reading' the arbitrators and other remote participants	Does not constitute a breach of due process as the parties' case does not hinge on the body language of the arbitrator during the oral hearing alone.
vii	Confidentiality and cyber security concerns	Security of virtual hearing platforms has improved tremendously to ensure adequate security.

Though the above list of reasons is not exhaustive, they are collectively the views of current international arbitral practitioners. These have typically constituted grounds (or excuses) for postponement of hearing (regardless of in-person or remotely) or even refusal of a virtual hearing. However, there is now greater awareness and transparency of thwarting frivolous and vexatious requests aiming at delaying or derailing the arbitral proceedings. The Claimants and Respondents are almost certainly going in different directions with head-on clashing objectives; the claimants and respondents to proceed quickly, to win and to enforce the awards against the losing party. Whereas, the respondent generally aims to slow down the process so that if they are found liable, they can buy time; to frustrate the claim so that the claimant may eventually drop the matter or for various reasons, be unable to proceed.

In *Capic* v. *Ford Motor Co. of Australia Ltd.*[68] ("**Capic**"), the learned Judge offered some valuable lessons on the use of technology during the pandemic and perhaps also in a world where technology plays a more pivotal role. In *Capic*, Perram J dismissed the application for an adjournment of a six-week trial commencing on 15 June 2020 (the case was first commenced in 2016). He implied 'dilatory tactics' employed, the case having a 'tortured procedural history and has already been set down for trial twice', then an application on the grounds of the pandemic.[69] It is interesting to note that the Respondent raised several issues such as technological limitations, intermittent internet connection, the inability of counsels to be together in one place, witness coaching and inabilities to read the body language of participants online. Perram J held that the first two issues were easily remedial and not insurmountable challenges.[70] That counsels were not in

68. Capic v. Ford Motor Co. of Australia Ltd. 2020 FCA 486.
69. *Id.* [1].
70. *Id.* [10]-[12].

one place did not mean the trial would be unfair or unjust.[71] Furthermore, Perram J acknowledged that the question of witness coaching was a fact-specific consideration, and given that the case was not a criminal trial, it was not a critical issue for the witnesses to testify virtually.[72] On the common grievances towards virtual hearing due the inability to 'read the body language' or demeanour of witnesses during cross-examination through video-link, Perram J said the following:

> *My impression of those platforms has been that I am staring at the witness from about one metre away and my perception of the witness' facial expressions is much greater than it is in Court.*[73]

Of significant interest is also Lee J's observation in Australian Securities and Investments Commission v. GetSwift Ltd.[74] on the role of demeanour on the evidence of witnesses that:

> *Indeed, I would go further and say that at least in some respects, it was somewhat easier to observe a witness closely through the use of the technology than from a sometimes partly obscured and (in the Court in which I am currently sitting) distant witness box.*[75]

As such, it can be argued that the nagging question of 'body-language' in litigation (likewise to arbitration) could finally be put to rest peacefully.

D. Response by the international arbitral community on virtual hearings

Arbitral bodies all over the world were conscious of the challenges posed to the conduct of arbitration due to the pandemic. The ICC[76] quite promptly issued a document titled 'Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic' ("**ICC Note**") on 9 April 2020. It sought to provide guidance to parties, counsels and arbitral tribunals involved in ICC arbitrations on possible measures that they may consider. In summary, the ICC Note recalls the existing procedural framework available to the parties and the greater need to implement case

71. *Id.* [13].
72. *Id.* [16].
73. *Id.* [19] (emphasis added).
74. Australian Securities and Investments Commission v. GetSwift Ltd., 2020 FCA 504 (9 April 2020).
75. *Id.* [33].
76. The International Chamber of Commerce, world's most preferred arbitral institution according to the QMUL 2021 Survey.

management techniques during the pandemic to ensure the fairness and efficiency of ICC arbitrations. The ICC Note also provides guidance on the organisation of virtual hearings, including a useful checklist for remote hearing protocols. Most notably, the ICC Note highlighted the following points:

(a) The arbitral tribunal in deciding the appropriate procedural measures to adopt in proceeding with the arbitration expeditiously and cost-efficient should evaluate the circumstances of the dispute (i.e. nature, length of the hearing, the complexity of the dispute, etc.) so as to enable the case to proceed without delay. Also in consideration would be whether any adjournment would lead to inordinate delay, including the parties' capacity to prepare properly.[77]

(b) The arbitral tribunal should consider carefully all circumstances and subsequent enforceability of the award at law (including potential challenges on the arbitral award on grounds of due process) in the event that the tribunal chooses to proceed with a virtual hearing without the agreement of the parties or with objection. In making these decisions, the tribunal is advised to consider its procedural powers under the ICC Arbitration Rules and after consulting the parties, adopt the appropriate measures so long as they are not contrary to any agreement of the parties.[78]

(c) The pandemic is an impediment to face-to-face hearing and the wait for it to be finally over, would possibly produce undue and even prejudicial delay. Therefore, the arbitral tribunal should adopt the appropriate approaches dependent on circumstances (e.g. whether a document-only or live hearing) as it exercises its authority. Under the ICC Rules of Arbitration, the tribunal in establishing suitable procedures should also perform its overriding duty in conducting the arbitration expeditiously and cost-efficiently.[79]

Meanwhile, the global professional body for arbitrators, the Chartered Institute of Arbitrators, has also responded by producing guidance on remote hearing[80] that can be applied not only to arbitration but other ADR

77. ICC Note para 18.
78. *Id.* para 22.
79. *Id.* paras 24 and 25.
80. *Guidance Note on Remote Dispute Resolution Proceedings* (Chartered Institute of Arbitrators) https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf accessed 10 September 2021.

methods such as mediation, negotiation, adjudication, expert determination, etc. The guidance note provides a useful framework for the use of parties when arranging for remote or virtual hearings. It is of no binding effect, neither is it intended to be a 'soft law', however parties in arbitration can certainly benefit from adopting some of the helpful suggested notes and checklist.

E. Considerations of other procedural issues

To state briefly, it is rudimentary to ensure that the party against whom the arbitration is commenced should be given proper notice of the arbitral proceedings or appointment of arbitrators. This is not an issue unique only to virtual arbitration because, with the increasing use of emails, communications by claimants to respondents are commonly transmitted digitally. There must be proof of transmission or record of the sending to the last known email and physical address of the other party, a well-established principle in international arbitration law that will not be elaborated in this article. The failure of the claimant to communicate properly and effectively to the respondent could give rise to a breach of due process and natural justice as the respondent could be deprived of the opportunity to present its case. This would be tantamount to grounds under the New York Convention for the refusal of enforcement of the arbitral award.[81] Finally, whilst thought to be rare or perhaps hypothetical, an arbitration agreement providing for the parties to opt-out from any virtual or remote proceedings except for in-person conduct must be followed by the tribunal. Unless varied by both parties, if the tribunal proceeds at the request of one party to conduct the arbitration remotely (against the will of the other party), enforcement of the award may be eventually challenged on grounds under the New York Convention[82] that the arbitral procedure is contrary to the agreement of the parties.

4. KEEPING ARBITRATION GOING – IS VIRTUAL ARBITRATION AND THE USE OF TECHNOLOGY A TRANSFORMATIVE PHENOMENON?

At the core of the purpose, meaning and conduct of arbitration is the trinity of factors: party autonomy, access to justice and due process, along with final and binding decision. Party autonomy in arbitration, unlike other legal dispute resolution processes, provides the parties with the flexibility to select procedures to be followed. Following due process is essential as

81. New York Convention 1958, art. V(1)(b).
82. *Id.,* art. V(1)(d).

parties want a fair and full opportunity to be heard and finally, a binding outcome which is the result of the arbitration process. The use of technology, whether in full or hybrid combination, is simply ancillary to the means of achieving the said objectives. The core remains the same.

Our adoption of technology does not mean that some of the inherent issues found in arbitration practice have been eradicated. In some cases, perhaps, technology could exacerbate it. For instance, a new relevant arbitration tactic is a 'guerrilla tactic',[83] which was raised in the Singapore High Court case of China Machine New Energy Corpn. v. Jaguar Energy Guatemala LLC.[84] In arbitration, requests for document production are typical but it can very quickly turn into a conscious tactical act by one party to dump a massive volume of data on the other party, which can delay the proceedings. The Singapore High Court defined guerrilla tactics as 'intended aim to obstruct, delay, derail and/or sabotage the arbitral proceedings.'[85] In the present case, one of the grounds cited by the party as tantamount to such a tactic involved the uploading of inordinate volumes of 'disorganised electronic documents to the Data Room, some also not entirely legible, redacted and unindexed.'[86] Excessive volume of information in poor form can present a challenge to anyone going through it and technology alone does not solve the problem. Modern digital technology age does not mean that data is necessarily easy to go through. In Pyrrho Investments Ltd. v. MWB Property Ltd.[87], the English High Court had to consider, for the first time, and approved the use of 'predictive coding'[88] in electronic discovery. The relevant document disclosure process originally involved more than 17.6 million electronic files, which were then reduced to 3.1 million.[89]

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83. *Introduction to Guerrilla Tactics in International Arbitration* in *Guerrilla Tactics in International Arbitration* in Günther J Horvath and Stephan Wilske (eds), (Kluwer Law International, 2013) referred to in China Machine New Energy Corpn. v. Jaguar Energy Guatemala LLC 2018 SGHC 101 [201].
84. China Machine New Energy Corpn. v. Jaguar Energy Guatemala LLC 2018 SGHC 101.
85. *Id.* [201].
86. *Id.* [208].
87. Pyrrho Investments Ltd. v. MWB Property Ltd. 2016 EWHC 256 (Ch).
88. *Id.* [17] '[The] term 'predictive coding' is used interchangeably with 'technology assisted review', 'computer assisted review', or 'assisted review'. It means that the review of the documents concerned is being undertaken by proprietary computer software rather than human beings. The software analyses documents and 'scores' them for relevance to the issues in the case. This technology saves time and reduces costs. Moreover, unlike with human review, the cost does not increase at the same rate as the number of documents to be reviewed increases'.
89. *Id.* [5].

During the pandemic, we have experienced acceleration in the use of digital technology and virtual arbitration, however, it can be argued to be merely crisis management; thus, we cannot be yet certain whether these will become permanent features in future arbitrations. It should also be borne in mind that the use of technology in arbitration predates the pandemic. Meanwhile, the users of arbitration are now more aware of the choices and solutions available to them with the use of technology. A hybrid of virtual and in-person arbitration can reduce costs and increase efficiency[90] compared to entirely in-person proceedings, where only the key and essential phases of the arbitration will be conducted physically as necessary. Ultimately, arbitrants are more concerned about the outcome of the arbitration rather than its processes.

5. CLOSING–THE PANDEMIC AMIDST A CHANGING ARBITRATION WORLD

In conclusion, this article has set out to appraise the use of virtual arbitration covering the findings, statistics, trends, and legal issues attached to it. Even before the pandemic, were already plagued by pestilence in the form of dilatory and due process allegations in arbitration proceedings that seek to delay or derail it and these issues can continue to manifest themselves even in virtual hearing settings. Arbitration is not without its complaints from users, most commonly high costs, lack of efficiency and procedural complexity. All along, it is also felt that there is a disconnect between arbitral users and practitioners. But the pandemic might have fuelled expedited transformation in terms of technological connectivity to the conduct of arbitration, which could, in turn, solve some of the arbitration's nagging problems. Perhaps this is an impetus for more innovation in addition to merely virtual arbitration or 'Online Dispute Resolution' (ODR), a term widely used now.

Virtual arbitration platforms and tools are becoming increasingly improved to replicate the experience of in-person hearing and to make it as satisfactory as possible. Software developers and engineers are listening to the feedback of users – features such as real-time electronic transcripts

90. Virtual case management, preliminary, and all other procedural meetings are generally easier to arrange because the parties, counsels, and arbitrators are not required to meet physically, particularly in international arbitrations where some participants may be located in different geographical locations. In-person meetings that require overseas travel can be time-consuming and inefficient because they require more planning on the part of those involved, such as scheduling time away from the office or home base, travel arrangements, applying for visas, etc. In the case of travel during the pandemic, reduced air transportation and strict health protocols also make travel difficult.

and cloud-based electronic bundles are immensely helpful in making the virtual hearing experience close to, if not equivalent, an in-person hearing. In cross-examinations for instance, witnesses will be referred to the common electronic bundle accessible to all parties and the tribunal. Live transcription also allows the tribunal and counsels in the hearing to review the transcripts on the spot and a copy of the entire day's proceedings is then made available at the end of each day. However, these platforms do not necessarily come cheap but with increasing competition among developers and service providers, a wider choice is soon expected as is the case with technology.

Finally, we must also not underestimate the long-term effect of the pandemic on the arbitral industry. Renowned expert and proponent of information technology in law, Professor Richard Susskind, has propagated the notion that the legal industry will be impacted by computer technology.[91] New vocations and jobs proving to be disruptive can be expected to emerge, such as legal technologists, ODR system architects and designers, dispute management executives, legal engineers, data auditors or document controllers. After all, technology has constantly made jobs redundant; for example, a curious profession in Britain called 'Knocker-uppers' that woke people up every morning because alarm clocks were neither cheap nor reliable, vanished in the 1970s. By the time this article[92] goes to print, we can expect the pandemic to have evolved in many more folds; there is only a question of which direction it is heading in. Citing the learned Judge in *Capic* referring to the pandemic," "Those who can carry on should, in my view, do their best to carry on as inconvenient and tedious as this is going to be."[93] We certainly will be watching this space.

91. Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (OUP, 2008) 27.
92. Written on 24 September 2021.
93. *Capic* (n 67) [23].

INTERSECTION OF HUMAN RIGHTS AND INVESTMENT ARBITRATION: THE ROAD AHEAD FOR INDIA

—Surjendu Sankar Das[*]

ABSTRACT

International Investment Arbitration has, ironically, stayed apart from changes in other relevant domains of law as a niche body of jurisprudence. Tribunals are increasingly being forced to consider issues that arise from a human rights narrative. According to several academics, there exist 'structural disparities' wherein international investment law and public international law are concerned. The same have led the tribunals to prioritise contractual standards that the host nations have agreed upon with the investors.

Human rights are not explicitly included in earlier investment protection agreements. However, it is becoming increasingly obvious that current international events have an impact on advancements in the domain of investment protection. The harsh criticism of some areas of investment arbitration has sparked some interesting developments in the debate. While arbitral tribunals previously paid little regard to human rights law concerns, the same appears to be no longer the case. Quite opposite, recent rulings demonstrate that arbitration tribunals are becoming more open to address of human rights problems.

The article is based on a thorough examination of publicly accessible investor-state conflicts in which the parties to the dispute or third-party interveners cited human rights. It endeavours to succinctly capture the development of practice in the perspective of Hague Rules and also highlight a juxtaposition of Indian law as its stand today.

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1. INTRODUCTION

The interlink between human rights and business is not an unknown concept. The underlying connection has been enunciated across the globe in multiple jurisdictions in acatena of judicial decisions.[1] The law is emerging and countries across the globe are gradually adapting to the changing requirements. The emerging trend is visible while exploring the mode of resolution of disputes involving human rights and business.

If conflicts or differences could be sorted through traditional court mechanism, the option for alternative resolution methods should also equally be explored, given the efficacious advantages involved in the later one. Arbitration being an adjudicatory mechanism has proven to be reliable across the industries, sector and jurisdictions. If so, arbitration of human rights and business disputes can be considered to be a viable option capable of resolving when the traditional remedies such as court and judicial proceedings are found to be ineffective and unavailable.

The boundaries between human rights and international arbitration have been eroding in recent years. However, the intersection that exists between human rights and investment cannot be considered a recent development. The principles developed in investor state arbitrations have witnessed the intermingling of a human rights perspective.[2] In fact, the worldwide acknowledgment of basic human rights came after the protection of foreign investment.[3] It can be observed that by the late 1900s, state responsibilities concerning the protection that is to be afforded to the foreigner's property had eventually been recognised as the "minimum standards of protection" and had found place in contemporary international law.

It is now being increasingly accepted that the concepts of international arbitration and human rights should not be considered to be distinct and unrelated aspects. The inclusion of human right claims in investor-state conflicts has prompted greater discussion about using international arbitration to settle human rights issues. With the introduction of the "Hague Rules on Business and Human Rights Arbitration" in 2019 ("Hague

1 Rojer Mathew v. South Indian Bank Ltd. (2020) 6 SCC 1.

2. Luke Eric Peterson, *Selected Developments in IIA Arbitration and Human Right* (2009) IIA MONITOR No. 2 International Investment Agreements.

3. Pierre-Marie Dupuy, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law* in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009).

Rules"), the overlapping of human rights and international arbitration has grown even more.[4]

Through this article, the author attempts to undertake a detailed examination of the questions of human rights in investment disputes leading to arbitrations in furtherance of the attempt, this paper is divided into three sections. In the first section, the author examines the nature of human rights that arise in investment arbitrations, and how do they pan out in terms of either their existence as issues emanating from other substantive questions involved as well as their independent existence. In the following section, the author addresses how these issues have been addressed in arbitration, and the legal means that exist to address and identify them at the Indian and international levels. Finally, the author highlights the shortcomings in the Indian legal position and provides a way forward by making suggestions towards the Indian legal framework in this regard through an understanding of the aforementioned problems identified as well as inspiration taken from the international position.

2. HUMAN RIGHTS PRINCIPLES RECOGNIZED IN INVESTMENT ARBITRATIONS

One element of investment arbitration is the human rights debate, which is very often overlooked. It is prone to be viewed one-sidedly with one assuming that human rights issues are solely brought forward to help State parties. However, it is to be remembered that it plays an equal role in investor protection. Human rights instruments and associated jurisprudence have been used by Tribunals to provide guidance on investor-related issues such as the standard of fair and equitable treatment (FET)[5] or expropriation[6] as well as to determine nationality.[7] For that matter, human rights are not limited to governments and investors. In *Tulip v. Turley*, the Tribunal turned to the European Court of Human Rights to determine an arbitrator's duty

4. Abhisar Vidyarthi, *Hague Rules on Business and Human Rights Arbitration: What Lies Ahead?* (ARIA, Columbia Law School, 28 September 2020) http://blogs2.law.columbia.edu/aria/hague-rules-on-business-and-human-rights-arbitration-what-lies-ahead/ accessed 29 October 2021.
5. Toto Costruzioni Generali SpA v. Republic of Lebanon ICSID Case No. ARB/07/12, Decision on Jurisdiction (2009).
6. Ronald S. Lauder v. Czech Republic UNCITRAL Award (2001).
7. Ioan Micula v. Romania ICSID Case No. ARB/05/20, Decision on Jurisdiction (2008).

to provide reasons.[8] This suggests that human rights are backroom players which serve as a support system for all the main players in the conflict.

Given the pervasiveness of human rights, ignoring the actual and essential interplay between human rights and investment law, would be a flagrant denial. It is important to note that the extent to which questions of human rights may be examined in the respective arbitration is determined by the jurisdiction clause's language, the relevant legislation so construed or the specific treaty interpretation method employed after the same is construed vide party autonomy or the closest connection test.[9] However, broad methods may be deduced,such as - affinity and denial. When the tribunal takes an affinitive approach, it recognises the importance of human rights and may even use them as a criterion for evaluation. One such example is of the Tribunal in Phoenix Action v. Czech.[10] In this case, it had been observed that the safeguards provided by International Centre for Settlement of Investment Disputes (ICSID) cannot be applied in instances where the investment has resulted in a contravention of human rights of another party.

The Tribunal observed that ICSID safeguards cannot be extended to investments committed in violation of the most basic human rights principles such as investments intended to support torture or genocide.

Despite the presence of a broadly worded jurisdiction provision in Pezold v. Republic of Zimbabwe,[11] the Tribunal refused to consider indigenous rights and concluded that Bilateral Investment Treaties (BITs) do not integrate the universe of international law into issues arising under BITs.[12] The proportionality concept was likewise rejected by the judges. Such categorical denials are difficult, particularly where there are regulatory conflicts such as when the State is faced with duties under the BIT and human rights commitments on opposing fronts. The case of Santa Elena

8. Tulip Real Estate v. Republic of Turkey ICSID Case No. ARB/11/28, Decision on Annulment (2015).
9. Ursula Kriebaum, *Human Rights and International Investment Arbitration* in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (OUP 2020).
10. Phoenix Action Ltd. v. Czech Republic ICSID Case No. ARB/06/5, Award (2009).
11. Pezold v. Republic of Zimbabwe ICSID Case No. ARB/10/15 (2012).
12. Pezold v. Republic of Zimbabwe ICSID Case No. ARB/10/15 (2012).

v. Costa Rica[13] is an example of regulatory conflict and denial. It is worth citing the Tribunal's remark:

> *"Expropriatory environmental measures, no matter how laudable and beneficial to society as a whole, are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, whether for domestic or international environmental purposes, the state's obligation to pay compensation remains."*

A. Who are the concerned players?

The contradictory judgments add to the ambiguity. Additionally, due to the absence of existence of a doctrine of precedence, it is now up to the discretion of the Tribunal to pick from a variety of options. It is confusing those tribunals which have the authority to touch upon human rights for them to be analysed, usually go into a mode of denial when direct conflicts are concerned. This is indubitably one of the most problematic factors contributing to the current legitimacy crisis.

1. *Tribunals*

The Tribunal typically has three alternatives in such regulatory issues:

- Sole Effect Doctrine:[14] The purpose of the rule is irrelevant, and the state is responsible if the investment is harmed.
- Santa Elena Police Power Doctrine:[15] This rule follows due process that is not considered to be expropriatory in nature. It can be thought of as a norm that does not discriminate and exists for the benefit of the public at large.
- Balancing:[16] In order to reach the conclusion of whether a rule shall be considered expropriatory or not, there must be an examination of whether the method employed is proportionate to the supposed public interest and the legal cover afforded to the investor's investments.

13. Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica Case No. ARB/96/1 (2000).
14. Methanex Corpn. v. United States 44 ILM 1345, Final Award on Jurisdiction and Merits (2005).
15. Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica ICSID Case No. ARB/96/1 (2000).
16. Técnicas Medioambientales Tecmed SA v. United Mexican States ICSID Case No. ARB (AF)/00/2 (2003).

The former two theories can be found at diametrical parts of the spectrum. Adopting the single impact theory would provide investors with blanket protection, while the police power concept would provide the government with unrestricted authority. The proportionality concept, is in many ways similar to the golden rule of meanlaid down by Aristotle, and can be considered to be a feasible option for balancing conflicting interests; nevertheless, it must be implemented properly and with appropriate respect to governmental acts.

Institutional systems, on the other hand, have rules with respect to admission. A case must, in particular, fall within the jurisdiction of the arbitral tribunal, which is stated in the system's founding document. The ICSID Convention contains regulations on claim admission, which might be considered the cornerstone of this dispute-resolution mechanism. The provisions have evolved into a complex and technical body of procedural law as a result of the interpretative jurisprudence of successive ICSID Tribunals, though it should be noted that each Tribunal is free to interpret the Convention as it sees fit because the ICSID Convention lacks a doctrine of precedent.

The *Plama* case[17] is an apt example of these ideas. "*This does not mean, however, that the protections provided for by the Energy Charter Treaty cover all kinds of investments, including those contrary to domestic or international law*," it said after noting that the Energy Charter Treaty (ECT) did not contain a provision requiring the conformity of the Investment with a particular law. The tribunal determined that the substantive safeguards of the ECT cannot apply to investments made contrary to law based on the Chairman's comments during the ECT adoption session in 1994 and the introduction note to the ECT.

2. *Parties*

The irony is that the nations that complain about wide investment safeguards are the ones that draft broad and ambiguous BITs.[18] It is important to note that international law, as a discipline, has not yet reached a stage where associated human rights can be imposed as legally binding obligations

17. Plama Consortium Ltd. v. Republic of Bulgaria ICSID Case No. ARB/03/24 (2008).
18. UNCHR, Sixty-second session, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* (22 February 2006) UN Doc E/CN.4/2006/97, p. 64.

upon companies.[19] Non-binding soft law instruments typically regulate such duties and businesses that comply with them do so voluntarily.[20] Despite international human rights treaties mandating State's governments to act in compliance with their obligation to conduct due diligence in an effort to prevent companies from indulging in violation of human rights, such host nations are not only apathetic to implementing this obligation but are often even observed to be complicit in breach of those rights.[21] In the face of such disregard from the host nations, one method that may prove effective is to employ treaties as the means to impose direct human rights responsibilities on investors. In their current form, BITs are mostly quiet and ambiguous on human rights concerns, necessitating a paradigm change.[22] Another route that States' government can take is by regulating and punishing non-state actors whose conduct is found to be in violation human rights on their territory or in areas under their authority via law and administrative procedures.[23] In fact, there has been extensive discussion on how national courts must examine the concept of 'clean hands' and dismiss investor claims in case the investors' claims have been 'dirtied' by human rights violations.[24] The notion of 'clean hands' in several BITs is brought into effect through the insertion of a clause that bestows protection upon only those investments that have been made "in compliance with the law".

Several tribunals in investor-state arbitrations have, over the years, employed the 'clean hands' theory to evaluate admissibility/jurisdictional issues to some extent. Notably, when furnished with claims pertaining to the criminal behaviour of an investor, like misrepresentations, fraud, or bribery/corruption, etc., ICSID tribunals have found that in several instances that they either do not have the jurisdiction or that the claim itself is inadmissible.

19. Patrick Dumberry and Gabrielle Dumas-Aubin, *When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration* (2012) JWIT 13 citing Luke E. Peterson and Kevin Gray (Working Paper for the Swiss Ministry for Foreign Affairs, April 2003).
20. *Ibid* (citing Janusz Symonides, *Human Rights: Concept and Standards* (Routledge 2000)).
21. Interim Report (n 18) p. 65.
22. Dumberry (n 19).
23. Robert McCorquodale and Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law* (2007) Mod Law Rev 70(4).
24. Gustav F.W. Hamester GmbH & C.o KG v. Republic of Ghana ICSID Case No. ARB/07/24, Award (June 18, 2010) para 125.

B. Tribunals circumventing questions of human rights

States often rely on various practices and tricks in order to somehow gain benefit from international obligations and commitments concerning human rights. Out of these, one that is frequently employed is them stating that the obligations that are due to foreign investors are "*necessarily moulded and shaped through the prism of human rights*."[25] What naturally follows from this is the conclusion that there exist several situations wherein the dual sets of obligations, namely the ones under the human rights law and secondly, the ones that arise from the investment treaty law, inevitably reach a standpoint where they are in friction. Therefore, the tribunals are faced with the inescapable issue of which of these two is to precede over the other. If one studies the way in which they have dealt with it in the past, it can be observed that most tribunals have found this issue to be beyond their potential and ability, and thus, have tried to circumvent it altogether. The methods for such circumvention have been observed to be neither cogent nor consistent in the legal sense. The same has been well demonstrated through the cases of the early millennium based in Argentina. For instance, in SAUR v. Republic of Argentina[26] and EDF v. Argentina,[27] the Respondent claimed that investment treaty commitments did not supersede its duty to protect its people's human rights. Furthermore, it was also contended by them that when rights find protection under treaties concerning the international human rights of parties, such should be considered "inherently *jus cogens*." This spate of instance is where the habit of avoiding such arguments began.

The panel in Azurix v. Argentina[28] had put forth its conclusion that it failed to find reason in the argument that human rights and investment treaty rules could be contradictory. In its responses to this instance, as well as Siemens v. Argentina[29] and Vivendi II,[30] the Tribunal used similar reasoning. For instance, the Tribunal had overlooked the human rights concerns and stated that they did not need to be resolved for the Tribunal's reasoning

25. Sayantan Chanda, *Human Rights and Investment Law: The Way Forward* ICAR (20 July 2020) https://investmentandcommercialarbitrationreview.com/2020/07/human-rights-and-investment-law-the-way-forward/ accessed 28 October 2021.
26. SAUR International SA v. Republic of Argentina ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (6 June 2012) para 328.
27. EDF International SA v. Argentina ICSID Case No. ARB/03/23, Award (11 June 2012) para 192.
28. Azurix v. Argentina ICSID Case No. ARB/01/12, Award (14 July 2006) para 261.
29. Glamis Gold Ltd. v. United States UNCITRAL, Award (8 June 2009).
30. Compania de Aguas del Aconquija SA v. Argentina ICSID Case No. ARB/97/3, Annulment Decision (19 August 2010) para 57.

to be upheld in the case of Glammis Gold v. United States[31] Furthermore, the Tribunal has also determined that when disputed investment has an effect and impact on the rights of indigenous people, the same shall be considered beyond the scope of the case. The same was held in the case of Border Timbers v. Zimbabwe.[32] In all these cases, it can be seen that a practice of evasion of addressing the human rights obligations by Tribunals started. While *Azurix* and *Siemens* reasoned that investment treaty rules and human rights were not contradictory in nature and hence there was no dispute, in *Glammis,* it was reasoned the judgment could be given and upheld without consideration the human rights issues involved. While in *Border timbers*, the courts simply refused their jurisdiction to rule over human rights disputes.

1. *Aligning substantive questions of investment and human rights*

Interpretation of the two relevant domains of international law in harmony serves to provide as a viable solution to tackle the evasiveness.[33] The Vienna Convention on the Law of Treaties (VCLT) provides legal support for this approach in Article 31(3)(c).[34] The International Law Commission has maintained for long that fragmentation of the various regimes within international law must be discouraged while the wholeness of the same as a single system must be upheld.[35] However, it is pertinent to take note of the difficulties that surface in effect as a result of the discouragement of such fragmentation when there arises a conflict between investment treaty law and human rights law.

The Tribunal in SAUR[36] noted that the sets of obligations that investment treaty law and human rights law gave rise to were not compatible and hence, could not function at a similar level. Nevertheless, the Tribunal attempted to reconcile and interpret the relevant documents harmoniously by determining that it is in accordance with the right of an investor under

31. Glamis Gold Ltd. v. United States UNCITRAL, Award (8 June 2009) para 8.
32. Border Timbers Ltd. v. Zimbabwe Procedural Order No. 2, ICSID Case No. ARB/10/25 (26 June 2012) para 58.
33. Rainer Hoffman and Christian Tams (ed), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011).
34. D. Rosentreter, *Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the Principle of Systemic Integration in International Investment Law and Arbitration* (Nomos 2015).
35. Martti Koskenniemi and Paivi Leino, *Fragmentation of International Law? Postmodern Anxieties* (2002) 15 Leiden J Int'l L 553.
36. SAUR International SA v. Republic of Argentina ICSID Case No. ARB/04/4.

the investment treaty that the duty upon Argentina to protect human rights is bestowed.

Notably, this is the most usual conclusion reached upon by Tribunals when attempting to interpret rights, emanating from the seemingly conflicting areas of law, in a harmonious manner.[37] Due to the adoption of this means of evaluation, the tribunals have reached the conclusion that there exists an exception or caveat to rights of investors, namely, the human rights obligations and responsibilities of the Government. In essence, rather than the other way around, this enables interpretation of the overall legal framework of investment treaties in consonance with the human rights legislations. However, several investing States are of the opinion that the method, i.e. defining investor rights as human rights, should be done to ensure a recognized and known basis to adjudicate on questions of investor rights.[38] This is probably unavoidable and reasonable, given the Tribunal's competence in investment treaty law rather than human rights law. In any case, the Tribunal's scope and purpose is to interpret and enforce the former rather than attempt to reconcile it with human rights obligations.[39] This further reinforces the idea that while the Tribunal may have the resources at its disposal to attempt harmonising the parties' rights and obligations under the concerned law, the diversion in this approach from evasion tactic discussed earlier arises in terms of the acknowledgement of subversion of human rights law to investment treaty law in such matters, as opposed to skirting around it as those Tribunals do that attempt to avoid the inevitable dilemma.

3. HAGUE RULES

The Hague Rules were enacted in December, 2019 in order to overcome legal and practical barriers encountered while when bringing business and human rights (BHR) disputes via the existing dispute resolution mechanisms, particularly national courts. Barriers to resolve transnational adverse BHR-related disputes in national courts include: (a) the risk that the

37. Suez Sociedad General de Aguas de Barcelona SA v. Argentina ICSID Case No. ARB/03/19, Decision on Liability (30 July 2010), paras 260, 262; CMS Gas Transmission Co. v. Argentina ICSID Case No. ARB/01/8, Award (12 May 2005), para 121.
38. Luke Eric Peterson (n 2).
39. Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic ICSID, Case No. ARB/07/26, Award, (8 December 2016), para 1143ff; Marfin Investment Group Holdings SA v. Republic of Cyprus ICSID Case No. ARB/13/27, Award (26 July 2018), para 827.

competent national court may be unable to deal with those complex BHR-related cases; (b) the risk that the parent company of an entity responsible for an infringement on human rights may be insulated from liability for the actions of its subsidiaries abroad because of jurisdictional barriers or legal principles; and (c) the overwhelming costs of litigation, etc. That apart, the claims relating to human rights have been raised in numerous investor-state disputes.

The objective of the Hague Rules is to further the cause of United Nations Guiding Principles on Business and Human Rights ("UPGP"), which seeks to secure access to remedy against business-related human rights violations. The rationale is that intersections of commercial and human rights' issues should be understood at least as broadly as the meaning such terms have under the UN Guiding Principles on Business and Human Rights. The traditional judicial system has its own disadvantages, such as delay and procedural complexity, which are the primary reasons or rational for extending the arbitration mechanism for its adjudication.

The Hague Rules establish a series of procedures for resolving disputes about the impact of commercial operations on human rights. The Hague Rules are based on the United Nations Commission on International Trade Law's ("UNCITRAL Rules") Arbitration Rules with changes to handle particular difficulties that are expected to occur in commercial and human rights conflicts. The breadth and range of the Hague Rules are not restricted by the kind of party (claimant or respondent) or the subject-matter of the dispute, as is the case with the UNCITRAL Rules. The Hague Rules apply to any issues that the parties to an arbitration agreement have decided to settle by arbitration under the Hague Rules. Business entities, people, labour unions and groups, States, State entities, international organisations and civil society organisations, as well as any other parties of any sort, might all be considered such parties. The Hague Rules purposely do not define the phrases 'business', 'human rights', or 'business and human rights', which is intriguing.

The Working Group on the Hague Rules highlighted that usually the jurisdictions having corrupt administrative and judicial mechanisms experience instances of grave human rights violations.[40] Due to the

40. Cleary Gottlieb, *The Launch of the Hague Rules on Business and Human Rights Arbitration* (Alert Memorandum, 29 January 2020) https://www.clearygottlieb.com/-/media/files/alert-memos-2020/the-launch-of-the-hague-rules-on-business-and-human-rights-arbitration.pdf accessed 30 October 2021.

politically influenced judiciary and inordinate delays, among other factors, there is a denial of justice.[41] Therefore, the Rules aim to extend the benefits of arbitration to the disputes related to human rights violations especially in states where there is rampant corruption and the national courts fail to provide an effective remedy. They aim to protect and uphold the rights of the victims of business-related human rights abuses while safeguarding them against the domestic encumbrances.[42]

A. Certain relevant provisions of the Hague Rules

Article 1(2) of the Rules provides that the disputes submitted to arbitration under these Rules shall be deemed to have arisen from a commercial relationship between the parties. This is for the purposes of Article 1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This deeming provision is added to opt into the New York Convention and to waiver of potential defences to its application.

Article 1(6) shows the importance of collaborative settlement mechanism with respect to business and human right disputes as they encourage parties to endeavour to resolve any dispute in good faith through negotiation, conciliation, mediation, facilitation, or other collaborative settlement mechanisms, at any time including after arbitration proceedings have been commenced.

In order to avoid any conflict of interest whose nationals are parties or of any State that is a party to the dispute, Article 11(1)(d) of the Rules specify that the presiding or sole arbitrator cannot be a national of States.

Article 26 provides for an expedited procedure. The ICSID Convention Arbitration Rules, the SCC Arbitration Rules, the SIAC Arbitration Rules and the HKIAC Administered Arbitration Rules all have comparable provisions. This provision would be a useful tool for dealing with baseless allegations made in order to frighten the other party or damage their reputation.

41. Shavana Haythornthwaite, *The Hague Rules on Business and Human Rights Arbitration: Noteworthy or Not Worthy for Victims of Human Rights Violations?* (Kluwer Arbitration Blog, 5 May 2021) http://arbitrationblog.kluwerarbitration.com/2020/05/05/the-hague-rules-on-business-and-human-rightsarbitration-noteworthy-or-not-worthy-for-victims-of-human-rights-violations/ accessed 29 October 2021.
42. Vidyarthi (n 4).

Since the public interests are involved in the business- human rights disputes, under Rule 38, the Tribunals can allow disclosure of information to the public. The tribunal has to consider public interests, confidentiality concerns of the parties, and the potential for aggravating conflicts amongst the relevant stakeholders.

Article 45 of the Hague Rules mandates the award to be in writing. The Tribunal must clarify the grounds for its decision and ensure that the award is in accordance with human rights. This implies that the award must be consistent with the internationally recognized standards of international human rights. Furthermore, this also indicates that the award must comply with globally recognised human rights as well as public policy standards under the law of the seat and likely sites of enforcement.

As a result, the Hague Rules should be applauded for their goal of correcting human rights transgressions. While the Rules are universal, they do allow parties to change or opt out of some elements that may or may not be relevant to the requirements of disputants. The Rules are built on the principle of consent but they do not address the enforcement of arbitral rulings.

In some circumstances, undemocratic, underequipped, and politically motivated legal institutions that limit access to redress pose a significant barrier. It is also unclear how the Rules will work with concepts like *forum non conveniens*, certain sorts of business structures and contractual rules like statutes of limitation which frequently impede remedial actions. Given that the Rules are founded on consent, it is also difficult to explain why corporations would agree to arbitrate here, despite the aforementioned principles of *forum non conveniens*.

4. INDIAN POSITION

The issue of enforcement of an arbitral award touching the aspect of human rights has to pass the test of domestic legislation. The (Indian) Arbitration and Conciliation Act, 1996 acknowledges that *"certain disputes may not be submitted to arbitration"*[43] and mandates that an arbitral award shall be set aside if "*the subject-matter of the dispute is not capable of settlement by arbitration under the law*".[44] If the subject matter is not arbitrable, the Tribunal shall not have jurisdiction to adjudicate the same.

43. Arbitration and Conciliation Act, 1996 s. 2(3).
44. Arbitration and Conciliation Act, 1996 s. 34(2)(b) and 48(2).

Evidently, the legislature has not specifically enumerated the categories of non-arbitrable disputes in the Act, leaving the question for judicial interpretation. There are handful of judgments which deal with the issue of arbitrability.

The Supreme Court of India in Booz Allen and Hamilton Inc v. SBI Home Finance Ltd.,[45] enunciated the 'nature of rights test' declaring the following two categories of disputes as non-arbitrable. First, disputes which are reserved by the lawmakers to be determined exclusively by public fora; and second, disputes which, by necessary implication, stand excluded from adjudication by an arbitration tribunal and as such tribunal lacks the authority to provide an effective remedy. The latter category covered disputes relating to actions *in rem* which determined legal obligations of an individual/party with the world at large and were therefore *'unsuited for arbitrations'* and could only be adjudicated by courts or public tribunals.

The court clarified that actions *in personam* describe the actions that determine the rights and interests of the parties themselves in the subject matter of the case. On the other hand, actions *in rem* reflect actions that determine the parties' title to the property and their rights therein, and does not solely refer to actions among themselves but also against all persons that may at any time claim an interest in the concernedproperty.[46] Notably, actions *in rem* also have an *ergaomnes* effect.

In the end, the Court decided that rights *in rem* could not be arbitrated. However, it did clarify that this is not an inflexible rule, and that subordinate rights *in personam* arising from broader *in rem* rights are nevertheless arbitrable. Therefore, if there exists a right to damages for personal injury in a criminal case, the dispute might then be referred for resolution to the process of arbitration. Conversely, a married couple who wishes to separate may resort to arbitration to sketch out the terms on which their separation

45. Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. (2011) 5 SCC 532 : AIR 2011 SC 2507.

46. It was held that "37. *It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property.*"

shall take place because such an agreement only governs their personal obligations.

In Vidya Drolia v. Durga Trading Corpn.,[47] the Supreme Court noted that a positive finding with respect to any of the following determinations would render the dispute non-arbitrable:

(i) *"when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem;*

(ii) *when cause of action and subject matter of the dispute affects third party rights; have ergaomnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;*

(iii) *when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and*

(iv) *when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s)."*

For maintaining objectivity and predictability in the arbitration procedure and developing a cogent understanding of the contours of human rights in India, it is important to identify three broad categories of human rights enforceable in India. *First*, human rights relating to life, liberty, equality, and dignity of the individual, which have been guaranteed by the Indian Constitution; *second*, human rights with respect to the environment emanating from the Environment Protection Act, 1986 and other allied enactments; and *third*, rights with respect to employment recognized under Indian labour law enactments.

It may be noted at the outset that a plethora of human rights such as the right to free speech, freedom of religion, etc. have been accommodated under the Constitutional mechanism and are desirably in the exclusive domain of public courts. Therefore, it is important to examine and explore the possibility of arbitration in India in only the latter two categories through the application of the tests enunciated by the Indian courts in *Booz Allen* and *Vidya Drolia* to determine the arbitrability of disputes and analyzing the impact of contemporary global developments on human rights arbitration. Certain other human rights such as the employee's right to compensation

47. Vidya Drolia v. Durga Trading Corpn. (2021) 2 SCC 1 : 2020 SCC OnLine SC 1018.

against environmental decay or accidents due to unsafe working conditions should be arbitrable in light of the speedy and confidential nature of the arbitral mechanisms.

The position on arbitrability of labour disputes in India has been explored by the High Court of Bombay in Kingfisher Airlines Ltd. v. Prithvi Malhotra[48] wherein labour disputes were held to be non-arbitrable under the Arbitration and Conciliation Act, 1996. The High Court reasoned that the overall objective and scheme of resolution of labour disputes under the Industrial Disputes Act, 1947 clearly indicate that such disputes were non-arbitrable and public policy warranted that they were reserved exclusively for judicial fora.

However, arbitrations can still be commenced in circumstances where there are subordinate rights emanating from *in rem* labour law actions. Consider a scenario where a supplier-retailer contract provides that an affirmative finding regarding violation of human rights by a party shall lead to immediate termination of the contract and questions of human rights violation will be determined by arbitration. In such a situation, if the retailer seeks to terminate the contract citing human rights violation by the supplier (such as forced labour or unsafe working conditions for employees), it will have to commence arbitration in pursuance of the supplier-retailer contract. Such arbitration will not be barred by the *Booz Allen Test* since the court, in that case, has unequivocally affirmed the arbitrability of subordinate rights *in personam*, emanating from the broader *in rem* rights. Termination of the supplier-retailer contract will qualify as a subordinate right *in personam* emanating from the broader *in rem* human rights and would therefore be arbitrable.

The aforementioned hypothetical scenario, however, does not touch upon the possibility of a private compensatory remedy in human rights disputes for the actual aggrieved party. It only addresses the question of arbitrations commenced by parties having subordinate rights (termination of the contract in that case) emanating from the broader human rights violation. Effectively, labour law disputes are non-arbitrable in light of the *in rem* principle in India and an individual/labour union has to approach the competent authority under the scheme of the relevant legislations for redressal of grievances and availing compensations.

48. Kingfisher Airlines Ltd. v. Prithvi Malhotra 2012 SCC OnLine Bom 1704.

It is important to highlight that Bangladesh's Accord on Fire and Building Safety in Bangladesh (the Accord) is one such multilateral agreement between various corporations, trade unions, and non-governmental organizations which aims at the protection of human rights for the textile industry workers in Bangladesh. The consent to arbitrate disputes arising out of the Accord is contained in Clause 5 and the Accord has witnessed two arbitrations regarding human rights violations against global fashion brands till date. Such an arrangement offers advantages to both parties in so far as confidentiality in arbitration mechanisms protects the reputation of business corporations and also provides a cheap and quick remedy for the aggrieved individuals.

5. CONCLUSION

The Hague Rules strive to achieve another milestone in providing a quick and affordable adjudication of human rights violations which has the potential of changing the global arbitration landscape. Rather than international law, investment arbitration is frequently connected with commercial arbitration. As a result, the techniques are more commercial in character than public. The stakes, however, are far higher in this situation, with critical policy problems like public health, the environment and water on the line. Human rights violations are unavoidable in investor-state disputes. As a result, in cases wherein the investment has been affected due to the occurrence of a violation of human rights, the same shall then become a conflict concerning investment and the same shall then be arbitrable. Governments must uphold both treaty safeguards and human rights responsibilities because the hierarchy of the concept of superiority between investment treaties and human rights has not found acknowledgement under the international laws.

As a result, BITs must be interpreted consistently.

India should not shy away from bringing necessary policy changes to allow resolution of human rights disputes through arbitration. The *in-rem* principle that in the *Booz Allen* case was enunciated by the court may be diluted to accommodate a parallel compensatory mechanism for any damages attributable to the actions of a corporate entity. Apprehensions regarding abuse of arbitral processes in such human rights disputes, especially coercion and lack of independence of arbitrators due to the uneven financial standing of aggrieved individuals vis-à-vis corporate giants, can be withered away by accommodating for post-dispute arbitral agreements in the Indian statutory scheme, effectively ensuring that an individual has the choice to opt for arbitration after the occurrence of the

dispute, thus not caging him in the confines of unfair arbitration clauses and trusting him to make an informed and conscious choice in light of his interests involved. The Hague Rules, 2019 open up a new paradigm in international arbitration and it will be interesting to witness the approach of the Indian policy makers in adapting to a rapidly changing global arbitration landscape.

FORM IV

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