The National Law Institute University
Kerwa Dam Road, Bhopal, India -462044

VOLUME VII
Indian Arbitration Law Review
2025

IALR
Indian Arbitration Law Review

VOLUME VII MARCH 2025

INDIAN ARBITRATION LAW REVIEW

Volume VII | 2025

March 2025

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

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

The Journal invites submissions of scholarly, original and unpublished written works from persons across the legal profession – students, academicians and practitioners.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

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

Published by:

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

Distributed exclusively by:

Eastern Book Company
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FOREWORD

*— Justice Rajiv Shakdher**

I am told that this is the VII edition of the Indian Arbitration Law Review ("**IALR**") publication. In taking out this and earlier publications, National Law Institute University, Bhopal ("**NLIU**") has done yeoman service to the cause of capacity building in the field of alternate dispute resolution amongst those who are concerned with quick resolution of disputes, albeit, at affordable cost.

It needs to be understood that in taking out such publications, year-on-year, NLIU has provided *inter alia* space to students, and young practitioners, to read, absorb, and contribute to the rapidly developing landscape of arbitration law.

For arbitration to gain traction in India, it is imperative that we have practitioners, as well as adjudicators, who are conversant with both domestic and international precedents, laws and regulations.

India can become an attractive destination for adjudication of international commercial disputes, if publications such as these are put in public realm as they provide the requisite platform for critiquing legislation enacted, judgements and awards rendered on the subject arbitration.

IALR provides such a space. The myriad articles that IALR has carried since February 2019, when it published its first edition, shows its commitment to raise a red flag, to caution, and make constructive suggestions whenever necessary.

The recent analysis conducted by members of Centre for Parliamentary Studies (an adjunct of NLIU) and IALR concerning the press release dated October 18, 2024, issued by the Government of India concerning the changes it proposes to the Arbitration and Conciliation Act, 1996 is a case in point.

* Justice Shakdher is a former Chief Justice of the High Court of Himachal Pradesh and former Judge of the High Court of Delhi.

Likewise, articles on topics suggesting that it is time to de-couple domestic public policy from international public policy while dealing with recognition, and enforcement of foreign awards, the discussion on blockchain based arbitrations, the interplay between the Micro, Small and Medium Enterprises Development Act, 2006, and the Arbitration and Conciliation Act, 1996, and the issues which it has thrown up, and the retrograde step that has been taken with the issuance of "Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement" which seeks to put breaks on resolution of disputes via arbitral tribunals offer insight into problems which bedevil the practitioners and adjudicators.

Having been on the bench for more than sixteen (16) and a half year, and practice at the bar of nearly two (2) decades, I can say with certainty that publications such IALR receive due weight and attention of policy makers, law commission, and law makers. It helps the executive of the day to keep itself abreast of the gaps and lacunas in the legal framework when applied to live situations.

NLIU's perseverance, dedication, and contribution to alternate dispute resolution is commendable. The contributors and the editorial team have put out, once again, an engaging edition which, I am sure, would be of great interest to its readers.

I wish the IALR team the very best in its future endeavors.

PATRON'S NOTE

—Prashant Mishra

As I reflect on the journey of the Indian Arbitration Law Review (IALR), I am filled with immense pride and gratitude. Since its inception, IALR has served as a beacon for critical engagement with arbitration law, fostering meaningful discourse on both domestic and international developments. With each successive volume, it has strengthened its role as a vital platform for scholarly debate, offering fresh perspectives on the evolving landscape of arbitration.

Volume VII stands as a testament to the editorial team's dedication, rigour, and unwavering commitment to excellence. Arbitration, as a dynamic field, is deeply intertwined with the broader legal framework, particularly constitutional principles of justice, fairness, and efficiency. The contributions in this volume reflect this intricate relationship, offering insightful analyses on contemporary challenges such as judicial intervention, institutional arbitration, and recent legislative reforms. The discussion in these articles aligns with the reforms under the 2024 Draft Bill which introduce stricter timelines and enhance institutional arbitration, seek to align India's arbitration framework with international best practices while upholding the constitutional mandate for speedy and effective dispute resolution.

Beyond academic discourse, IALR has actively contributed to the practical engagement of students and professionals with arbitration law. This year marked a significant milestone with the successful organisation of the 1st NLIU-IALR Arbitral Award Drafting and Presentation Competition, held in collaboration with the Singapore International Arbitration Centre and Shardul Amarchand Mangaldas. This flagship event provided a platform for participants to hone their advocacy and drafting skills, reinforcing IALR's commitment to bridging the gap between theoretical study and real-world arbitration practice.

I extend my heartfelt congratulations to the entire team behind this remarkable achievement. Special recognition is due to Harshali, Shvena, Akhila, Adira, and Divyank, whose leadership and vision have been instrumental in shaping this volume. Their dedication, along with the unwavering support of our esteemed Advisory Board and Peer Review Board, ensures that IALR continues to set high standards for arbitration scholarship.

As a Patron of IALR, I remain committed to its mission of advancing academic excellence in arbitration law. I am confident that this volume will serve as a valuable resource for practitioners, scholars, and students alike, inspiring further engagement with the complexities of arbitration in India and beyond.

My best wishes to the contributors, editors, and management team for their continued success in the years to come.

EDITORIAL NOTE

—Harshali Sulebhavikar & Shvena Neendoor

With the Indian Arbitration Law Review (IALR) completing its seventh successful year of publication, we take a moment to reflect on our journey of fostering scholarly discourse in arbitration law in India. Established to provide a platform for students, practitioners, and academicians to engage with critical issues in this evolving domain, IALR has gained a prominent place in the arbitration community by consistently addressing contemporary and pertinent arbitration matters.

This volume represents our unwavering commitment to excellence, building upon the foundation laid by our predecessors and guided by the esteemed members of our Board of Advisors. The support of the illustrious Board of Advisors has been crucial in shaping the editorial standards at IALR. We sincerely appreciate the contributions of Mr. Udyan Arya Srivastava, Mr. Prabal De, Mr. Pranjal Agarwal, Mr. Syamantak Sen, Ms. Aadya Bansal, and Mr. Siddharth Sisodia, the Editors-in-Chief of previous volumes, along with their colleagues, whose dedication has played a pivotal role in the Journal's continuous growth and success. We also extend our heartfelt gratitude to Mr. Prashant Mishra, our Patron, who has been the backbone of IALR.

We are honoured to have Justice Rajiv Shakdher author the Foreword for this volume. With an illustrious career that includes serving as a Judge of the Delhi High Court and the Chief Justice of the Himachal Pradesh High Court, his profound insights into the legal landscape have added immense value to this publication. We are deeply grateful for his gracious contribution.

Arbitration has established itself as the mainspring in commercial dispute resolution, committed to core tenets such as party autonomy, efficiency, transparency, and effective resolution. Recent amendments to the Singapore International Arbitration Centre Rules (**'*SIAC Rules*'**) and the proposed amendments to the Arbitration and Conciliation Act, 1996

reflect dynamism of the field. This volume presents a diverse collection of articles, case comments, and analyses that mirror contemporary arbitration law's vibrancy. From critical assessments of statutory reforms to discussions on emerging challenges such as third-party funding, assignment of arbitration agreements, and the enforcement of foreign awards, the contributions in this edition provide valuable insights for practitioners, academics, and policymakers alike.

The article *'Assignment of Arbitration Agreement: Making a Case for Automatic Transfer Approach in India'* advocates for the automatic transfer approach in the assignment of arbitration agreement. Through doctrinal and cross-jurisdictional analysis, it argues for a restrictive autonomy of arbitration clauses and concludes that such clauses should transfer seamlessly with contractual rights and obligations. The subsequent article '*Third-Party Funding Codification Imperative: Augmenting Equitability in Indian Domestic Arbitration'* emphasises the need for a codified framework for Third-Party Funding in Indian domestic arbitration, proposing a *light touch* approach to balance non-disclosure necessities with transparency needs. Furthermore, *'One Step Forward, Two Steps Back: State of Arbitration in India'* critically examines the implications of the Ministry of Finance's recent guidelines on arbitration in government contracts, highlighting their potential to undermine India's arbitration-friendly stance.

The commercial world's landscape is rapidly changing, with Artificial Intelligence (AI) reshaping social and economic dynamics. The push to include technology to transform dispute resolution has been a longstanding conversation, particularly in arbitration, where efficiency is paramount. In the same beat, the authors of *'When Codes Meet Courtrooms – Examining the Enforceability of Blockchain Based Arbitral Awards Under The New York Convention and Indian Law'* acknowledge the evolving phenomenon of block-chain based dispute resolution mechanisms and address the loopholes in the current system to ensure proper recognition of such awards in the spirit of party autonomy.

As India continues to traverse the path of becoming a global hub of arbitration through legislative, judicial and institutional developments, evaluating its synergy with the global framework is crucial. The article '*National or International Public Policy: The Perfect Fit for International Arbitration in India? - Drawing Inspiration from The French Approach'* analyses the 'public policy of India' exception in arbitration law, advocating for a shift towards 'international public policy' in line with the French approach to enhance India's attractiveness as an arbitration hub. Additionally, the authors of *'International Arbitration: The Remedy to Cross-Border Insolvency's Enforcement Woes in A Post-Model Law World'* explore the limitations of the UNCITRAL Model Law on cross-border insolvency enforcement and propose international arbitration under the New York Convention as a viable alternative. They argue that the Model Law is plagued with ambiguities which affects its efficacy, in contrast to the New York Convention which has a proven-record of enforceability.

On the judicial front, the Supreme Court and the High Court have continued to grapple with questions of arbitration law. The courts have attempted to step in to ensure that the Indian law continues to bolster efficient dispute resolution, as seen in the judgments of *Cox and Kings Ltd v SAP India (P) Ltd* and *Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899, In re*. This Volume features analytical expositions of both decided and pending questions. The article *'Reaffirming the Group of Companies Doctrine in Indian Arbitration: A Comprehensive Analysis of the Cox and Kings Judgment'* provides a thorough analysis of the Supreme Court's judgment in reaffirming the Group of Companies Doctrine in Indian arbitration, exploring its implications for non-signatories and its role in harmonising Indian arbitration with global standards. The authors of *'When Laws Collide: Resolving MSME Act — Arbitration Act Disputes in India'* highlight legal ambiguities arising from overlapping dispute resolution mechanisms in the two acts, arguing for refining the MSME Act's dispute resolution framework rather than overhauling it entirely. They highlight that the recent Supreme Court referral in *NBCC (India) Ltd v State of W.B.* to a larger bench underscores the need for judicial

clarity on key aspects of the MSME Act, including the scope of Section 18 and the registration requirement under Section 8. The forthcoming ruling is expected to shape the legal landscape for MSME dispute resolution in India.

Further, the article *'Permitting Modification of Arbitral Awards to Expedite the Delayed Disposal of S. 34 Challenges – A Case for Recalibrating the Lakshman Rekha'* critically assesses the judicial approach to Section 34 of the Arbitration and Conciliation Act, analysing whether modification of arbitral awards should be permitted to enhance efficiency in dispute resolution. This discussion gains significance in light of the Supreme Court's referral of the issue to a larger bench and the Viswanathan Committee's recommendations for legislative amendments.

The past year has been one of new beginnings and landmark achievements for IALR. In collaboration with the NLIU Centre for Parliament Studies, IALR submitted comments on the *2024 Draft Arbitration Amendment Bill*, reinforcing its commitment to policy engagement. Marking another milestone, IALR organised the 1st NLIU-IALR Arbitral Award Drafting and Presentation Competition, in collaboration with the Singapore International Arbitration Centre (SIAC) and Shardul Amarchand Mangaldas (SAM). Held on February 1-2, 2025, at the National Law Institute University, Bhopal, the event aimed to foster practical advocacy and decision-making skills among participants. Furthering our goal of policy engagement, the competition featured a distinguished panel discussion on 'Navigating Emergency Arbitrations: Insights from India and SIAC,' with insights from Mr. Vakhtangi Giorgadze (Deputy Counsel, SIAC), Mr. Vaijayant Paliwal (Partner, SAM), and Mr. Prashant Mishra (Arbitration Practitioner & Patron, IALR).

This volume features a special article on the issue of Emergency Arbitration from the winner of the competition. In *'Protective Preliminary Orders Under the 2025 SIAC Rules: Analysing Enforceability in Indian Courts',* Mr. Kanishk Srinivas evaluates the mechanism of Protective Preliminary Orders (PPOs) introduced in the new SIAC Rules. Addressing concerns relating to consent and procedural fairness, the article argues that PPOs

could be enforceable under the same principles governing emergency arbitration reliefs.

We extend our heartfelt gratitude to our core committee members- Akhila, Adira, and Divyank, as well as to the entire Editorial Board. Their unwavering dedication has been instrumental in the success of this volume and the achievements of the past year. As the journal looks ahead, there is confidence that, under their stewardship, IALR will continue to ascend to greater heights, reflecting a bright and promising future.

This volume is enriched by the diverse contributions from practitioners, academicians, and students, both within India and internationally. Their scholarly submissions have significantly enhanced the academic discourse on arbitration law through this journal, and we are grateful that IALR was the platform chosen to share their esteemed insights, underscoring a shared commitment to advancing understanding and practice in the field.

With great pride, we present the seventh volume of the Indian Arbitration Law Review and eagerly anticipate your feedback and reflections. Heartfelt gratitude is extended to the members of the Peer Review Board and Editorial Board for their unwavering dedication in curating this volume and ensuring the highest standards of scholarly excellence. Most importantly, we thank our readers for their continued support and engagement in advancing the discourse on arbitration law in India.

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CONTENTS

WHEN LAWS COLLIDE: RESOLVING MSME ACT - ARBITRATION ACT DISPUTES IN INDIA

—*Radhika Bishwajit Dubey*[*] *& Karan Khetani*[**]

ABSTRACT

The Micro, Small and Medium Enterprises Development Act, 2006 was introduced with a view to make legal procedures less cumbersome for enterprises that would be registered under the Act. In order to achieve this, the Act provided for the establishment of a Micro and Small Enterprise Facilitation Council, and a separate dispute resolution mechanism is also stipulated under section 18 of the same Act. This resolution mechanism provides firstly, for mediation (earlier, this was conciliation) and in the event that mediation fails, the parties are to undergo arbitration. These provisions, while introduced for an appreciable reason have given rise to a host of issues, both in their legal implications, and in their practical implementation. The provisions have created and vested many powers with the Micro and Small Enterprise Facilitation Council. The council is instrumental in the resolution of disputes, and any issues that arise with the functioning of the council is directly felt on the parties. Additionally, in situations where parties have entered into an agreement with a pre-existing arbitration agreement, the provisions of this Act collide with those of the Arbitration and Conciliation Act, 1996, giving rise to legal ambiguities. This article explores various such issues that have arisen as a result of the law, the interpretation of the law and the implementation of the same.

1. INTRODUCTION

The Allahabad High Court, in a judgement issued earlier this year,[1] has stated that a party, in order to challenge an arbitral award made by way of proceedings under the Micro, Small and Medium Enterprises Development

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[**] Mr Karan Khetani is an Advocate at the High Court of Delhi.

1. *Sahbhav Engg Ltd v MSEFC, U.P.* 2024 SCC OnLine All 2384.

Act, 2006 (hereinafter, '***the MSMED Act***'),[2] must approach the Court under section 19 of the Act, read with section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter, '***the AC Act***').[3] The question that this decision of the High Court appears to be an answer to, is just one of the many that have arisen as a result of the conflict between the provisions of the MSMED Act and the AC Act. Both the acts have laid out different procedures for dispute resolution by arbitration, and naturally, there have arisen questions as to the reconciliation between the two. In a series of judgements, as will be discussed, the Courts have stated that the provisions of the MSMED Act would override the AC Act, however, there remain many legal and practical considerations regarding this stance, and the same have been addressed in this paper.

To briefly outline the paper, the authors will, in the *first* section, in an attempt to trace the evolution of the dispute, first examine the two acts, namely, the MSMED Act, and the AC Act, and focus on the relevant provisions of both that have given rise to the current difficulties. This section will then explore the law as it stands today, by referring to the above-mentioned series of judgements. In the *second* and *third* sections, the authors will critique the current legal position, on two grounds respectively – the legal implications of the interpretation of the Courts, and the practical difficulties in implementing the same. In the fourth section, the authors will provide a potential way forward, keeping in mind both the intention of the legislature behind enacting the MSMED Act, as well as the practical difficulties arising out of some of the provisions therein. *Finally*, the authors will conclude.

2. UNTANGLING THE WEB: MSMED ACT AND THE AC ACT

The MSMED Act, which came into effect in the year 2006, was aimed at "facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto."[4] A bare reading of the provisions of this Act makes clear, the intention behind the MSMED Act, to provide protection and support for the Micro, Small and Medium Enterprises (hereinafter, '***MSMEs***').

2. Micro, Small and Medium Enterprises Development Act 2006 (27 of 2006).
3. Arbitration and Conciliation Act 1996 (26 of 1996).
4. Micro, Small and Medium Enterprises Development Act 2006 (27 of 2006), Long Title.

Prior to the enactment of this legislation, there was no comprehensive framework that dealt exclusively with the MSMEs. There was the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993,[5] (the 1993 Act) but even this was found to be inadequate as it did not, for example define a medium scale enterprise. Thus came the MSMED Act in 2006, which by virtue of section 32, repealed the 1993 Act.

The MSMED Act is a special, beneficial legislation, which brought about some changes in the MSME framework. For example, the Act provides for the establishment of a National Board, which has as one of its primary functions, to advise the Central Government on any matter that is related to facilitating the promotion and development of the MSMEs.[6] It also defined clearly, 'small', 'medium' and 'micro' enterprises. Another change it brought in, which is the subject matter of the conflict between this Act and the AC Act, is the dispute resolution mechanism as envisioned under it.

Chapter V of the MSMED Act, deals with situations where the payments due to the Micro and Small Enterprises are delayed, and imposes strict liability on the buyers.[7] The specific dispute resolution mechanism is culled out in section 18 of the MSMED Act. By way of this provision, the MSMED Act stipulates Alternate Dispute Resolution as the mechanism for resolution of any disputes that arise from a contract between a micro or small enterprise, being the supplier, and any buyer thereof.

The MSMED Act recognised the limitations of the usual route of cumbersome legislation, and the related advantages of the alternate methods of dispute resolution, such as arbitration. The intention of the legislation is commendable, in that it seeks to prevent a situation wherein a micro or small enterprise, already burdened by non-payment on part of the buyer, is also forced to go through the lengthy and expensive process of litigation. In furtherance of the same intention, the MSMED Act has provided for a Micro and Small Enterprise Facilitation Council (hereinafter, the '***Facilitation Council***'),[8] which would have the authority to hear the disputes referred to it by any party, under section 18(1) of the MSMED Act. Section 18(2) of the MSMED Act provides that on receipt of any reference of a dispute under 18(1), the Facilitation Council would have the authority to either conduct

5. Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act 1993 (32 of 1993).
6. Micro, Small and Medium Enterprises Development Act 2006 (27 of 2006), s 6.
7. *Gujarat State Civil Supplies Corpn Ltd v Mahakali Foods (P) Ltd* (2023) 6 SCC 401, para 37.
8. Micro, Small and Medium Enterprises Development Act 2006 (27 of 2006), s 20.

mediation proceedings, governed by the Mediation Act, 2023,[9] or refer it to a mediation service provider for the same. Section 18(4) further states that where this method fails, the Council would have the authority to conduct arbitration proceedings by itself, or refer the dispute to an institution for the same, both required to be governed as per the provisions of the AC Act. Thus, this provision seeks to impose mandatory mediation on the parties to the dispute, and where that fails, arbitration, in the manner provided by the MSMED Act.

This provision has given rise to many questions, not the least amongst them being with respect to the enforceability of a contract between the disputing parties, which already provides for arbitration between them, in case of a dispute. The arbitration agreements enclosed within a contract also include stipulations as to the appointment of the arbitrator, and the procedure that would be followed in case the arbitration clause is invoked. In light of the provisions of the MSMED Act, there is a possibility of a clash between the two sets of provisions for arbitration, one provided in the Act itself, and one enshrined in an arbitration clause in the contract between the parties involved, governed by the AC Act. Indeed, this clash, as to which of the two would override the other, has been the subject matter of various writ petitions filed before the courts, and a decisive answer was given in a judgement last year.[10]

This judgement, hereafter referred to as '*Gujarat State Civil*', delivered as a result of seven appeals involving common questions of law, essentially sought to answer three questions. *Firstly*, whether the provisions of Chapter V of the MSMED Act would override the provisions of the AC Act. *Secondly*, whether parties to a contract which also provides for an arbitration agreement between them would be allowed to approach the Facilitation Council under the MSMED Act, and *lastly*, whether in light of section 80 of the AC Act, the Facilitation Council under the MSMED Act could potentially act as both the Conciliator and the Arbitrator.

In answering the first question, the Court looked into the scope of the two acts, in an attempt to identify their objectives, and found that the MSMED Act is a special legislation, aimed at specifically benefitting the MSMEs.[11] On the other hand, the AC Act was considered to be a more consolidatory legislation, which aimed to provide for a fair procedure for domestic and international arbitration, as well as other forms of dispute resolution such

9. Micro, Small and Medium Enterprises Development Act 2006 (27 of 2006), s 18(3).
10. *Gujarat State Civil Supplies Corpn Ltd v Mahakali Foods (P) Ltd* (2023) 6 SCC 401.
11. ibid at para 42.

as conciliation. Thus, seeing as the MSMED Act is a special act and the AC Act is a general one, the court, relying on the principle of *generalia specialibus non derogant*, held that the provisions of the MSMED Act would override those of the AC Act.[12] Further, section 24 of the MSMED Act is a non-obstante provision, stating that the MSMED Act would have overriding effect on provisions of the other Acts to the contrary.[13] Regarding the second question, the Court, once again looking at the objectives of the MSMED Act stated that a mere private agreement between two parties could not override the provisions of a statute, and a special one at that. Thus, the arbitration agreement between the parties would also be overridden by the MSMED Act.[14] The final question was also answered in a similar fashion, that is, by giving effect to the provisions of the MSMED Act, and placing reliance on section 24 of the same, once again. Thus, section 24 of the MSMED Act would override section 80 of the AC Act, and there would be no bar on the Facilitation Council to act as both the conciliator as well as the Arbitrator.

Thus, the settled position of the law gives effect to the MSMED provisions over all other provisions to the contrary. In arriving at this decision, the court in this case placed reliance on the decisions given in earlier cases, and specially relied on *Silpi Industries v Kerala SRTC* (hereinafter '*Silpi Industries*') case,[15] where also the Apex court concluded that the MSMED Act, being a special act, would have an overriding effect over the AC Act, a general act.

However, these decisions of the courts, in an attempt to settle the law, may have had the opposite effect, in that they have now given rise to certain ambiguities with respect to the enforcement of the law. These ambiguities have been divided into legal ambiguities and practical difficulties, and are respectively addressed in the next two sections of the paper.

3. THE LEGAL AMBIGUITIES SURROUNDING THE CURRENT POSITION OF LAW

A. 'Any Party' Under Section 18 of the MSMED Act

Section 18 of the MSMED Act stipulates that 'any party' to a dispute arising under section 17 may make a reference to the Facilitation Council.

12. ibid at para 34.
13. ibid at para 40.8.
14. ibid at para 46.
15. *Silpi Industries v Kerala SRTC* (2021) 18 SCC 790.

A significant question that emerges from a textual reading of this provision is, whether a buyer, under the MSMED Act, possesses the right to refer a dispute to the Facilitation Council. The text of section 18 appears to suggest that a reference is primarily envisaged in scenarios where the buyer is liable to pay an amount to the supplier. This creates ambiguity regarding the legal standing of buyers who may seek recourse through the Facilitation Council. This precise question of legal interpretation came before the Hon'ble Supreme Court of India in the case of *Silpi Industries*.

The issue under consideration was whether a counterclaim by the buyer could be entertained before the Facilitation Council. The Supreme Court clarified that a counterclaim by the buyer is maintainable. The Court reasoned that denying such a right would result in procedural inefficiencies and multiplicity of proceedings before various forums or courts, thereby frustrating the objective of swift and effective dispute resolution envisaged under the MSMED Act.

The judgment in *Silpi Industries* holds significant importance as it harmonises the procedural aspects of dispute resolution under the MSMED Act. By permitting counterclaims, the Court ensured that all related disputes between the supplier and buyer can be adjudicated in a single forum, avoiding fragmented litigation. It highlighted judiciary's intent to uphold the spirit of the MSMED Act, which aims to provide a robust mechanism for the resolution of disputes involving MSMEs. Nevertheless, while *Silpi Industries* case clarifies the maintainability of counterclaims, certain ambiguities persist regarding the scope and extent of buyers' rights under section 18. These ambiguities warrant further legislative or judicial clarification to ensure a balanced and unambiguous framework for both suppliers and buyers under the MSMED Act.

Furthermore, the court, in passing reference, stated that a buyer may also subject its claim to the jurisdiction of the Facilitation Council,[16] but since such a claim can only be made under section 18 of the MSMED Act, which requires it to be a situation where the buyer has defaulted in payment. Thus, conceiving of a situation where a buyer would approach the Facilitation Council is difficult. Additionally, a related question which has arisen before the courts is with respect to the disputes in connection to which the dispute resolution mechanism under the MSMED Act may be invoked. In a case where the dispute between the MSME and the buyer emerged out of services that were being rendered separate to that which the MSME

16. ibid at para 37.

had registered itself for, the Allahabad HC has held that in such cases, the Facilitation Council would be divested of its jurisdiction to deal with the matter.[17] The implication of this decision is that it creates room for a situation where between the same parties, two separate forms of dispute resolution would be required in order to resolve an issue which could very well arise out of the same service provider agreement, which would go against the objectives of the MSMED Act.

B. The Interplay Between Contractual Dispute Resolution And Statutory Mechanisms Under The Msmed Act

One of the significant and unresolved questions that has yet to be addressed by the Hon'ble Supreme Court is the legal consequence of a situation wherein a buyer initiates dispute resolution proceedings due to non-delivery of goods by the supplier. If the buyer, pursuant to a pre-existing agreement between the parties, approaches a court or tribunal for redressal, and the supplier subsequently refers the matter to the Facilitation Council under the MSMED Act, the legal issue that emerges is whether such reference to the Facilitation Council would have the effect of overriding the pre-existing judicial or arbitral proceedings.

The jurisprudence that has emerged from various judicial pronouncements suggests that once the dispute resolution process under section 18 of the MSMED Act is invoked, the parties are effectively bound by its statutory mechanism, thereby rendering any pre-existing contractual agreement for dispute resolution inoperative. However, the acceptance of such a proposition raises serious concerns regarding its implications on judicial and arbitral autonomy. If a dispute has already been brought before a court or a tribunal in accordance with the contractual dispute resolution clause between the parties, allowing one party to subsequently invoke the statutory mechanism under the MSMED Act to the exclusion of the ongoing proceedings would amount to an undue interference with the judicial process. The conclusion that the Court, in the cases above, has arrived at is that once the dispute resolution mechanism is kickstarted, upon invocation of section 18 of the MSMED Act, the parties are, in essence, trapped in the particular dispute resolution mechanism laid out in section 18 of the MSMED Act, and any other agreement which is independently entered into between the parties is overridden.[18] Such an interpretation

17. *Neeraj Potato Presarvation & Food Products (P) Ltd v MSEFC, U.P.* 2024 SCC OnLine All 427, para 32.
18. *Silpi Industries v Kerala SRTC* (2021) 18 SCC 790.

may not only lead to forum shopping but could also result in a disregard for the autonomy of courts and tribunals, thereby creating an anomalous situation where statutory override effectively nullifies legally sanctioned dispute resolution mechanisms. This raises important questions about the harmonious construction of contractual obligations and statutory remedies, necessitating a more nuanced judicial examination of the issue, especially, having regard to the principle of 'party autonomy'.

Fortunately, an alternative view has been provided in a Calcutta High Court decision,[19] and this differing view that the arbitration agreement between the parties is only eclipsed during the procedure under the MSMED Act, and not overridden altogether, although, more practicable than the previous one, is still not devoid of its problems. It is still unsure as to at what point the proceedings would be 'eclipsed' and then later open to be taken up again. Thus, this is one major ambiguity that continues to surround this law, and its existence is further evidenced when the status of the agreement between the supplier and the buyer post registration as an MSME is considered. In a situation where the buyer has entered into an agreement with the supplier prior to its registration as an MSME under the MSMED Act, would the subsequent registration then bind the buyer to the dispute resolution mechanism, even if such buyer is given no notice of this registration? This question becomes even more pertinent in light of the provision under the MSMED Act for registration, and the wide discretion afforded to a potential MSME therein.

The life of an MSME begins from its registration under section 8 of the MSMED Act. The section provides wide discretion to entity – by the extensive use of the word 'may' in the section. This wide discretion has led the Delhi High Court to suggest that there are three existing scenarios under section 8.[20] *Firstly*, where an entity has not yet come into existence, section 8(1) requires the memorandum to be filed according to the manner prescribed by the appropriate Government. *Secondly*, where the entity was already in existence before the commencement of the MSMED Act, the proviso to section 8(1) requires it to file the appropriate memorandum within 180 days of the commencement of the MSMED Act. These scenarios are evident from the working of the section; however, the court went on to state that there is a third possibility, wherein an entity that is established after the commencement of the MSMED Act may also seek registration as

19. *Odisha Power Generation Corpn Ltd v Techniche Consulting Service* 2024 SCC OnLine Cal 10386.
20. *GE T&D India Ltd v Reliable Engg Projects and Mktg* 2017 SCC OnLine Del 6978.

an MSME. The MSMED Act does not conceive of any such situation, and the lack of regulation adds to the disadvantage of a buyer who enters into a contract with an entity, which subsequently registers itself as an MSME.

A related problem that arises is with respect to the *effect* of an enterprise's registration under the MSMED Act during the subsistence of a contract with a buyer. The Apex Court in this regard has stated that the effect of registration would only be prospective, and only those transactions which take place after such registration would fall under the jurisdiction of the Facilitation Council.[21] Despite the appearance of finality regarding this position of the law, there are different stances. In one case of the Delhi High Court,[22] a single bench comprising of S Muralidhar, J, as he then was, held that even if the registration of an enterprise has taken place after the contract between the parties for supply of goods and services has been entered into, the whole of the supplies made under the contract would be considered, as the supplies would have been made in continuation of the same contract. The reason this second view gives rise to ambiguity, even in the face of Apex Court decisions to the contrary, is because in *Silpi Industries*, the court only distinguished this judgement on the basis of facts, and did not go into the merits of this case. In fact, no case has gone before the Apex Court as of yet, upon merits. In *Gujarat State Civil*, the court certainly stated that if the registration is acquired after the commencement of the contract, the MSMED Act would only apply prospectively, on those transactions which occurred after the registration, but did not overrule the Delhi High Court's case to the contrary. That said, there exist multiple High Court judgements that have followed the law as stated in *Gujarat State Civil*, and have held that the MSMED Act's provisions would only apply prospectively.[23]

Thus, although mostly settled in its legal aspect,[24] this particular legal question, i.e., as to when would the provisions of the MSMED Act enure to the benefit of the supplier if the registration is obtained during the subsistence of the contract, can only be conclusively put to a close through a case decided by the Apex Court on this point on merits. The practical issues of splitting the claim, however, are many in number and will be dealt with in the next section of the paper.

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21. *Gujarat State Civil Supplies Corpn Ltd v Mahakali Foods (P) Ltd* (2023) 6 SCC 401.
22. *GE T&D India Ltd v Reliable Engg Projects and Mktg* 2017 SCC OnLine Del 6978.
23. *Malani Construction Co v Delhi International Arbitration Centre* 2023 SCC OnLine Del 1665; *MTNL v Delhi International Arbitration Centre* 2024 SCC OnLine Del 687.
24. *Neeraj Potato Presarvation & Food Products (P) Ltd v MSEFC, U.P.* 2024 SCC OnLine All 427.

4. THE PRACTICAL DIFFICULTIES

The complex nature of the law, particularly, in cases involving multiple statutes, often leads to unforeseen challenges in its practical application, even where the legal position appears settled. A pertinent issue that emerges in this context relates to the process of segregating claims before the Facilitation Council, limiting them only to transactions occurring after the enterprise's registration under the MSMED Act. This raises a fundamental question: where should such an exercise be conducted, and who is entrusted with the responsibility of carrying it out? These practical concerns, while seemingly procedural, underscore deeper uncertainties that can complicate the efficient implementation of the MSMED Act. Nevertheless, while the *Silpi Industries* case clarifies the maintainability of counterclaims, certain ambiguities persist regarding the scope and extent of buyers' rights under section 18. These ambiguities warrant further legislative or judicial clarification to ensure a balanced and unambiguous framework for both suppliers and buyers under the MSMED Act. The Apex Court, in *Gujarat State Civil*, has stated that the Facilitation Council or any other centre/ institute that is acting as the Arbitral Tribunal would have the authority to decide a matter such as this, since it is jurisdictional in nature.[25]

At this juncture is where the practical difficulties arise. The members of the Facilitation Council are expected to know the law, and apply the law, to determine the dispute between the parties by way of arbitration. However, section 21 of the MSMED Act, while laying down certain categories of officers from which the Facilitation Council may be comprised of, has not made knowledge of the law a requirement, thus leaving open the possibility that there would be members of the Council who are not familiar with the law, or arbitration, and are despite this expected to act as arbitrators or mediators. This has also led to a situation where the Facilitation Councils often forward cases to a centre for mediation or arbitration, and sometimes to arbitration directly, without conducting the mandatory mediation. Furthermore, a pertinent question arises regarding the competence of the Facilitation Council to handle such disputes effectively, particularly in relation to the distinction between substantive legal knowledge and procedural knowledge. The Facilitation Council, while vested with adjudicatory powers, operates as an administrative authority rather than a traditional judicial body. A crucial distinction must be drawn between 'knowledge of law'—which pertains to substantive legal

25. *Gujarat State Civil Supplies Corpn Ltd v Mahakali Foods (P) Ltd* (2023) 6 SCC 401, para 51.

principles governing commercial disputes—and 'knowledge of procedure,' which concerns the proper conduct of adjudication. The discrepancy in implementation arises when the administrative authority, tasked with facilitating dispute resolution, lacks the procedural expertise necessary to ensure that justice is administered in accordance with established legal norms. This potential lacuna in procedural adherence may result in arbitrariness, inconsistencies, and challenges to the enforceability of decisions rendered by the Facilitation Council, thereby raising serious concerns regarding due process and natural justice. This trend, of directly forwarding the matters to arbitration centres, is likely to go against the objective of this Act, and instead of making the process speedy as it aims to, it would create a situation wherein the Arbitration Centres are referred most of the MSMED cases, which competent arbitrators themselves should have handled.

Further, another practical implication, connected to the one above inasmuch as it also arises out of the inaction of the Facilitation Council, is a situation wherein the Facilitation Council simply does not refer the matter that has come before it for arbitration, on the invocation of section 18 of the MSMED Act. In this regard, reference may be made to a case,[26] wherein, a petition was filed before the Bombay High Court under section 11(6) of the AC Act in a desperate attempt by the petitioner, a registered MSME, after an inordinate delay by the Facilitation Council in referring the dispute to arbitration, even after the conciliation proceedings failed. The petition sought to invoke the powers of the Court under section 11(6) and have an arbitrator appointed to resolve the dispute. The High Court, however, held that section 11(6) of the AC Act requires a pre-existing arbitration agreement between the parties, as the section uses the words "under that procedure". The High Court interpreted this phrase to mean the procedure that would have been laid out in a pre-existing arbitration agreement between the parties, and thus since in that case the parties did not have such an agreement, it was held that a petition under section 11(6) of the AC Act may not be filed. In holding so, however, the HC seems to have missed section 18(4) of the MSMED Act, which states in quite clear terms that the mechanism provided in that section would be treated as an agreement under section 7 of the AC Act. Naturally, a question arises as to the effect of this equation, in that, if it does not allow the invoking of section 11(6) of the AC Act, why then is a challenge to the arbitral award of the Facilitation

26. *Bafna Udyog v Micro & Small Enterprises* 2024 SCC OnLine Bom 110.

Council allowed only under section 34 of the same act? This same question forms the basis for the next practical problem that exists.

The Courts have held that the awards may only be challenged by approaching the court under section 34 of the AC Act, read with section 19 of the MSMED Act, and in fact, High Courts have been held to be devoid of the power to entertain a writ petition against an award of the Facilitation Council,[27] for two reasons, *first* that there is an alternative mechanism provided under section 34 of the AC Act, and *second* that the deposit mandated under section 19 must be given effect. Section 19 of the MSMED Act provides that a challenge may be made by the buyer, but only after having deposited 75% of the award amount with the courts. A series of judgements of the courts have held that this amount to be deposited is mandatory and may not be waived off, by virtue of the use of the word 'shall' in the section.[28] However, it is unclear as to whether the same amount is required to be deposited even while challenging the jurisdiction of the Arbitral Tribunal under the MSMED Act, as recently, the Madras High Court,[29] while allowing an appeal challenging the Award of a Tribunal under the MSMED Act on the grounds that it lacked jurisdiction in the very first place, also waived the requirement of 75% pre-deposit. Although this particular judgement is a welcome novelty in the interpretation of section 19 of the MSMED Act, it is still reflective of the ambiguity surrounding it.

Interestingly, the Hon'ble Supreme Court has, recently, in *T.N. Cements Corpn Ltd v MSEFC*,[30] while highlighting critical legal questions surrounding the maintainability of writ petitions under Article 226 of the Constitution against orders passed by the Facilitation Council in the exercise of powers under section 18 of the MSMED Act, deemed it necessary to refer the matter to a 5-Judge Bench, recognising the need for authoritative clarity on the intersection of writ jurisdiction, alternative remedy, and arbitration under the MSMED Act. The Court identified three key issues requiring determination. *Firstly*, it questioned whether the ratio in *India Glycols Ltd v MSEFC*, *Medchal — Malkajgiri*,[31] which categorically held that a writ petition could never be entertained against

27. *India Glycols Ltd v MSEFC, Medchal — Malkajgiri* 2023 SCC OnLine SC 1852.
28. *Tirupati Steels v Shubh Industrial Component* (2022) 7 SCC 429; *Gujarat State Disaster Management Authority v Aska Equipments Ltd* (2022) 1 SCC 61.
29. *Swiss Garniers Genexiaa Sciences (P) Ltd v Avant Garde Cleanroom & Engg Solutions (P) Ltd* (2024) Nos. 2059 & 2060 of 2024 Mad HC.
30. 2025 SCC OnLine SC 127.
31. 2023 SCC OnLine SC 1852.

an order or award of the Facilitation Council, amounts to a complete bar or prohibition on the maintainability of writ petitions before the High Court. *Secondly*, if the prohibition is not absolute, the Court sought to define the circumstances in which the principle of an adequate alternative remedy would not apply, thus allowing the exercise of writ jurisdiction. *Thirdly*, the Bench raised a significant concern regarding the procedural fairness of the Felicitation Council's role, particularly whether its members, who initially undertake conciliation proceedings, can subsequently act as arbitrators under section 18 of the MSMED Act, in light of the restrictions under section 80 of the AC Act. The Court clarified that the first and second issues would inherently address the broader question of when and under what conditions a writ petition may be entertained against an order or award passed by the Facilitation Council, whether acting as an arbitral tribunal or conciliator. This reference underscores the need to strike a balance between the expeditious dispute resolution mechanism envisaged under the MSMED Act and the constitutional guarantee of judicial review, particularly in cases where procedural impropriety or jurisdictional errors may arise. The outcome of this deliberation by the larger Bench is poised to have significant implications for the scope of judicial intervention in Facilitation Council proceedings and the broader framework of alternative dispute resolution in commercial disputes.

5. THE WAY FORWARD

The objective behind the MSMED Act is highly commendable, as it seeks to establish a comprehensive framework to address the challenges faced by MSMEs. However, as previously highlighted, certain practical issues have surfaced in its implementation. The Facilitation Council established under the MSMED Act holds the potential to significantly alleviate the burden on both the Courts and Arbitration Centres. One of the central points of contention in this regard is the principle of party autonomy, which often conflicts with the statutory arbitration process under the MSMED Act. The Supreme Court has opined that once the MSMED Act is invoked for dispute resolution, any prior arbitration agreement between the parties ceases to hold relevance. This effectively sets aside party autonomy in favour of the statutory framework, ensuring that the legislative intent of the MSMED Act is prioritised.

Enacted with the purpose of addressing critical challenges faced by this sector, including delayed payments, limited access to finance, and lack of formal recognition, the MSMED Act reflects a forward-looking policy

framework designed to enhance the competitiveness of these enterprises. Central to its objective is the establishment of efficient dispute resolution mechanisms under section 18, enabling timely and cost-effective redressal of grievances, particularly regarding delayed payments. While this interpretation aligns with the statutory mandate, the authors contend that it may not always be necessary to disregard party autonomy entirely. A balanced approach could allow for the coexistence of party autonomy and statutory processes. For instance, in cases where the Facilitation Council is approached under the MSMED Act, the Council could, after a failed mediation, refer the dispute to arbitration as per the terms of the pre-existing agreement between the parties. Such an approach would honor the spirit of party autonomy while remaining consistent with the MSMED Act's dispute resolution objectives.

It is imperative to recognise that the role of the Facilitation Council extends beyond merely acting as a conduit for disputes. The Council is vested with the responsibility to exercise its judgment and either adjudicate the dispute itself or refer it to a competent institution capable of doing so. Simply forwarding disputes without applying its mind would undermine the Council's intended purpose and reduce its efficacy. In light of the concerns highlighted above, it is imperative to introduce statutory provisions that align with the principle of party autonomy while ensuring that the objectives of the MSMED Act are not undermined. One possible reform could involve amending the Act to provide greater flexibility to parties who have already opted for an alternate dispute resolution mechanism through a contractual agreement, ensuring that the statutory mechanism does not automatically override pre-existing dispute resolution processes.

Moreover, there is a pressing need to enhance the credibility and efficiency of the Facilitation Council by mandating the appointment of qualified arbitrators and conciliators with expertise in commercial and contractual disputes. Strengthening procedural safeguards, including clearer guidelines on the intersection of contractual and statutory dispute resolution, would further ensure that the MSMED Act does not inadvertently erode established principles of fairness and procedural integrity in commercial adjudication.

Such an approach would give effect to both the MSMED Act's dispute resolution mechanism and the fundamental principle of arbitration – party autonomy. It is imperative to recognise that the role of the Facilitation Council extends beyond merely acting as a conduit for disputes. The

Council is vested with the responsibility to exercise its judgment and either adjudicate the dispute itself or refer it to a competent institution capable of doing so. Simply forwarding disputes without applying its mind would undermine the Council's intended purpose and reduce its efficacy.

Further, the law regarding the registration of entities as MSMEs under the MSMED Act remains vague. It is unclear whether the legislature intends to allow entities established after the commencement of the MSMED Act to register as MSMEs and subsequently avail the benefits of the statute. This uncertainty has placed buyers in a disadvantageous and precarious position.

The authors believe that greater clarity is necessary in this area, either through rules, regulations, or legislative amendments. In conclusion, while the MSMED Act provides an effective framework for dispute resolution, its practical application necessitates a careful and nuanced approach. A measured balance between statutory provisions and party autonomy can enhance the efficiency of the Facilitation Council and ensure that disputes are resolved in a manner that serves the interests of justice and aligns with the objectives of the MSMED Act. Additionally, addressing ambiguities in the registration process will provide much-needed certainty and fairness to all stakeholders involved.

6. CONCLUSION

It is necessary for the effectiveness of law, that it must not be impracticable, or create more problems than it seeks to resolve. The authors believe that the answer to the questions and difficulties pointed out above is not to replace the whole system altogether, as the intention behind it is admittedly commendable, but rather, to fine tune the system as envisioned and fix the cracks in the wall. The Facilitation Councils set up under the MSMED Act require clear guidelines to function, and the same must be introduced. Further, the requirements under section 21 of the MSMED Act could be tuned in order to ensure persons with some experience in dispute resolution may be appointed to the Facilitation Council. With some changes in this regard, the procedure could be made smoother, and the true stakeholders – the suppliers and the buyers – would not be adversely affected.

After penning down of the present paper was concluded, the Hon'ble Supreme Court has, in *NBCC (India) Ltd v State of W.B.*,[32] addressed

32. 2025 SCC OnLine SC 73 : 2025 INSC 54.

whether registration under section 8 of the Micro, Small, and Medium Enterprises Development Act, 2006 (MSMED Act) is a prerequisite for referring disputes to the Facilitation Council under section 18. The Court clarified that section 18's language, which states "any party to a dispute," is inclusive and not limited to registered suppliers. It emphasised that the registration requirement under section 8 is discretionary for micro and small enterprises. The Court also analysed prior rulings, including *Silpi Industries* case and *Gujarat State Civil* case, concluding that neither case explicitly decided the issue of mandatory registration before invoking remedies under section 18. The judgment rejected the appellant's argument, which sought to restrict dispute resolution access, reaffirming the MSMED Act's remedial purpose and its role in facilitating justice for MSMEs. Consequently, the matter was referred to a larger bench for authoritative resolution due to its broader implications.

The Supreme Court's referral to a larger bench offers a pivotal opportunity to address several unresolved and contested issues under the MSMED Act. Among the key clarifications needed is the scope and application of section 18, particularly, concerning whether enterprises unregistered at the time of contract execution can invoke the statutory dispute resolution mechanisms. This is significant given the discretionary nature of section 8 registration and the Act's overarching goal to empower MSMEs, many of which operate informally and lack formal registration. The referral allows the Court to harmonise conflicting judicial interpretations, such as those in *Silpi Industries* case and *Gujarat State Civil* case, which seemingly restricted the rights of unregistered entities but did so without a comprehensive examination of the MSMED Act's text and purpose. Additionally, it provides an avenue to resolve inconsistencies surrounding the retrospective application of benefits under the Act, the interplay between the MSMED Act and general contract law principles, and the Act's precedence over other legislations, such as the Arbitration and Conciliation Act, 1996.

A larger bench will also have the opportunity to refine the understanding of the term 'supplier' under section 2(n), explore whether registration under section 8 is merely procedural or substantive, and reinforce the principle of access to justice for MSMEs. This moment is crucial for establishing a robust jurisprudential framework that balances statutory rights, equitable remedies, and the legislative intent of bolstering the MSME sector's growth and resilience. The outcome will not only clarify ambiguities but also shape future litigation and dispute resolution strategies involving MSMEs.

REAFFIRMING THE GROUP OF COMPANIES DOCTRINE IN INDIAN ARBITRATION: A COMPREHENSIVE ANALYSIS OF THE COX AND KINGS JUDGMENT

—Vikash Kumar Jha[*] *& Namrata Sadhnani*[**]

ABSTRACT

This article critically examines the Supreme Court of India's landmark judgment in Cox and Kings Ltd. v. SAP India Pvt. Ltd. & Anr., which reaffirms the Group of Companies Doctrine as a cornerstone of Indian arbitration jurisprudence. The judgment represents a pivotal step in adapting arbitration law to the complexities of modern corporate structures, allowing non-signatories within corporate groups to be bound by arbitration agreements under specific circumstances. By striking a balance between traditional principles of consent and the realities of integrated business operations, the judgment aligns Indian arbitration with globally recognised practices while addressing its unique legal and commercial context.

The article offers a distinctive perspective by analysing the judgment's nuanced application of Group of Companies Doctrine and situating it within the broader evolution of Indian arbitration law. It also provides a comprehensive analysis of the judgment's attempt to harmonise conflicting precedents and clarify the doctrine's contours, distinguishing it from related concepts like piercing the corporate veil. In particular, it highlights the Supreme Court's focus on implied consent, composite transactions, and mutual intent, setting a robust yet flexible framework for determining the involvement of non-signatories. Further, the article's exploration of the judgment's practical implications offers a fresh understanding of its significance.

By delving into the judgment's strengths, the article demonstrates how Group of Companies Doctrine enhances efficiency of arbitration and ensures

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inclusivity in resolving disputes involving corporate groups. It also identifies certain challenges, such as the risk of inconsistent application and potential for overreach, while advocating for legislative codification to address these concerns. This analysis underscores the doctrine's potential to strengthen India's position as a pro-arbitration jurisdiction, fostering a fair and predictable framework for domestic and international stakeholders.

Through its comprehensive analysis, the article contributes to the ongoing discourse on the Group of Companies Doctrine, offering valuable insights for practitioners, academics, and policymakers aiming to refine arbitration framework in India.

> *"Group of Companies doctrine - a modern theory which challenges the conventional notions of arbitration law. It is celebrated by some, reviled by many others. Yet, its legacy continues."*
>
> —Dr. Dhananjaya Y Chandrachud, Former CJI

1. INTRODUCTION

In the present times, wherein trade and commerce is at the forefront of every civilization, and almost all significant and important commercial disputes are being resolved through arbitration, it is only imminent that it is ensured that an arbitral award is effectively and necessarily enforced. With increasing complexities in commercial transactions and various layers and structures that are invariably present these days in various companies and conglomerates, it is only necessary that the arbitration process also develops and becomes robust with time to tackle all possible scenarios for it to be an effective dispute resolution process.

It is now established jurisprudence that arbitration, as a method of dispute resolution, hinges on party autonomy, of which consent is the bedrock. The principle of party autonomy ensures that only parties who willingly submit their disputes to arbitration are bound by its procedures and outcomes. Against this backdrop, the *Group of Companies Doctrine* challenges traditional and literal notions of consent and privity by allowing arbitration agreements signed by one corporate entity to bind other entities within the same group under specific circumstances in order for it to be more pragmatic and effective approach of dispute resolution.

The landmark judgment of the Supreme Court of India in *Cox and Kings Ltd v SAP India (P) Ltd*[1] represents a seminal moment in Indian arbitration jurisprudence, in a sense reaffirming the doctrine and cementing it as part of Indian arbitration regime. The judgment delves into various aspects surrounding the applicability of the said doctrine and its relationship with the well settled legal principles of corporate law and contract law, *inter alia*, 'piercing the corporate veil', separate legal personality, party autonomy, privity of contract, and requirement of written/ express consent to arbitration agreement. The judgment decides the contours of the doctrine, and more specifically, finds its imprint in the Indian Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") and interprets the phrase "claiming through or under" as present in Section 8, Section 35, and Section 45 of the Arbitration Act. The judgment raises critical questions about the balance between judicial pragmatism and the sanctity of contractual principles. It also invites comparisons and similarities with international arbitration practices.

This article seeks to conduct an in-depth analysis of the aforesaid judgment, its impact on Indian arbitration law, and its alignment with global standards, offering a critical evaluation of its merits and limitations.

2. TRACING THE ORIGIN AND HISTORICAL OVERVIEW OF THE DOCTRINE – INTERNATIONAL STANCE

The *Group of Companies Doctrine* has its roots in the practical realities of corporate structures. In many complex commercial transactions, multiple entities within a corporate group play an active role in negotiating, executing, or performing contracts, even when only one entity formally signs the arbitration agreement. The doctrine enables tribunals to bind non-signatories within such groups, provided the evidence demonstrates their mutual intent to arbitrate.

The doctrine has originated from the decisions rendered by international arbitral tribunals. The Supreme Court is aware that to authoritatively determine the validity and applicability of the doctrine in the Indian arbitration regime, it ought to be pragmatically tuned with well recognised and internationally accepted principles. Thus, the Supreme Court has traced the origin of the doctrine to other jurisdictions, as elaborated below.

1. *Cox and Kings Ltd v SAP India (P) Ltd* (2024) 4 SCC 1.

In France, *Dow Chemical Case*[2] was the first to establish that a non-signatory could be bound by an arbitration agreement entered into by another entity within the same corporate group, provided there was common intention or mutual intention of all the parties and the non-signatory appears to be a veritable party to the contract on the basis of their engagement in negotiating, performing, and terminating the contract. In fact, membership within the same group of companies or, as may be called, the "same economic reality" was neither the sole nor the guiding criteria to bind the non-signatory companies to the arbitration agreement.

Despite its recognition in some jurisdictions, the doctrine has not been uniformly embraced or applied in the same manner across the globe. In fact, Bernard Hanotiau, a renowned scholar in international arbitration, contends that the ruling in Dow Chemical has been misconstrued to support the emergence of the *Group of Companies Doctrine*. Instead, he highlights that the true significance of the Dow decision lies in its focus on assessing a non-signatory's status as a party based on its conduct, which demonstrates consent. Hanotiau further argues that referring to a group of companies is in fact superfluous, as affiliation within the same corporate group is not a decisive criterion for determining party to an arbitration agreement.[3]

The English Courts have generally taken a rather conservative approach, by favouring strict adherence to the doctrine of privity. The English law envisages that only such non-signatories that claim under or through the original party to the agreement, may be bound by an arbitration agreement. Consequently, under English law, an arbitration agreement is extended to non-signatory parties by way of applying traditional contractual principles and doctrines such as novation, agency, operation of law, assignment, and merger and succession.

Courts in Singapore have dismissed the applicability of the *Group of Companies Doctrine*, upholding the core corporate law principle of maintaining distinct legal identities for separate entities.[4]

In contrast, Swiss courts have permitted non-signatories to be bound by arbitration agreements if their conduct demonstrates implied consent. The Swiss Federal Court has clarified that, under Article 178 of the Swiss

2. *Dow Chemical v Isover Saint Gobain,* Interim Award, ICC Case No. 4131, 23 September 1982.
3. Bernard Hanotiau, 'Consent to Arbitration: Do We Share a Common Vision?' (2011) 27(4) Arbitration International 539.
4. *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] SGHC 181.

Private International Law Act, an arbitration agreement must be in writing. However, the determination of whether a non-signatory is a party to such a written agreement can be made by examining its role in the preparation and performance of the contract containing the arbitration clause, thereby evidencing its intention to be part of the arbitration agreement.[5]

The US courts do not expressly rely on the *Group of Companies Doctrine*, but have often used general principles of contract law such as incorporation by reference, assumption, agency, veil piercing or alter ego, and arbitral estoppel for binding non-signatories to arbitration agreements.[6]

In India, the doctrine gained prominence with the Supreme Court's judgment in *Chloro Controls India (P) Ltd v Severn Trent Water Purification Inc* (2013)[7]. In this case, the Supreme Court held that a non-signatory could be bound by an arbitration agreement if it played a significant role in the contractual framework and if the transaction was composite in nature. The doctrine was subsequently applied in several cases, notably *Cheran Properties Ltd v Kasturi and Sons Ltd* (2018)[8], *MTNL v Canara Bank* (2020)[9], and *ONGC Ltd v Discovery Enterprises (P) Ltd* (2022)[10], further elaborating and solidifying its place in Indian arbitration law.

Thus, the Supreme Court has observed that other jurisdictions, in certain ways, have moved beyond the formal requirement of express and written consent to bind a non-signatory to an arbitration agreement, and thus even the Arbitration Act should be interpreted in a manner that is consistent with the approaches prevailing internationally.

However, the doctrine has also faced criticism for undermining principles of party autonomy and privity of contract. These tensions had set the stage for the five-judge bench in *Cox and Kings* (supra) to revisit its validity, and thus, the following observations emerge from the landmark judgment of the Supreme Court in this regard.

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5. X.___ et al v. Z.___, 4A_115/2003; A._____, v. B._____ Ltd., 4A_376/2008; X._____ v. Y._____ Engineering and Y._____ S.p.A., 4A_450/2013.
6. *GE Energy Power Conversion France SAS Corpn, FKA Converteam SAS v Outokumpu Stainless USA, LLC*, et al., Case No. 18-1048 (1 June 2020).
7. *Chloro Controls India (P) Ltd v Severn Trent Water Purification Inc* (2013) 1 SCC 641 : 2012 INSC 436.
8. *Cheran Properties Ltd v Kasturi and Sons Ltd* (2018) 16 SCC 413.
9. *MTNL v Canara Bank* (2020) 12 SCC 767.
10. *ONGC Ltd v Discovery Enterprises (P) Ltd* (2022) 8 SCC 42 : 2022 INSC 483.

3. FINDINGS AND OBSERVATIONS OF THE SUPREME COURT

A. Consent

The Supreme Court has unequivocally held that the issue of determining who qualifies as a "party" to a given arbitration agreement, fundamentally revolves around the concept of consent. It emphasised that arbitration is a matter of contract, and an arbitration agreement, being a creature of such contract, is also governed by the contract law principles. Accordingly, the contractual principles or doctrines such as, privity of contract, consensus ad idem, express and implied consent, etc., are foundational for constituting a valid arbitration agreement. Under Indian contract law, a party's actions or conduct can signify consent of a party to be bound by a contract and that this principle of implied consent extends equally to arbitration agreements.

The Supreme Court has also noted that determining whether a non-signatory can be bound by an arbitration agreement is a rather fact-specific inquiry. The phenomenon of group companies is the "modern reality of economic life and business organization". Often, a company signing the contract, which contains the clause on arbitration, is not the one who negotiated or performs the contract. Rigidly focusing on formal consent in such cases will lead to the exclusion of such non-signatories from the ambit and scope of the arbitration agreement, resulting in fragmented disputes and multiple proceedings.

Additionally, the Supreme Court has observed that the term "non-signatories" is more appropriate, than the traditional "third parties", to describe entities that have given consent to arbitration through means other than signature or explicit formal agreement.

B. Adhering to requirements under Section 7 of the Arbitration Act and Definition of "party"

The Supreme Court has held that for an arbitration agreement to be valid and enforceable, it must meet the requirements laid down under Section 7 of the Arbitration Act, which contains two aspects:

(1) Substantive aspect - The legislative intent underlying Section 7 of the Arbitration Act is that any legal relationship, including relationships where there is no contract between the persons or entities, whose actions or conduct has given rise to a relationship, could form a subject matter of an arbitration agreement.

(2) Formal aspect - Section 7(3) of the Arbitration Act stipulates the requirement of a written arbitration agreement. Section 7(4) lays down three circumstances under which arbitration agreement can be said to be in writing: (i) if it is signed by the parties; (ii) if it is contained in an exchange of letters, telex, telegrams or other means of telecommunication, including communication through electronic means, which provide a record of the agreement; (iii) if it is contained in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. The Supreme Court has observed that above three circumstances are geared towards determining the "mutual intention of the parties" to be bound by an arbitration agreement.

Consequently, the Supreme Court has also observed that Section 2(1)(h), read with Section 7 of the Arbitration Act, does not expressly require the "party" to be a signatory to an arbitration agreement. Accordingly, the Apex Court has conclusively settled the position as follows[11]:

- The definition of "parties" under Section 2(1)(h), read with Section 7 of the Arbitration Act includes both signatory as well as non-signatory parties.
- Conduct of non-signatory party could signify its consent to be bound by the arbitration agreement;
- The *Group of Companies Doctrine* has an independent existence as a principle of law, which stems from a harmonious reading of Section 2(1)(h) along with Section 7 of the Arbitration Act.
- The underlying basis for application of the *Group of Companies Doctrine* rests on maintaining the corporate separateness of group companies while determining the mutual intention of the parties to bind the non-signatory party to the arbitration agreement;
- The *Group of Companies Doctrine* concerns only parties to the arbitration agreement and not the underlying commercial contract. Consequently, a non-signatory could be held to be a party to the arbitration agreement without becoming a formal party to the underlying contract.

11. *Cox and Kings Ltd v SAP India (P) Ltd* (2024) 4 SCC 1.

C. Relevant factors

The Supreme Court has held that to apply the *Group of Companies Doctrine*, the courts have to consider all the cumulative factors as laid down in ***Discovery Enterprises*** (supra)**,** which are:

- *"Mutual intent of parties;*
- *Relationship of a non-signatory to a signatory;*
- *Commonality of the subject matter;*
- *Composite nature of the transaction; and*
- *Performance of the contract."*

The Supreme Court has observed that the primary test to apply the doctrine is by determining the intention of the parties on the basis of the underlying factual circumstances. Such intention can be gauged from the circumstances that surround the participation of the non-signatory party in the negotiation, performance, and termination of the underlying contract containing such an agreement. Further, when the conduct of the non-signatory is in harmony with the conduct of the others, it might lead the other party or parties to legitimately believe that the non-signatory was a veritable party to the contract containing the arbitration agreement. However, in order to infer consent of the non-signatory party, their involvement in the negotiation or performance of the contract must be positive, direct and substantial and not be merely incidental.

The other factors such as commonality of subject matter and composite nature of the transactions, ought to be cumulatively considered and analysed by courts and tribunals to identify the intention of the parties. The burden is on the party seeking joinder of the non-signatory to the arbitration agreement to prove a conscious and deliberate conduct of involvement of the non-signatory, based on objective evidence.

D. "Claiming through or under"

The judgment holds that the approach in *Chloro Controls case*, to the extent that it traced the *Group of Companies Doctrine* to the phrase "claiming through or under", was erroneous and against the well-established principles of contract law and corporate law. Consequently, the Supreme Court conclusively settled the position as follows:[12]

12. ibid.

- *"that the persons "claiming through or under" can only assert a right in a derivative capacity that is through the party to the arbitration agreement;*
- *the typical scenarios where a person or entity can claim through or under a party are assignment, subrogation and novation;*
- *the persons claiming through or under do not possess an independent right to stand as parties to an arbitration agreement, but as successors to the signatory parties' interest;*
- *mere legal or commercial connection is not sufficient for a non-signatory to claim through or under a signatory party."*

As a corollary, the Supreme Court has noted that the term of "party" is distinct from the concept of "*persons claiming through or under*" a party to the arbitration agreement. The *Group of Companies Doctrine* operates to bind the non-signatory to the arbitration agreement, enabling it to assert the benefits and bear the obligations arising from the performance of the contract.

Furthermore, Section 9 of the Arbitration Act permits a "party" to seek interim measures and does not from the court and does not use the phrase "claiming through or under". The Supreme Court has thus clarified that once a non-signatory is determined to be a veritable party to the arbitration agreement by court or tribunal, such non-signatory party can also apply for interim measures under Section 9 of the Arbitration Act.

E. Piercing the corporate veil

The Supreme Court has highlighted a key distinction between the *Group of Companies Doctrine* and the principle of veil-piercing or alter ego, where, the principle of alter ego sets aside the separate legal identities of corporate entities (say that of a parent company and its subsidiary) based on overriding considerations such as equity and good faith, often to prevent fraud.[13] Conversely, the *Group of Companies Doctrine* focuses on uncovering the mutual intent of the parties to identify the true participants in the arbitration agreement, without disregarding the legal personality of the entities involved.[14]

13. ibid.
14. ibid.

As a result, the Supreme Court has clarified that the principle of alter ego or piercing of the corporate veil, cannot serve as the foundation for applying the *Group of Companies Doctrine.*

F. Concept of 'Single Economic Unit'

The existence of strong organisational and financial ties between signatory and non-signatory parties is merely one of the many factors that a court or tribunal may evaluate to ascertain the legal relationship between them. Consequently, the Supreme Court has clarified that the concept of "single economic entity" cannot, on its own, be the criteria for applying the *Group of Companies Doctrine*.

Whether court or tribunal can decide on binding non-signatory to an arbitration

The issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the arbitral tribunal which is enshrined in Section 16 of the Arbitration Act. It is a settled position of law is that the referral court only needs to give a prima facie finding on the validity or existence of an arbitration agreement.[15] The arbitral tribunal is the preferred first authority to look into the questions of arbitrability and jurisdiction, and the courts at the referral stage should not venture into contested questions involving complex facts.[16]

Consequently, the Supreme Court has conclusively held that when a non-signatory person or entity is arrayed as a party at Section 8 or Section 11 stage, the referral court should *prima facie* determine the validity or existence of the arbitration agreement, and leave it for the arbitral tribunal to decide at the stage of Section 16 on whether the non-signatory is bound by the arbitration agreement.

Thus, when subsequent to the decision of the Supreme Court in *Cox and Kings (supra)* a petition under Section 11 of the Arbitration Act was filed in the given arbitration matter[17], the three-judge bench[18] of the Supreme

15. *Lombardi Engg Ltd v Uttarakhand Jal Vidyut Nigam Ltd* (2024) 4 SCC 341: 2023 INSC 976; *Interplay between Arbitration Agreements under Arbitration and Conciliation Act 1996 and Stamp Act 1899, In re* (2024) 6 SCC 1: 2023 INSC 1066.
16. *SBI General Insurance Co Ltd v Krish Spinning*, 2024 SCC OnLine SC 1754: 2024 INSC 532.
17. *Cox and Kings Ltd v SAP India (P) Ltd* (2024) 4 SCC 1: 2024 INSC 670.
18. Bench comprising of Justice D.Y. Chandrachud (Former CJI), Justice J.B. Pardiwala and Justice Manoj Misra.

Court held that in light of the settled principle in *Cox and Kings (supra)*, it would be appropriate for the arbitral tribunal to take a decision on the application of the doctrine after taking into consideration the evidence adduced by the parties. Since the requirement of *prima facie* existence of an arbitration agreement, as provided under Section 11 of the Arbitration Act, was satisfied, the Supreme Court therefore allowed the petition.

4. STRENGTHS OF THE JUDGMENT

The judgment acknowledges commercial realities. It recognises the complexity of modern commercial transactions, where entities within a corporate group often function as a single economic unit. By allowing non-signatories to be bound under specific circumstances, the Supreme Court ensures that the arbitration mechanism adapts to the realities of integrated business operations. This approach aligns with the pro-arbitration stance of the Arbitration Act, and fosters efficient dispute resolution.

The Supreme Court reiterates that consent remains central to arbitration. The *Group of Companies Doctrine* can only apply if mutual intent to arbitrate is demonstrated through objective factors such as participation in contract negotiation, performance, or termination. Further, by emphasising consent, the Supreme Court seeks to balance the doctrine's pragmatic application with the foundational principle of party autonomy.

The judgment limits the doctrine's applicability to cases where the facts clearly establish the non-signatory's involvement in the transaction. This ensures that its application remains contextual and not arbitrary. Further, the focus on composite transactions and direct involvement prevents overreach and ensures that the doctrine is applied in genuine interdependent cases.

By analysing the international position on the *Group of Companies Doctrine*, the judgment situates India within the broader global framework. Jurisdictions such as France, Switzerland, and the United States employ similar principles, making the Indian stance more predictable for multinational corporations.

Moreover, while validating the doctrine, the Supreme Court underscores the importance of party autonomy. This prevents the indiscriminate extension of arbitration agreements to non-signatories, ensuring that arbitration remains a consent-based process.

5. LIMITATIONS OF THE JUDGMENT

The Supreme Court relies heavily on judicial interpretation to determine the applicability of the doctrine. However, the absence of explicit legislative guidance creates ambiguity, leaving the doctrine open to inconsistent application by lower courts. Further, while the judgment provides detailed factors, it stops short of recommending legislative amendments to codify the doctrine's use under the Arbitration Act.

Further, factors such as "mutual intent" and "composite transaction" are inherently subjective and can lead to inconsistent interpretations. What constitutes "direct involvement" or "mutual intention" may vary widely across cases, creating legal uncertainty. The judgment does not establish a clear evidentiary threshold for proving these factors, leaving significant discretion to the judiciary. A more definitive statutory framework would provide greater predictability and uniformity in the doctrine's application.

Despite its safeguards, the judgment may inadvertently result in overuse of the doctrine. Aggressive litigants might attempt to bind non-signatories in unrelated cases by exploiting the doctrine's flexible criteria, or may use it as a tactic to delay the proceedings. This poses risks for entities operating within corporate groups, particularly in industries with complex supply chains or multi-tiered contractual structures.

The doctrine may seem to challenge the principle of separate legal personality, a cornerstone of corporate law. By binding non-signatories within a corporate group, the judgment risks blurring the boundaries between independent entities. The judgment does not sufficiently address how this reconciles with the well-established principles of corporate autonomy and limited liability.

6. BROADER IMPLICATIONS

The judgment reinforces India's position as a pro-arbitration jurisdiction by ensuring that disputes involving interconnected corporate entities can be resolved in a single forum. However, the lack of legislative clarity may deter foreign investors who prioritise legal certainty in arbitration frameworks.

Companies/businesses operating within corporate groups may face increased exposure to arbitration risks. Non-signatories might be drawn into disputes despite having no direct contractual relationship with the signatories. This could lead to cautious contractual practices, with

businesses seeking to limit their involvement in negotiations or performance to avoid being implicated.

The judgment aligns India with jurisdictions like France that adopt a pragmatic approach to non-signatories in arbitration. However, it diverges from stricter jurisdictions like the United Kingdom and Singapore, potentially creating conflicts in cross-border disputes.

7. CONCLUSION

The Supreme Court has embraced the *Group of Companies Doctrine* as being instrumental in making the transition from a restrictive express consent-based approach to a more flexible approach in attaching relevance to the concept of 'implied consent' in order to bind a non-signatory to an arbitration agreement. The judgment conclusively holds that the *Group of Companies Doctrine* should be retained in the Indian arbitration regime given its utility in determining the party's intention to be bound by arbitration agreement, specifically in the context of composite transactions involving several parties and multiple agreements.

Further, the Supreme Court has harmonised the divergent strands of law emanating from the judgments in Cheran Properties (supra), Canara Bank (supra) and Discovery Enterprises (supra), and categorially held that "*the observations pertaining to the Group of Companies Doctrine were rendered in the facts and circumstances of each case*". Thus, the judgment aims to make further progress in evolution of Indian arbitration law, without dismissing the earlier rulings and taking each of such judgments, beginning with Chloro Controls *(supra)* to Cox and Kings (supra), as adding further dimensions to the theory already propounded by such earlier judgments.

By reaffirming the Group of Companies Doctrine, the judgment ensures that Indian arbitration remains flexible and business-friendly. However, its success will depend on careful judicial application and legislative support to address its inherent ambiguities. By embracing these measures, India can strengthen its position as a global arbitration hub, offering a fair and predictable dispute resolution framework for domestic and international stakeholders alike.

The views expressed in this Article are the authors' personal views and do not reflect the views of Cyril Amarchand Mangaldas.

ONE STEP FORWARD, TWO STEPS BACK: STATE OF ARBITRATION IN INDIA

—*Ramkishore Karanam*[*]

ABSTRACT

While repeated attempts are being made to establish India as a global arbitration hub, the recent Memorandum issued by the Ministry of Finance on "Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement" dated 03.06.2024 has proven counterproductive. Though the Arbitration and Conciliation Act, of 1996 has been amended from time to enable India in becoming the international hub for arbitration, the present Memorandum would render all the earlier efforts made through amendments redundant. With the government being the largest litigant in India, compelling the counterparty to avail civil suits as the only legal remedy against the government would directly hamper the inflow of foreign investments in the country. The author critically analyses the rationale behind the issuance of the Memorandum and discusses whether the means justify the end. This article also delves further into the effect of adopting the pro-mediation approach in case of disputes with government entities. Finally, this article provides a probable solution to the concerns raised by the Ministry of Finance.

1. INTRODUCTION

The Office Memorandum dated 03.06.2024,[1] issued by the Ministry of Finance on "*Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement*" ("***Memorandum***") is a major setback to the process of dispute resolution in India. While efforts are being made by the legislature and the judiciary to make arbitration an effective tool in dispute resolution, the implementation of this Memorandum would set the clock back. Ultimately, this Memorandum will significantly increase the burden of the already overloaded courts and would make it impossible to get any

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1. Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement 2024, F No FIN/22/2/2022-CDN (A&A).

significant relief in an expedited manner. The present article identifies and analyses the pros and cons of the Memorandum and its consequent impact on the dispute resolution system in India.

2. THE RATIONALE BEHIND THE ISSUANCE OF THE MEMORANDUM

The Memorandum sets out various peculiarities that come into the picture when the Government is a litigant and disadvantages of having arbitration as a mode of dispute resolution where the Government (including Government entity or agency such as a public sector undertaking) is a party. The peculiarities and disadvantages mentioned in the Memorandum are summarised below:

- Acceptance of an award without exhausting the challenge avenues is considered "improper" by various government authorities.
- Same practice has to be followed for all contractors in order to maintain fairness and non-arbitrariness which makes it difficult to accept arbitration awards if they vary from general practice.
- Government officers get transferred and it handicaps the Government from making an effective representation before the arbitrator.
- Arbitration is time-consuming and very expensive.
- Lack of standard selection process of arbitrators, apprehension of collusion and little accountability of the arbitrators for wrong decisions.
- The majority of arbitration awards are challenged before the courts, thereby increasing litigation.
- Commercial disputes can be amicably resolved and parties tend to raise inflated claims and counterclaims in arbitration proceedings.

3. PRO-MEDIATION APPROACH

The only positive takeaway from this Memorandum is the suggestion of adopting a pro-mediation approach to amicably settle the disputes. Most commercial disputes are capable of settlement without adjudication of the merits of the disputes with subject to the consent of the parties. The

Memorandum promotes mediation under the Mediation Act, of 2023,[2] the setting up of a high-level committee to oversee the mediation proceedings and, to ensure that the parties treat mediation on par with any judicial proceedings. However, the Memorandum fails to answer a crucial question – would the Government or its agencies abide by the outcome of the mediation proceedings?

Even before the introduction of the Mediation Act, of 2023, several Public Sector Undertakings ("***PSUs***") have introduced various alternate dispute mechanisms to settle disputes amicably. Various Dispute Resolution Boards/ Dispute Resolution Committees/ Resolution Redressal Committees have been formed by PSUs. For instance, the National Highway Authority of India ("***NHAI***") issued policy guidelines for the settlement of contractual disputes[3] to settle disputes under Part III of the Arbitration and Conciliation Act, of 1996 ("***Act***"),[4] before the invocation of arbitral proceedings. However, parties do not generally consent to the outcome of the pre-arbitral proceedings and proceed with the arbitral proceedings which have rendered these pre-arbitral mechanisms a mere useless formality. Therefore, in effect, the Memorandum makes initiation of a civil suit mandatory for all contractual disputes with the Government or its agencies.

4. IRRELEVANT CONSIDERATIONS

All the peculiarities identified in the Memorandum are rampant even in a civil suit and therefore, it does not justify the compelled approach to the civil courts.

The first peculiarity identified by the Memorandum is that arbitral awards cannot be accepted until all the available avenues to challenge the award are exhausted by the Government or its agencies. Even after the issuance of a decree by the Civil Court, if the Government or its agency do not challenge the decree, it will be considered "improper" by the relevant authorities. It is not the stand of the Government that it will adhere to the decree passed by a civil court without exhausting the appellate remedies available.

The Memorandum notes that arbitration only adds an additional layer of litigation and delays final resolution and consequently, the object of reducing the burden of the courts has not been achieved. While there is

2. Mediation Act 2023 (32 of 2023).
3. National Highways Authority of India/Policy Guidelines/ Conciliation & Settlement of Contractual Disputes 2017, No 2.1.22.
4. Arbitration and Conciliation Act 1996 (26 of 1996), pt III.

a procedure to challenge an arbitral award, the scope of the challenge is narrower than that for a first or second appeal filed against decrees passed by civil courts. The narrow scope of challenging an arbitral award has already been settled by the Hon'ble Supreme Court in *Associate Builders v DDA*[5] *and Ssangyong Engg and Construction Co Ltd v NHAI*. Whereas, a first or second appeal against a decree requires the court to examine the merits of the disputes which significantly delays the adjudication process.

The second peculiarity identified in the Memorandum is that the Government or its agencies cannot accept awards that are against the general practice. This is applicable to other similarly placed contractors in order to maintain fairness and non-arbitrariness. The Memorandum fails to note that such an outcome is inevitable even if the civil courts are to be approached. There is no assurance that the civil courts will not deviate from the general practice adopted by a particular Government agency. Ultimately, an arbitral tribunal or a civil court decides the dispute based on the terms of the contract agreed by the parties, the conduct of the parties and how the parties understood the terms of the contract.[6] Therefore, this peculiarity identified in the Memorandum is an irrelevant consideration in making compulsory the need to approach a civil court when the attempt to amicably resolve the disputes through mediation fails.

The third peculiarity identified in the Memorandum is that Government officers get transferred which handicaps the Government when presenting its case before arbitrators. This problem persists not just in arbitrations, but in civil suits as well. Therefore, eradicating arbitration does not solve the problem. The Government has to take active steps in ensuring that the person with personal knowledge of the dispute is held accountable, and also make it mandatory that they would have to continue assisting during the dispute resolution. The Government must also be mindful of the fact that making the government officers to be present in civil suits is much more time-consuming since civil courts have multiple matters every day and it takes several days to complete the cross-examination of each witness. However, in arbitration proceedings, there is a lot more flexibility for fixing dedicated time slots that accommodate the witnesses' availability as well.

5. *Associate Builders v DDA* (2015) 3 SCC 49; *Ssangyong Engg and Construction Co Ltd v NHAI* (2019) 15 SCC 131.
6. *McDermott International Inc v Burn Standard Co Ltd* (2006) 11 SCC 181; *Pure Helium India (P) Ltd v Oil & Natural Gas Commission* (2003) 8 SCC 593 : AIR 2003 SC 4519.

5. ARBITRATION VS. CIVIL SUITS

A. Time period

The Memorandum raises concerns about the time taken for the conclusion of arbitration proceedings and records that these proceedings are not conducted in the expedited manner as contemplated in the Act. While there could be some merit in this concern, it certainly does not warrant the blanket exclusion of arbitration as a dispute resolution process. The resolution of disputes arising out of and in connection with infrastructure/ construction projects in courts, which more often than not entails the perusal of voluminous documents, has proven to be extremely time-consuming primarily on account of the court systems being already overburdened.

In infrastructure/construction contract cases, both parties lead multiple witnesses to prove their case and the cross-examination will practically take more than a year and, in some instances, the determination is even more difficult owing to the technical nature of the dispute. Further, it will be difficult for the civil court to render a decision in an expedited manner considering it has to peruse thousands of documents and deal with highly technical aspects to arrive at a decision for each case. Whereas in an arbitration proceeding there will be a dedicated tribunal, which can also comprise technical experts depending on the nature of the dispute, who can peruse voluminous documents in relation to a particular case and render a decision within a reasonable timeframe. Furthermore, an arbitral tribunal is also not bound by the strict rules of procedure which makes it easy for the parties to conduct the arbitration proceedings.[7]

In fact, in the practical experience of the author, the trial in a commercial suit arising out of a construction contract took more than 2 years to be completed. This was due to the fact that the court has multiple cases in a day and it is difficult to accommodate the witnesses based on their availability. Civil courts in India are already overburdened with cases and this move from the Government will make it difficult not only for the courts but also for the litigants. The solution provided in the Memorandum for delay in the arbitration proceedings (i.e., switching to civil suits) is tantamount to switching from one process with delays to another one with an equal amount of, if not more delays, making the adjudication of disputes more difficult in the country. The move to eradicate arbitration from Government contracts will further delay the resolution of disputes and that makes it difficult to

7. Arbitration and Conciliation Act 1996 (26 of 1996), s 19.

attract investments from foreign countries. While many steps have been taken to make India an arbitration-friendly country, this Memorandum will negate all the efforts taken by the judiciary and the legislature.

B. Costs

While there is some merit in the concern raised in the Memorandum regarding arbitration being expensive, the cited concern is again not compelling enough to exclude arbitration. The parties always have the option to regulate the fees paid to the arbitrators. Schedule IV of the Act sets out reasonable fees to be paid to the arbitrators. The Hon'ble Supreme Court has already issued 'Directives governing fees of arbitrators in ad hoc arbitrations' in *ONGC Ltd v Afcons Gunanusa JV*,[8] in order to regulate the fees paid to the arbitrators. It is relevant to note that the court fees for a commercial suit would be equivalent to or more than the fees contemplated under Schedule IV of the Act.

For example, the court fee for a civil suit for recovery of money or claim for compensation under Section 22 read with Article 1 of Schedule I of Tamil Nadu Court Fees and Suits Valuation Act, 1965 (as amended in 2017),[9] is 3% of the amount claimed in the dispute. If a party has a claim for Rs. 50 crores, the court fee payable would be Rs. 1.5 crores in a civil suit. However, the maximum fees payable to an arbitral tribunal under Schedule IV of the Act,[10] for a Rs. 50 crores claim would be Rs. 90 lakhs (assuming a three-member tribunal).

C. Apprehension of Collusion in Arbitrations

A genuine concern raised in the Memorandum is that there is an apprehension of wrongdoing, including collusion in the conduct of the arbitration proceedings especially in high-stakes matters. Such apprehensions are less when the courts appoint the arbitrator under Section 11 of the Act. However, when the parties appoint the arbitrators, such apprehensions are high and this can be regulated by introducing certain qualifications and standards for appointment of arbitrators in ad-hoc arbitrations. Further, the Act also has sufficient safeguards to ensure the impartiality and independence of the arbitrators under Sections 12 to 15 read with Schedule V and VII.

8. *ONGC Ltd v Afcons Gunanusa JV* (2024) 4 SCC 481 : 2022 INSC 884.
9. Tamil Nadu Court-Fees and Suits Valuation (Amendment) Act 2017 (6 of 2017).
10. Arbitration and Conciliation Act 1996 (26 of 1996), sch 4.

While Schedule 8 of the Act[11] has been removed, broad-based guidelines for the appointment of an arbitrator may be introduced by the legislators to address this issue in ad-hoc arbitrations.

6. CONCLUDING REMARKS AND SUGGESTIONS

As elaborated above, none of the concerns raised in the Memorandum justify the exclusion of arbitration clauses from Government contracts. This move will lead to docket explosions in courts and consequently, dispute resolution will be significantly delayed in the country. This will further discourage foreign companies from investing in India. Through the introduction of the Vivad se Vishwas II scheme dated 29.05.2023[12] and 29.12.2023,[13] the Government in the past had already come up with a solution for tackling the problems identified in the Memorandum. This scheme allows the Government to settle the disputes based on the arbitral awards considering the genuine nature of the claims. Nothing in the memorandum prevents the Government from continuing this scheme and settling disputes under it. Further, the NHAI has also formed a committee to determine whether the arbitral award can be accepted or an appeal has to be made against such an award.[14] Reportedly, NHAI settled around 60 cases for around Rs. 4076 crores against the claimed amount of Rs. 14,590 during FY 2021-22. The Government and its agencies can adopt similar methods to ensure speedy resolution of disputes. Implementation of this Memorandum would result in a gradual eradication of arbitration in India since the Government is touted to be the biggest litigant in India.

11. Arbitration and Conciliation (Amendment) Act 2019, sch 8; Subsequently, the Schedule was removed through the Arbitration and Conciliation (Amendment) Act 2021 (31 of 2021).
12. Press Information Bureau, 'Government Launches a One-Time Settlement Scheme Vivad se Vishwas – II (Contractual Disputes) to Effectively Settle Pending Contractual Disputes, as Announced in the Union Budget 2023-24' (*Press Information Bureau* 2 August 2023) <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1945072> accessed 10 September 2024.
13. Ministry of Finance, Government of India, Department of Expenditure and Procurement Public Division, Vivad se Vishwas – II (Contractual Disputes) 2023, No F 1/7/2022-PDD.
14. Ministry of Finance, Government of India, Department of Public Enterprises, General Instructions on Procurement and Project Management 2021, No F1/1/2021, F No DPE/7(4)/2017-Fin., 19.

NATIONAL OR INTERNATIONAL PUBLIC POLICY: THE PERFECT FIT FOR INTERNATIONAL ARBITRATION IN INDIA? - DRAWING INSPIRATION FROM THE FRENCH APPROACH

—Amogh Srivastava[*] & Mathilde Adant[**]

ABSTRACT

This article critically examines the 'public policy of India' exception under Sections 34 and 48 of the Arbitration and Conciliation Act, 1996, highlighting its identical application to both domestic and foreign arbitral awards. While the statutory alignment reflects an attempt at consistency, it overlooks the nuanced distinction required between domestic and international arbitration frameworks. Drawing inspiration from the French approach, which differentiates public policy for domestic and international awards, the article advocates for replacing the "public policy of India" ground under Section 48 with "international public policy" for the enforcement of foreign awards.

The article traces the evolution of the 'public policy of India' exception and analyses its judicial interpretation over time. It argues that aligning India's arbitration law with international best practices by adopting "international public policy" will enhance India's appeal as a preferred seat for international arbitration. To ensure predictability and limited judicial interference, the article further recommends that the scope of "international public policy" for foreign awards be narrowly confined to issues such as fraud and corruption. The article proposes statutory amendments to Section 48 to incorporate

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The views and opinions expressed in this article are solely those of the authors and do not reflect the views, opinions and positions of their firm.

'international public policy' similar to the French approach. The aim of this article is to highlight ways to improve the enforcement regime for foreign awards, thereby positioning India as a more arbitration-friendly jurisdiction and fostering greater confidence in its legal framework for international commercial disputes.

1. INTRODUCTION

In May 2024 during the inauguration of the Arbitration Bar of India (ABI)[1] in New Delhi, the Solicitor General of India remarked that "*we don't need to learn from any other country because it is my firm belief that arbitration as a concept has its origin in India*"[2]. This might be debatable, considering the amendments to the Arbitration & Conciliation Act, 1996 ('***Arbitration Act***') over the past decade, aimed at aligning India's arbitration laws with those of arbitration-friendly jurisdictions.

The Arbitration Act is the parent statute which contains the law relating to domestic arbitration[3], international commercial arbitrations and enforcement of foreign arbitral awards[4]. The Arbitration Act is broadly modelled on the lines of UNCITRAL Model Law on International Commercial Arbitration, and Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ('***New York Convention***') as adopted by India subject to a few reservations.

Article V(2)(b) of the New York Convention provides that a Convention State may refuse enforcement of an award if the recognition or enforcement of the award would be contrary to the '*public policy of that country*'. The New York Convention does not define the term 'public policy' and leaves it open for states to adopt their standards of and notions of public policy in the enforcement of arbitral awards.[5]

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1. Ausaf Ayyub and Isra Mukhtar, 'Inaugural of the Arbitration Bar of India' (*Live Law*, 15 May 2024) <https://www.livelaw.in/events/arbitration-bar-of-india-inauguration-257923 > accessed 14 February 2025.
2. Abhimanyu Hazarika, 'Arbitration Born in India; We do not Need to Learn it from Others: Solicitor General Tushar Mehta' (*Bar and Bench*, 12 May 2024) <https://www.barandbench.com/news/arbitration-born-india-solicitor-general-tushar-mehta> accessed 14 February 2025.
3. Arbitration and Conciliation Act 1996 (26 of 1996) pt I.
4. Arbitration and Conciliation Act 1996 (26 of 1996) pt II.
5. Jean-Michel Marcoux, 'Transnational Public Policy as an International Practice in Investment Arbitration' (September 2019) 10(3) Journal of International Dispute Settlement 496-515; Cassimatis, Anthony E (2019) 'Public Policy under the New York

Section 34 (Part I) of the Arbitration Act, provides certain grounds for setting aside a domestic arbitral award and Section 48 (Part II) enumerates certain grounds to refuse recognition or enforcement of foreign arbitral award. In line with the New York Convention, conflict with the 'public policy of India' is one such ground, which is available to challenge a domestic award as well as refuse the enforcement of a foreign award. Section 34 (2)(b) and Section 48 (2)(b), therefore broadly mirror each other.

The dichotomy lies in the fact that statutorily the Arbitration Act does not differentiate between public policy for domestic and international arbitration awards. The public policy exception provided in Sections 34 and 48 of the Arbitration Act does not set out or explain how public policy exception is to be applied to domestic and separately to international arbitral awards. However, there have been some judicial precedents lately that have held that public policy is to be construed narrowly for international arbitral awards.[6]

This article argues in favour of statutorily differentiating the exception of public policy for domestic (Section 34) and international arbitral awards (Section 48). In doing so, the article analyses the evolution of the public policy exception in India as set out under the Arbitration Act (**Section 2**). This article will also discuss how France has adopted an international standard of public policy as provided in the French Code of Civil Procedure (**Section 3**). The article further discusses why there is a need to have different standards of public policy for domestic and international arbitral awards (**Section 4**). Lastly, the article proposes appropriate statutory amendments and solutions to formulate well-defined and separate standards of public policy to be applied to domestic and international arbitral awards (**Section 5** and **Section 6**).

2. THE EVOLUTION OF PUBLIC POLICY IN INDIA

A. The Renusagar Era and the Three 'Narrow' Prongs of Public Policy

One of the first cases, where the Supreme Court of India interpreted the components of public policy was in *Renusagar*[7]. The term 'public

Convention — Bridges between Domestic and International Courts and Private and Public International Law' (2022) 31(1) National Law School of India Review art 2.

6. *Avitel Post Studioz Ltd v HSBC PI Holdings (Mauritius) Ltd* (2024) 7 SCC 197 [33].
7. *Renusagar Power Co Ltd v General Electric Co* 1994 Supp (1) SCC 644 : AIR 1994 SC 860.

policy' was construed to be interpreted in a narrow sense. It was held that enforcement of a foreign award would be refused, only if the award is contrary to (i) the fundamental policy of Indian Law; (ii) the interests of India, or; (iii) justice or morality. The Court held that a distinction must be drawn while applying the said rule of public policy between a matter governed by domestic law, and a matter involving conflict of laws. The application of this doctrine in the field of conflict of laws is more limited, and the courts are slower to involve public policy in cases involving a foreign element, than when a purely municipal legal issue is involved.[8] In relation to the 'fundamental policy of Indian law', the Court held that (i) the award must invoke something more than merely a violation of Indian law to be refused enforcement; (ii) a violation of economic interests of India is contrary to public policy; (iii) it is the fundamental principle of law that orders of courts must be complied with and a disregard for such orders would be contrary to public policy[9].

The court adopted a pro-arbitration stance to align Indian law with international standards and practices and narrowed down the scope of 'public policy'. It also distinguished the scope of public policy in domestic awards from that of a foreign arbitral award. The Court while referring to the New York Convention, elaborated that the expression used in the provision, is the term 'public policy of a country' and not the words 'the law of the country'. Thus mere 'contravention of law' alone shall not attract the bar of public policy. The court's verdict in *Renusagar* was greatly appreciated in the Indian Jurisprudence and set the course for all future judgements and amendments.

B. Introduction of the Test of 'Patent Illegality'

The Supreme Court of India in *Saw Pipes*[10] widened the scope of public policy and laid down a new test of 'patent illegality'. To the disappointment of the international community, the Court added another ground under the head of public policy on which enforcement of an award could be refused. Following this decision, courts could examine the merits of the dispute in review and refuse to enforce an award if it was in complete contradiction to the fundamental laws of India. This extension, however, applied only to domestic arbitrations.

8. *Renusagar* (n 7) [51].
9. *Renusagar* (n 7) [65].
10. *ONGC Ltd v Saw Pipes Ltd* (2003) 5 SCC 705 [13].

In *Saw Pipes*, it was held that an award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in the public interest and is likely to adversely affect the administration of justice[11]. Thus, the patent illegality of the award was added as a ground under the scope of public policy. The court in *McDermott*[12] further elaborated that such patent illegality must go to the root of the matter and the public policy violation, should be so unfair and unreasonable as to shock the conscience of the court.

In *Phulchand Exports*[13] and *Satyam Computers*[14], the Supreme Court of India held that the test of 'patent illegality' as laid down in *Saw Pipes* would also apply to foreign arbitral awards under Section 48 of the Arbitration Act. One of the major impacts of these rulings was that parties to international commercial arbitrations were allowed to reopen their cases based on alleged contraventions of Indian law, thereby unreasonably extending the scope of judicial interference. Therefore, these judgements opened a floodgate of litigations under Section 34 of the Arbitration Act. The test increased the extent of court interference in the enforcement of arbitral awards by allowing the court to review the merits of the arbitral award.

C. The Aftermath of Saw Pipes

Later, a larger bench of the Supreme Court of India in *Shri Lal Mahal*[15] overruled the *Phulchand Exports* verdict. The bench limited the scope of judicial intervention in the enforcement of foreign awards by removing the ground of 'patent illegality', and thereby restored the position as laid down in *Renusagar*. The court further clarified that such ground was limited to Section 34 of the Act only in case of a domestic award. Thus, the ground of public policy is available in India both for a challenge to an India-seated arbitral award and to resist enforcement of a foreign award, except the ground of 'patent illegality' which would not be available as a ground to resist the enforcement of a foreign arbitral award.

To set the course straight after *Saw Pipes* and *Phulchand Exports*, in 2014 the 246th Law Commission Report made certain recommendations to

11. *Saw Pipes* (n 10) [31].
12. *McDermott International Inc v Burn Standard Co Ltd* (2006) 11 SCC 181 [59].
13. *Phulchand Exports Ltd v OOO Patriot* (2011) 10 SCC 300 [16].
14. *Venture Global Engg v Satyam Computer Services Ltd* (2008) 4 SCC 190 [23].
15. *Shri Lal Mahal Ltd v Progetto Grano Spa* (2014) 2 SCC 433 [28], [29].

restrict the scope of public policy as a ground for challenging an arbitral award and to make a distinction between a domestic award and foreign arbitral award. Additionally, it recommended (i) addition of Section 34(2A) to the Act, to limit the ground of 'patent illegality' to purely domestic arbitral awards; and (ii) a suggestion to add that "an award shall not be set aside merely on the ground of erroneous application of the law or by re-appreciating evidence".[16]

The 246th Law Commission Report also proposed to statutorily include a definition of public policy based on the Supreme Court's decision in *Renusagar*. Going a step forward, it also suggested that the definition of public policy should not include within it '*the interests of India*' since the same was capable of interpretational misuse. Thus, it was proposed that the ambit of public policy for enforcement of foreign and domestic awards should be limited to fundamental policy of Indian law or basic notions of justice or morality.

D. The Conundrum Surrounding the 'Fundamental Policy of Indian Law'

One of the components of public policy that the court laid down in the *Renusagar* verdict was the 'fundamental policy of Indian law'. It held that the enforcement of an arbitral award would be said to be contrary to the public policy of India if it contradicts a 'fundamental policy of Indian Law'. The Supreme Court of India in two of its decisions laid down the interpretation as to what constitutes a fundamental policy of Indian Law, which offset the course of Indian arbitration law another step backwards.

In 2014, the Supreme Court in *Western Geco*[17] decided on the question of what would constitute the 'Fundamental policy of Indian Law' and held that it includes three fundamental juristic principles, namely:

(i) the duty to adopt a judicial approach, i.e., to not act in an arbitrary, capricious, or whimsical manner. Judicial approach requires courts to act in a fair, reasonable, and objective manner and its decision should not be actuated by any extraneous consideration.

16. Law Commission of India, *Amendments to the Arbitration & Conciliation Act, 1996*, Report No. 246, 55 published in August 2014.
17. *ONGC Ltd v Western Geco International Ltd* (2014) 9 SCC 263 : AIR 2015 SC 363 [35], [38], [39].

(ii) compliance with principles of natural justice, including audi alterum partem and application of mind to the facts and circumstances; and

(iii) 'Wednesbury principle' i.e., an award may be set aside if it is perverse and so irrational that no reasonable person would have arrived at the same.

Later in *Associate Builders*[18], the court gave an expansive definition to the term 'fundamental policy of Indian Law' to include: (i) contravention of a statute which is the national economic interest of India; (ii) disregarding orders of superior courts in India; (iii) disregarding the binding effect of the judgment of a superior court; and (iv) the principle of adopting a judicial approach, which demands that a decision be fair, reasonable and objective.

These judgments which propounded on the lines of *Saw Pipes* were severely criticised, and it was said that the improvements that the courts made on the ground of patent illegality were offset by these judgments[19]. To clarify the position, the Law Commission published a supplementary Report and recommended amendments to the Arbitration Act and added Explanation II to Section 34 (2)(b)(ii) regarding the test of contravention with the fundamental policy of Indian law and clarified that such a test shall not entail a review on the merits of the dispute.

E. The 246th Law Commission Supplementary Report

Considering the judgment in *Western Geco*, the Law Commission issued a Supplementary Report to the 246th Law Commission Report specifically on the topic of 'Public Policy' in February 2015. It recorded the 'chief reason' for its issuance as the inclusion of the Wednesbury principle of reasonableness within the phrase of 'fundamental policy of Indian law' in *Western Geco*. The Wednesbury principle of reasonableness permitted courts to look at an award to understand whether the conclusion would be one that "no reasonable person would have arrived at". This test permitted a review of an arbitral award on its merits. The Law Commission suggested that such a power to review an award on merits is contrary to the objectives of the Arbitration Act and international practice and would increase judicial interference with arbitral awards. It proposed that another explanation be added to Section 34 of the Act, i.e. *"For the avoidance of doubt the test as*

18. *Associate Builders v DDA* (2015) 3 SCC 49 [27], [34].
19. Hiroo H Advani, 'Public Policy' (2009) 21(2) National Law School of India Review 55-63 <https://www.jstor.org/stable/44283803>.

to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."[20]

Hence, the explanation added to the Arbitration Act because of this report limited the scope of interpretation as provided in *Western Geco*. To completely neutralise the effect of the *Western Geco* and *Associate Builders* and to give effect to the Law Commission reports, the Parliament introduced the 2015 amendments to the Arbitration Act.

F. Amendment Act of 2015

The 2015 amendments overhauled the Arbitration Act completely and added an explanation to the public policy exception, which clarified that an award would be deemed to conflict with the public policy of India, only if:

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 (confidentiality) or Section 81 (admissibility of evidence); or

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

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

Additionally, the 2015 Amendment clarified that Indian Courts are not permitted to review the merits of a dispute when making an assessment regarding the setting aside of an award based on public policy. Ever since the Amendment, the Courts have avoided giving a wide interpretation of public policy or interfering with the merits of the case. In *Venture Global*[21] the court observed that '*the Award of an arbitral Tribunal can be set aside only on the grounds specified in Section 34 of the AAC Act and on no other ground. The Court cannot act as an Appellate Court to examine the legality of Award, nor it can examine the merits of claim by entering in factual arena like an Appellate Court.*'[22]

Further, the Supreme Court of India in *Ssangyong Engineering*[23] acknowledged that the amendment of 2015 had narrowed down the scope of public policy and clarified that under no circumstance any court would

20. Supplementary to Report No. 246 on Amendment to Arbitration & Conciliation Act, 1996, published in September 2015 < https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081637.pdf> page 21.
21. *Venture Global Engg LLC v Tech Mahindra Ltd* (2018) 1 SCC 656, ¶121.
22. *Venture Global* (n 21) [127].
23. *Ssangyong Engg & Construction Co Ltd v NHAI* (2019) 15 SCC 131, ¶ 76.

interfere with an arbitral award on the ground of injustice or entail an entry into the merits of the dispute. The court also held that the ground of public policy and the most basic notions of justice would only be attracted in very exceptional circumstances when an award shocks the conscience of the Court. Thus, the court overruled the verdict in *Western Geco* and restored the grounds as elucidated in *Renusagar*[24].

G. The Flip – Flop Continues

The Arbitration & Conciliation (Amendment Act) 2021 introduced a fresh ground of 'fraud and corruption' to set aside the enforcement of an arbitral award. It provided for an unconditional stay to the enforcement of a foreign award in cases where such an award was induced by fraud or corruption.

The Supreme Court in *Vijay Karia*[25] recognised that, following the 2015 amendments, the grounds of '*public policy of India*' provided in Sections 34 and 48 are now identical. This means that in an international commercial arbitration held in India, the grounds for challenging an award based on '*public policy of India*' are the same as those for resisting the enforcement of a foreign award in India.[26] The court further held that it does not have any discretion to either refuse or not refuse enforcement of a foreign award if it is induced by fraud or corruption, or which violates the fundamental policy of Indian law, or basic notions of justice and morality[27]. The court reaffirmed the decision in *Renusagar* and held that the fundamental policy of Indian law must pertain to a breach of some legal principles or legislation which is so basic to Indian law that it is not susceptible to being compromised[28]. The court elucidated that 'fundamental policy' refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also in time-honoured, hallowed principles which are followed by the courts[29].

The court ultimately adopted a pro-arbitration and enforcement approach. It held that the grounds raised to resist the enforcement of the foreign award were, in essence, arguments about the fairness of the arbitral award's conclusion. This amounted to an impermissible review of the merits of the case, which is prohibited under Section 48 of the Arbitration Act. As

24. *Ssangyong* (n 23) [34].
25. *Vijay Karia v Prysmian Cavi E Sistemi SRL* (2020) 11 SCC 1.
26. *Vijay Karia* (n 25) ¶ 43.
27. *Vijay Karia* (n 25) ¶ 59.
28. *Vijay Karia* (n 25) ¶ 88.
29. *Vijay Karia* (n 25) ¶ 88.

a result, the court dismissed the petition and imposed a cost of INR 10 million on the appellants.

Later, the Supreme Court of India in a controversial decision in *Alimenta*[30] held a foreign arbitral award to be unenforceable under Section 48 of the Arbitration Act for being against the public policy of India. The court delved into the merits of the case, in violation of Explanation II of Section 48(2)(b) and decided on the terms of contracts between the parties whereas the only question was as to the enforcement of the award. The court observed that the principles governing public policy are capable of expansion or modification.[31] Although the court in *Alimenta* referred to previous Supreme Court decisions[32] that consistently held that the scope of inquiry under Sections 34 and 48 does not involve reviewing an arbitral award on its merits, it nevertheless reached a contrary conclusion. Interestingly, the court in *Alimenta* did not rely on or refer to *Vijay Karia*.

The uncertainties surrounding the interpretation of the 'public policy of India' exception by Indian courts persist. While a series of judicial precedents has leaned towards protecting foreign awards from excessive judicial interference, the statutory provisions for 'public policy of India' under Sections 34 and 48 of the Arbitration Act remain unchanged.

This is particularly important now as the Arbitration Act is currently undergoing a significant revamp. In October 2024, the Government of India sought public comments on the Draft Arbitration and Conciliation (Amendment) Bill, 2024 ("**Draft Bill 2024**"), aimed at promoting institutional arbitration, minimising judicial interference, and ensuring the timely resolution of arbitration proceedings. While the Draft Bill 2024 addresses several critical aspects, it does not propose any changes to Section 48 of the Arbitration Act.

This highlights the need for a clearer understanding of 'public policy' for foreign awards. This could be achieved by way of appropriate statutory amendments to Section 48 of the Arbitration Act. Therefore, it would be helpful to draw inspiration from the French approach, which differentiates between domestic and international public policy.

30. *National Agricultural Cooperative Mktg Federation of India v Alimenta SA* (2020) 19 SCC 260.
31. *Alimenta* (n 30) ¶ 63.
32. *Alimenta* (n 30) ¶62-69.

3. THE FRENCH PERSPECTIVE ON PUBLIC POLICY

French arbitration law is recognised as one of the most arbitration-friendly legal systems in the world.[33] The current regime, reformed in 2011, is codified in Articles 1442 to 1527 of the French Code of Civil Procedure (‘***FCCP***’) and is bolstered by the French courts’ reliable, pro-arbitration case law. Its defining characteristics include a commitment to party autonomy and the robust enforceability of arbitral awards.

A specificity of French arbitration law is that it distinguishes between domestic and international arbitration, granting greater flexibility to the latter to address the complexities of cross-border disputes.

A. Distinction between Domestic and International Public Policy

French arbitration law distinguishes between domestic and international public policy through two separate sections of the FCCP, with certain expressly listed provisions applying to both.[34] The key criterion for determining whether arbitration is domestic or international is whether the dispute involves ‘international trade interests,’[35] irrespective of whether the award is rendered in France or abroad.

One of the key distinctions between the two regimes lies in their treatment of public policy, a difference explicitly set out in the text of the law. Article 1492 of the FCCP, which lists the grounds for annulment of domestic awards, provides that an award may be set aside if “*the award is contrary to public policy*”. In contrast, Article 1520, governing the annulment of international awards, provides that an award may be set aside if “*recognition or enforcement of the award is contrary to international public policy*”.[36]

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33. M Scherer, ‘Long-Awaited New French Arbitration Law Revealed’ (Kluwer Arbitration Blog, 15 January 2011) <https://arbitrationblog.kluwerarbitration.com/2011/01/15/long-awaited-new-french-arbitration-law-revealed/> accessed 14 February 2025. C J Hendel, M A Pérez Nogales, ‘Chapter 12: Enforcement of Annulled Awards: Differences Between Jurisdictions and Recent Interpretations’, in K Fach Gómez, A M López-Rodríguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International 2019) 194; C Malinvaud & C Camboulive, ‘Paris’, in M Ostrove, C Salomon, et al (eds), *Choice of Venue in International Arbitration* (Oxford University Press 2014) 324.
34. French Code of Civil Procedure 1981, art 1506.
35. French Code of Civil Procedure 1981, art 1504.
36. The same distinction applies at the enforcement stage of arbitral awards: in domestic matters, enforcement cannot be granted if the award is “manifestly contrary to public policy” French Code of Civil Procedure 1981, art 1488, whereas, in international

Articles 1492 and 1520 of the FCCP highlight that domestic public policy is broader than international public policy: a domestic award can be annulled if it violates public policy, while an international award is only set aside if its recognition or enforcement breaches international public policy. This narrower focus means an award will stand if its outcome complies with international public policy, even if the arbitrators' reasoning does not.[37]

The distinction between the two notions has been refined by case law. French public policy, applicable in domestic matters, encompasses French *lois de police* (imperative laws), i.e., laws deemed crucial for safeguarding the political, social, or economic organisation of the State, in situations where the outcome of the award contravenes such mandatory laws. It includes procedural principles[38] (similar to those included in international public policy),[39] and substantial principles, such as respect for the authority of the general meeting of shareholders, rules governing credit, and provisions of the French Commercial Code related to bills of exchange and promissory notes.[40]

In contrast, the concept of international public policy, which is more narrowly construed, encompasses "*all the rules and values that the French legal system cannot ignore, even in international matters*"[41]. These grounds are limited to cases where integrating the award into the French legal order would be blatantly unacceptable. They include procedural principles such as equality of the parties in arbitration and respect for the rights of the defence, as well as the prohibition of fraud, and substantive principles such as competition law, insolvency law principles, sanctions stemming

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matters, enforcement is denied if the award is "manifestly contrary to international public policy" (art 1514 of the FCCP).

37. M De Boisséson, J Madesclair & C Fouchard, *Le Droit Français De l'arbitrage* (2023) 919. For example, if arbitrators fail to recognise that a contract is illicit but still invalidate it on other grounds, such as a defect in consent, the ultimate result — declaring the contract void — aligns with international public policy, and the award should remain enforceable, *see* C Greenberg, 'A La Recherche Du Juste Équilibre Entre Contrôle De La Conformité De La Sentence à l'ordre Public De Fond, Efficacité De La Sentence Et Ordre Public Procédural', (2023) 4 Revue de l'arbitrage 2023 1039.
38. D Bensaude, 'French Code of Civil Procedure (Book IV), Article 1520 [Grounds for setting aside and for appeal of an enforcement order]' in L A Mistelis (ed), *Concise International Arbitration*, 2nd edn, 2015, 1175, para 21.
39. M De Boisséson, J Madesclair & C Fouchard, *Le Droit Français De L'arbitrage* (2023) 915.
40. M De Boisséson, J Madesclair & C Fouchard, *Le Droit Français De L'arbitrage* (2023) 915.
41. Paris, 14 June 2001, Rev. arb. 2001, p. 773.

from United Nations resolutions, or as detailed below, the prohibition of corruption and money laundering.[42]

B. The French Courts' Control of International Public Policy: The Transition From a Minimalist to A Maximalist Approach

Until recently, French arbitration law maintained a non-interventionist and pro-arbitration stance, limiting judicial review of arbitral awards to extreme cases; this was termed as a 'minimalist approach'. The French courts set out this standard in the *Thalès*[43] and *Cytec*[44] cases, where they ruled that a violation of international public policy must be "*flagrant, effective, and concrete*". This restricted review to cases where the breach was evident and discernible from the award itself, with little to no examination of facts or evidence beyond the arbitrators' findings.

This approach, characterised by minimal judicial review of arbitral awards, meant that courts rarely annulled awards for violations of international public policy.[45] It faced criticism for its limitation to a mere appearance-based review of the award's compliance with public policy and failing to adequately address breaches of fundamental values within the French legal system.[46]

Driven by the paramount importance of combating corruption and money laundering,[47] French case law has shifted toward a broader scope of judicial review, initially limited to these specific issues.[48] In this context,

42. M De Boisséson, J Madesclair & C Fouchard, *Le Droit Français De L'arbitrage* (2023) 916-917; D Bensaude, 'French Code of Civil Procedure (Book IV), Article 1520 (Grounds for Setting Aside and for Appeal of an Enforcement Order)' *in* L A Mistelis (ed), *Concise International Arbitration*, 2nd edn, 2015, 1175, para. 22.
43. Paris, 18 November 2004, *Thalès*, JDI 2005, p 357.
44. Cass. Civ. 1, 4 June 2008, no. 06-15.320.
45. D Bensaude, 'French Code of Civil Procedure (Book IV), Article 1520 (Grounds for Setting Aside and for Appeal of an Enforcement Order)' in L A Mistelis (ed), *Concise International Arbitration*, 2nd edn, 2015, 1175, para 22.
46. *See*, on this topic, C Seraglini, *in* J Béguin, J Ortscheidt and C Seraglini, Chronique Droit de l'Arbitrage, *La Semaine Juridique Edition Générale* No. 28-29, 9 July 2008, I 164, para 8; J Ortscheid, Note under Cass. Civ. 1, 4 June 2008, No. 06-15.320, *La Semaine Juridique Edition Générale* No. 25, 18 June 2008, 430.
47. *See* L Larribère, 'La Conception « Maximaliste » Du Contrôle De L'ordre Public International Devant La Cour De Cassation', 3 May 2022, 15 La Gazette du Palais 11.
48. This expanded over time to encompass broader matters, including state rights over natural resources and national defense secrecy: see E. Loquin, Note under Paris Court of Appeal, 28 May 2019, no. 16/11182, *Alstom Transport*, in *Journal du droit international (Clunet)* no. 2, April-June 2020, 10, p. 694.

courts adopted an expanded review in cases involving corruption and money laundering. Notably, in *Indagro*, the courts ruled that violations of international public policy could be raised for the first time during annulment proceedings.[49]

This new "maximalist" approach was confirmed and expanded in the landmark *Belokon* decision, upheld by the *Cour de Cassation* in 2022.[50] The Paris Court of appeal ruled, in a case involving allegations of money laundering, that it was not restricted to the evidence presented before the arbitrators, nor bound by their findings, assessments, or legal characterisations. Instead, the court relied on "serious, specific, and consistent evidence" to conclude that enforcing the award would enable a party to benefit from the proceeds of money laundering, thereby violating international public policy. This new standard aligned with the internationally used "red flags" methodology for addressing corruption and similar allegations, enabling proof through indirect indicators when direct evidence is difficult to obtain.[51]

The Court of Cassation confirmed this decision, upholding the shift from the standard of a flagrant, effective, and concrete breach, to a mere "characterised" breach. While the Court of Cassation emphasised that this did not amount to re-judging the merits, this approach marked a significant departure from the previous standard. This new standard was reaffirmed in further decisions, such as *Sorelec*,[52] where the Court of Cassation upheld the court of appeal's examination of all evidence supporting corruption allegations, irrespective of the fact that such evidence had not been earlier submitted before the arbitral tribunal, and *Santullo*[53], where an award was annulled on grounds of corruption following an in-depth review.

This shift from minimalist review has been praised by some as essential for effectively combating corruption and money laundering, given their

49. Paris, 27 September 2016, No. 15/12614, confirmed by Cass. Civ. 1, 13 September 2017, nos. 16-25.657 and 16-26.445, *Indagro*.
50. Paris, 21 February 2017, no. 15/01650, confirmed by Cass. Civ. 1, 23 mars 2022, no. 17-17-981, *Belokon*. See also L Larribère, 'La Conception « Maximaliste » Du Contrôle De L'ordre Public International Devant La Cour De Cassation' (3 May 2022) 15 La Gazette du Palais 11.
51. See L Larribère, 'La Conception « Maximaliste » Du Contrôle De L'ordre Public International Devant La Cour De Cassation' (3 May 2022) 15 La Gazette du Palais 11.
52. Cass. Civ. 1, 7 September 2022, No. 20-22.118, *Sorelec*, upholding Paris, 17 November 2020, No. 18/02568.
53. Paris, 5 April 2022, No. 20/03242, *Santullo*.

concealed nature, while others have criticised this maximalist approach for increasing judicial interference in arbitral awards, bordering on a review of their merits, which may undermine the efficiency of arbitration.[54] Despite these fears, recent French case law demonstrates an effort to balance the effective protection of international public policy with avoiding a review of arbitral awards on the merits. In *Pharaon*, the Court of Appeal reiterated that the review of international public policy does not aim to ensure the arbitral tribunal correctly applied legal rules, even public policy rules. It emphasised that an alleged violation of a foreign mandatory rule by the tribunal does not necessarily mean the award contravenes the French conception of international public policy.[55]

In *Monster Energy*, the Court of Appeal denied enforcement of an award for breaching international public policy, citing the arbitrators' reliance on Californian law instead of applying French mandatory law prohibiting exclusive import rights agreements in overseas territories.[56] The Court of Cassation overturned this decision,[57] emphasising that enforcement can only be denied if the outcome of the award—not the arbitrators' reasoning—clearly and concretely violates international public policy. This approach preserves arbitration's efficiency while ensuring that decisions violating France's fundamental values or enabling parties to benefit from prohibited conduct are excluded from its legal system, aligning with the broader goal of maintaining arbitration's legitimacy.[58]

4. NEED FOR DIFFERENT STANDARDS OF PUBLIC POLICY FOR DOMESTIC AND INTERNATIONAL ARBITRAL AWARDS

The notion of public policy is an inherently amorphous concept, lacking a precise definition and subject to variations across different jurisdictions and periods. Transnational public policy can be understood as "*a reflection of global consensus- deriving from the convergence of national laws,*

54. C Debourg, Note under Cass. Civ. 1, 7 September 2022, no. 20-22.118, *Sorelec*, in *Journal du droit international (Clunet)* no.vol 4 (October-December 2023, 22) 1334, 1339; A Cottin, W Brillat Capello, '2022 Year in Review: Arbitration-Related Developments in France' (Kluwer Arbitration Blog, 7 February 2023) <https://arbitrationblog.kluwerarbitration.com/2023/02/07/2022-year-in-review-arbitration-related-developments-in-france/> accessed 14 February 2025.
55. Paris, 13 September 2022, No. 21/02217, *Pharaon*.
56. Paris, 19 October 2021, No. 18/01254, *Monster Energy*.
57. Cass. Civ. 1, 17 May 2023, No. 21-24.106, *Monster Energy*.
58. See C Greenberg, 'A La Recherche Du Juste Équilibre Entre Contrôle De La Conformité De La Sentence à L'ordre Public De Fond, Efficacité De La Sentence et Ordre Public Procédural, (2023) 4 Revue de l'arbitrage 1040.

international conventions, arbitral case law and scholarly commentary- on fundamental economic, legal, moral, political, and social values".[59]

The 2015 amendments to the Arbitration Act introduced an inclusive definition of public policy aimed at curbing judicial interference with arbitral awards. Despite these efforts, courts continue to intervene, often citing public policy as grounds for annulment or refusal to enforce arbitral awards.

The introduction of the 'fundamental policy of Indian law' within the amended definition has added to the confusion and vagueness surrounding the application of public policy. This confusion is particularly problematic given that public policy should ideally differ for domestic and international awards. Section 34 of the Arbitration Act, which pertains to domestic awards, can reasonably accommodate a broader definition of public policy. However, for international commercial awards, India's adherence to the New York Convention necessitates a more restrictive interpretation to maintain consistency with international standards.

Recently the Supreme Court of India's judgment in *Avitel*[60] is a landmark decision that supports a narrow construction of public policy for international awards. In this decision, the Court emphasised that public policy, in the context of international arbitration, should be interpreted restrictively.[61] The Court held that for an award to be set aside on public policy grounds, the violation must be of a fundamental and most basic notion of justice and morality. This decision aligns with the principles of the New York Convention, which India is a signatory to, reinforcing the need for minimal judicial intervention in international arbitral awards. The Supreme Court of India in Avitel was guided by the French conception of public policy and how it differentiates between domestic and international arbitral awards:

> *18. At this point, we may also note that Courts in some countries have recognized that when applying their own public policy to Convention Awards, they should give it an international and not a domestic dimension. The Arbitration legislation in France,*

59. Lamm, C B, Pham, H T, et al, *Fraud and Corruption in International Arbitration*, in Fernandez-Ballester, M A and Lozano, D A (eds), Liber Amicorum Bernardo Cremades (Wolters Kluwer España, La Ley 2010) 707; Transnational Public Policy, Jus Mundi, Wiki Notes, 14 May 2024.
60. *Avitel Post Studioz Ltd v HSBC PI Holdings (Mauritius) Ltd* (2024) 7 SCC 197.
61. *Avitel* (n 60) [27], [34].

> *for instance, makes an explicit distinction between national and international public policy, limiting refusal of enforcement only to the latter ground [...]*

Given the clarity provided in *Avitel*, it is imperative to statutorily recognise this restrictive interpretation of public policy for international awards to prevent further judicial overreach and maintain India's credibility in the global arbitration landscape.[62] The notion of public policy for international arbitral awards should be truly international and limited to aspects where there is a broad global consensus. This consensus typically centers around fundamental issues such as fraud and corruption. India has taken a firm stance against fraud and corruption, as evidenced by the Arbitration & Conciliation (Amendment) Ordinance 2020. This ordinance introduced provisions allowing for the stay of an arbitral award if it was induced or affected by fraud or corruption.

To ensure consistency and foster a more arbitration-friendly environment, India's approach to public policy should align with international standards, similar to the French conception of public policy. In France, the scope of public policy concerning international arbitral awards is narrowly construed, focusing primarily on the characterised violation of international public policy which includes serious breaches such as fraud and corruption.

By adopting a similarly restrictive approach, India can enhance its credibility and attractiveness as a venue for international arbitration, ensuring that judicial interference is minimised and only invoked in cases of characterised and significant violations of international public policy. This would not only harmonise India's arbitration framework with global practices but also uphold the integrity and enforceability of international arbitral awards in line with the objectives of the New York Convention. The statutory clarification would help resolve ambiguities and ensure that India's arbitration framework aligns with international practices, fostering a more arbitration-friendly environment.

5. PROPOSED AMENDMENT

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

62. Abhisar Vidyarthi, Sikander Hyaat Khan, 'India: A Late Opening to the Notion of International Public Policy?' (December 2022) 38(4) Arbitration International 249-261.

A. Amendment to Section 48 (Part Ii of the Arbitration Act)

i *Current Provision:*

(2) Enforcement of an arbitral award may also be refused if the Court finds that— (a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or (b) the enforcement of the award would be contrary to the public policy of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

ii *Proposed Amended Provision:*

(2) Enforcement of an arbitral award may also be refused if the Court finds that— (a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or (b) the recognition or enforcement of the award would be contrary to international public policy.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the international public policy of India, only if the making of the award was induced or affected by fraud or corruption.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with international public policy shall not entail a review on the merits of the dispute.]

Section 34 of the Arbitration Act which sets out grounds for annulment of a domestic award should remain intact without any amendments (which mirrors the above Section 48 current provision).

6. CONCLUSION

The proposed amendment to Section 48 of the Arbitration Act would ensure that courts apply a different standard of public policy to international awards compared to domestic awards. The proposed amendment would limit the scope of public policy to issues of fraud and corruption, thereby preventing extensive judicial interference with international awards. It is important to omit the term 'fundamental policy of Indian law', as it currently serves as a broad and often ambiguous ground for resisting enforcement of international arbitral awards. By narrowing the focus to widely recognised issues like fraud and corruption, the proposed amendment will align India's arbitration framework more closely with global standards, promoting a more consistent and predictable enforcement process.

The proposed removal of '*most basic notions of morality and justice*' from the provision aims to streamline and clarify the application of international public policy. It is widely accepted that these fundamental concepts are inherently part of international public policy, making their explicit mention redundant. It would be best to entrust the judiciary to incorporate these notions within the broader scope of international public policy. This would prevent unnecessary verbosity and potential overreach. Thus, the proposed amendment would not only simplify the legal framework but also ensure that the enforcement of international arbitral awards in India remains aligned with international best practices similar to other arbitration-friendly jurisdictions like France.

PERMITTING MODIFICATION OF ARBITRAL AWARDS TO EXPEDITE THE DELAYED DISPOSAL OF S. 34 CHALLENGES – A CASE FOR RECALIBRATING THE LAKSHMAN REKHA

—Kartik Dey[*] & Anish Venkatesh Bindlish[**]

ABSTRACT

The aim of this paper is to examine the history, scope, and judicial interpretations given to Section 34 of the Indian Arbitration and Conciliation Act, 1996. This is against the backdrop of an Order dated 20.02.2024 passed by the Supreme Court in SLP (C) Nos.15336-15337/2021 titled Gayatri Balasamy v ISG Novasoft Technologies Ltd[1] *- wherein, observing a divergence in precedents qua permissibility of modification of arbitral awards challenged under Section 34 of the 1996 Act, a three-judge bench referred the issue to a larger bench. The authors juxtapose the earlier provisions under the Indian Arbitration Act, 1940 which explicitly provided for modification with the present Indian Arbitration and Conciliation Act, 1996 and hypothesise that a purposive interpretation of the existing statutory language permits for modification of arbitral awards. Furthermore, the authors undertake a critical analysis of the landmark Supreme Court pronouncement in NHAI v M. Hakeem*[2]*, which attempted to resolve the divergence by holding that modification was impermissible under Section 34 of the 1996 Act. With the recently released Viswanathan Committee recommendations, suggesting amendments to make modification and part setting aside of awards in the legislation, the limited case sought to be canvassed for judicial intervention through modification of arbitral awards is analogous to minimal invasive*

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1. *Gayatri Balasamy v ISG Novasoft Technologies Ltd* 2024 SCC OnLine SC 1681 <https://main.sci.gov.in/supremecourt/2021/20788/20788_2021_4_15_50676_Order_20-Feb-2024.pdf>.
2. *NHAI v M. Hakeem* (2021) 9 SCC 1.

surgery, as opposed to a full-blown open surgery; that would facilitate course correction in line with the aim of arbitration - an expeditious mode of dispute resolution, while still preserving the sanctity of the Tribunal proceedings.

1. INTRODUCTION

Recently a three-judge bench of the Supreme Court considered whether the powers of the Court under Section 34 and 37 of the Arbitration and Conciliation Act, 1996, would include the power to modify an arbitral award[3], and referred the proposition to a larger bench, given a divided jurisprudence of the issue arising out of *NHAI v M. Hakeem*[4], in contrast to the decisions of other benches of two judges in *Vedanta Ltd v Shenzhen Shandong Nuclear Power Construction Co Ltd*[5], and three judges in *J.C. Budhraja v Orissa Mining Corpn Ltd*[6], *Tata Hydro-Electric Power Supply Co Ltd v Union of India*[7] among others wherein the Supreme Court has either modified or accepted modification of the arbitral awards under consideration. With the procedure for the process of arbitration clearly spelt out in the Act itself, this paper focuses on the post-award stage i.e. the stage of challenge to a given arbitral award. The broader goal of this paper is to examine the judicial questions framed by the three-judge bench, in light of the global legal position qua the permissibility of modifying arbitral awards by the courts and to inspect the former and extant statutory provisions in India for ascertaining the contours of powers of Courts under Section 34 of the 1996 Act to answer whether the power to set aside the arbitral award would include the power to modify the same. The authors undertake a critical analyses of some of the recent landmark rulings of the Supreme Court, particularly *NHAI v M. Hakeem*[8], whose ratio is rather sweeping in its scope and in also in the teeth of Supreme Court decisions *viz a viz* Article 142 that have consistently held that powers under Article 142 of the Constitution of India cannot be exercised beyond the scope of the statutes

3. *Gayatri Balasamy v ISG Novasoft Technologies Ltd* 2024 SCC OnLine SC 1681 <https://main.sci.gov.in/supremecourt/2021/20788/20788_2021_4_15_50676_Order_20-Feb-2024.pdf>.
4. *NHAI v M. Hakeem* (2021) 9 SCC 1 followed in *Larsen Air Conditioning & Refrigeration Co v Union of India* (2023) 15 SCC 472 : 2023 SCC OnLine SC 982 and *S.V. Samudram v State of Karnataka* (2024) 3 SCC 623.
5. *Vedanta Ltd v Shenzhen Shandong Nuclear Power Construction Co Ltd* (2019) 11 SCC 465 along with *Oriental Structural Engineers (P) Ltd v State of Kerala* (2021) 6 SCC 150 and *M.P. Power Generation Co Ltd v ANSALDO Energia SpA* (2018) 16 SCC 661.
6. *J.C. Budhraja v Orissa Mining Corpn Ltd* (2008) 2 SCC 444.
7. *Tata Hydro-Electric Power Supply Co Ltd v Union of India* (2003) 4 SCC 172.
8. *NHAI v M. Hakeem* (2021) 9 SCC 1.

governing the issue. Furthermore, the authors assess the recommendations of the recently released Viswanathan Committee Report on the Arbitration Framework in India, to conclude by proposing a test that could be adopted – a discretionary grant of leave to modify the awards, upon satisfaction by the Courts that there are elements present which could be addressed by the modification of the award, without the need of remitting the case back to the Arbitral Tribunal.

2. EVOLUTION OF ARBITRATION LEGISLATIONS IN INDIA

Arbitration[9] is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court. Presently, arbitration in India is governed by the Arbitration & Conciliation Act, 1996[10] which is predominantly modelled on the UNCITRAL Model Law on International Commercial Arbitration.[11] Further, India is a signatory to the New York Convention on Enforcement and Recognition of Foreign Arbitral Awards as well as the Geneva Convention on the Execution of Foreign Arbitral Awards.[12]

The India Arbitration Act, 1940 (hereinafter, "the 1940 Act" was modelled on the provisions of the English Arbitration Act, 1934 and was designed to be a comprehensive code for arbitration law.[13] Under the Indian 1940 Act, an award could not be enforced without approval of the Court, and by securing a judgment in terms of the award. Further, the Court had the power to modify, remit, or set aside the award.[14]

There was a recognised need to standardise the law by aligning it with the United Nations Commission on International Trade Law (UNCITRAL)

9. World Intellectual Property Organization, 'What is Arbitration?' (WIPO Arbitration and Mediation Center) <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> accessed 14 August 2024.
10. Preamble to the Arbitration & Conciliation Act, 1996 <https://www.indiacode.nic.in/bitstream/123456789/1978/3/a1996-26.pdf>.
11. Alternative Dispute Resolution in India <https://legalaffairs.gov.in/sites/default/files/arbitration-and-mediation.pdf>.
12. Sumit Kumar and Avani Tiwari, 'Recognition and Enforcement of Foreign Arbitral Award in India: In Search of a Formidable Shore' <https://www.scconline.com/blog/post/2021/07/28/foreign-arbitral-award-in-india/>.
13. Law Commission of India, *Amendments to Arbitration and Conciliation Act, 1996* (Law Com. No. 246 2014).
14. 1940 Act, ss 15 and 16.

Model on Commercial International Arbitration, 1985. This led to the enactment of the Indian Arbitration and Conciliation Act, 1996. The 1996 Act, intended to be a comprehensive code, was established to consolidate and amend the existing laws related to domestic arbitration. It also aimed to define conciliation and create a unified legal framework for the fair and effective resolution of disputes. Based on the Model Law, the 1996 Act replaced the 1940 Act, focusing on reducing delays in arbitration proceedings. It further consolidated the laws related to domestic arbitration, international commercial arbitration, and the enforcement of foreign arbitral awards, with its primary goals being expedited arbitration processes and minimal judicial intervention. The key objectives[15] of the Arbitration and Conciliation Act, 1996 emphasise a minimal supervisory role of courts along with speedy and cost-efficient settlement of disputes.

A. Law Commission Reports and Recommendations

In its 176th Report[16] issued in 2001, The Law Commission conducted a thorough review of the 1996 Act. The Commission noted that while the principle of minimal judicial interference in setting aside an award was appropriate for international arbitral awards, it could not be fully applied to domestic arbitrations. Consequently, it recommended the addition of two grounds for challenging a domestic award under Section 34: a substantial error of law, apparent on the face of the award; and the absence of reasons in the arbitral award.

In 2014, the Law Commission was again tasked with reviewing the 1996 Act. In its 246th Report,[17] the Law Commission provided a detailed analysis of India's arbitration law and suggested several significant amendments. This paved the way for the Arbitration and Conciliation (Amendment) Act, 2015. Some of the key amendments made include: interim orders of arbitral tribunal were made enforceable in the same manner as if were a decree of a court,[18] obligation for arbitrators to disclose their independence,[19] fast

15. Ministry of Law and Justice, Government of India, *Alternative Dispute Resolution in India*, <https://legalaffairs.gov.in/sites/default/files/arbitration-and-mediation_0.pdf> accessed on 14 August 2024.
16. Law Commission of India, *The Arbitration Act & Conciliation Amendment Bill, 2001* (Law Com. No. 176, 2001).
17. Law Commission of India, *Amendments to Arbitration and Conciliation Act, 1996* (Law Com. No. 246, 2014).
18. Arbitration and Conciliation Act 1996, ss 9 and 17.
19. Arbitration and Conciliation Act 1996, s 12 read with schs 5 and 7.

track procedure[20] for arbitration, statutory recognition of 'patent illegality' as a ground to set aside a domestic award under Section 34, fixed timeline for courts to dispose of challenges to arbitral awards within one year[21], no automatic stay of awards merely upon challenging the award,[22] etc.

3. CHALLENGE TO ARBITRAL AWARDS

The process of arbitration under the Arbitration and Conciliation Act of 1996 begins upon issuance of request or notice of arbitration to the opposite party[23] and ends with an arbitral award being granted by an arbitrator appointed in terms of the agreement, the consent of the parties or by the court. Section 34 of the 1996 Act permits setting aside of arbitral award upon an application being made under Sub sections (2) and (3) on the grounds of:[24]

i. Incapacity of a party

ii. Improper composition of the arbitral agreement or invalidity of the arbitration agreement under the law to which the parties have subjected it;

iii. The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

iv. The award deals with a dispute not contemplated by, or not falling within the terms of the submission or it contains decisions on matters beyond the scope of the submission to arbitration.

v. the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

vi. the arbitral award is in conflict with the public policy of India

vii. the award is vitiated by patent illegality appearing on the face of the award

In dispute resolution practice, every ground is availed of as a matter of right, to assail the arbitral award, to a point where the pleadings can be

20. Arbitration and Conciliation Act 1996, s 29A.
21. Arbitration and Conciliation Act 1996, s 34(6).
22. Arbitration and Conciliation Act 1996, s 36(2).
23. Arbitration and Conciliation Act 1996, s 21.
24. Arbitration and Conciliation Act 1996, s 34.

tailored to retrofit or couch them in the narrow remit of challenge. These are considerations like unreasoned findings without evidence, omission to appreciate vital evidence or extraneous/irrelevant considerations by the arbitral tribunal as laid down by the Supreme Court in *Associate Builders v DDA*[25] and *Ssangyong Engg & Construction Co Ltd v NHAI*[26] Keeping in view a scrupulously distant examination of the award, before a court can undertake that exercise, it is tasked with a delicate role of peregrinating around the merits, followed by entertaining the challenge on the limited technical grounds.

When an arbitral award is challenged under Section 34, there are four outcomes possible:

a) The award is upheld in its entirety.

b) The award is set aside in its entirety and remitted back to the Tribunal to be decided afresh.

c) A severable part of the award is permitted to be excised for fresh adjudication and the rest is upheld.

d) If so requested by a party, the proceedings are adjourned for a period of time in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.[27]

A. Permissibility of Arbitral Award Modification by Courts

The earlier Indian Arbitration Act, 1940 had explicitly granted courts the power to modify or correct an arbitral award under Section 15:

> *"15. Power of Court to modify award- The Court may by order modify or correct an award-*
>
> *(a) where it appears that a part of, the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or*

25. *Associate Builders v DDA* (2015) 3 SCC 49.
26. *Ssangyong Engg & Construction Co Ltd v NHAI* (2019) 15 SCC 131.
27. Arbitration and Conciliation Act 1996, s 34(4).

(b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or

(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission."

The Apex Court, in *Larsen Air Conditioning & Refrigeration Co v Union of India*[28] and *S.V. Samudram v State of Karnataka*[29], observed that that power to modify had been consciously omitted by the Parliament, while enacting the Arbitration Act, 1996. The court held that the Parliamentary intent was to exclude the power to modify an award, in any manner, by courts. Moreover, in the scheme of the 1996 Arbitration Act, Section 5 prohibits intervention by any judicial authority, except to the extent provided in Part I of the Arbitration Act.

It is the case of the authors that the repurposing of Section 15 of the 1940 Act may not have been the outcome of a conscious legislative discourse, but perhaps a hasty adoption of Article 34 of UNCITRAL Model Law, 1985 on International Commercial Arbitration. The 1940 Act was introduced to improve the Arbitration Act 1899, which did not allow courts to alter or amend an award. The discussion from the 76th Law Commission Report[30] is germane in this context, which termed Section 15, Arbitration Act, 1940 as "salutary" and consciously observed that there was no requirement to effect any change in it. The nuance and importance of Section 15 in the 1940 Act is likely to have gotten brushed under the carpet, as its quiet omission was conspicuously absent in the 176th Law Commission Report[31] or the 246th Law Commission Report[32] which suggested amendments to the Arbitration Act 1996. A table is provided to illustrate the comparison of provisions in the 1940 and 1996 Act.

28. *Larsen Air Conditioning & Refrigeration Co v Union of India* (2023) 15 SCC 472 : 2023 SCC OnLine SC 982.
29. *S.V. Samudram v State of Karnataka* (2024) 3 SCC 623 : 2024 SCC OnLine SC 19.
30. Law Commission of India, *Sixth Report on Arbitration Act, 1940* (Law Com. No. 76, 1978).
31. Law Commission of India, *The Arbitration Act & Conciliation Amendment Bill, 2001* (Law Com. No. 176, 2001).
32. Law Commission of India, *Amendments to Arbitration and Conciliation Act, 1996* (Law Com. No. 246, 2014).

Provision	1940 Act	1996 Act
Power to modify award	Section 15	-
Severability	Section 15 (a)	Section 34(2) Proviso
Amending of errors or imperfection	Section 15(b)	-
Clerical Mistake rectification	Section 15(c)	Section 33

B. Will Permitting Courts to Modify Arbitral Awards Violate the Principle of Kompetenz-Kompetenz?

The principle that arbitrators have jurisdiction to consider and decide the existence and extent of their own jurisdiction is referred to as the *kompetenz-kompetenz* principle or the question of 'who decides'[33]. Section 16(1) of the 1996 Act enunciates the principle of *kompetenz-kompetenz*, granting the arbitral tribunal the power to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement.[34] The principle of *kompetenz-kompetenz* has further been postulated to have two precepts: positive and negative.[35] While the positive effect of *kompetenz-kompetenz* refers to an arbitral tribunal's power to rule on its jurisdiction[36], the negative effect takes the said principle a step further by establishing a notional chronological priority for the tribunal with respect to resolving jurisdiction questions.[37] The negative effect prioritises a priority in favour of the arbitral tribunal in the event of *lis-pendens* with court proceedings qua the same subject matter, and excludes actions aimed at confirming or denying the validity of the arbitration agreement and, more broadly, the jurisdiction of the arbitral tribunal; the latter could only be controlled by the Courts in an application to set aside the decision – preliminary or final – of the arbitral tribunal or at the enforcement stage.[38] This begs the question, does reading Section 34 of the 1996 Act as including the power to modify the award, violate the principle of *kompetenz-kompetenz*? The answer that the authors propose would be - no, as the principle of *kompetenz-kompetenz* is concerned with

33. Gary B Born, *International Commercial Arbitration* (2010) 853.
34. Arbitration and Conciliation Act 1996, s 16.
35. Pratyush Panjwani and Harshad Pathak, 'Assimilating the Negative Effect of Kompetenz-Kompetenz in India: Need to Revisit the Question of Judicial Intervention?' 2013 2(2) Indian Journal of Arbitration Law.
36. Amokura Kawharu, 'Arbitral Jurisdiction' (2008) 23 NZ Univ L Rev, 238, 243.
37. *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Emmanuel Gaillard and John Savage eds 1999) 397; Stephen Schwebel, *International Arbitration: Three Salient Problems* (1987) 2.
38. Gaillard, (n 37), at 660.

the jurisdictional aspects of a dispute. The arbitration process is conducted before a competent tribunal, which, based on the statement of claims and counter-claims, passes an award. When this award is challenged under Section 34, modification by the court would not violate the jurisdiction of the arbitral tribunal as the award is the outcome of a jurisdictionally competent forum.

This also gets support from the purposive interpretation of Section 34 by the Delhi High Court in *Union of India v Modern Laminators Ltd*[39], in which the Court read into Section 34 of the 1996 Act, the "obvious error" and "the slip rule" found in Section 15 of the 1940 Act. The Court observed that the power given to the court to set aside the award, would necessarily include a power to modify the award, notwithstanding absence of express power to modify the award, as under the 1940 Act, reasoning that if the powers of the court under Section 34 were restricted to not include power to modify, the courts power to impart a finality to the litigation through curing of manifest infirmities would cease, making arbitration as a form of alternative dispute resolution more cumbersome than the traditional judicial process. However, this decision rightly qualifies the scope of such interference with the award, by precluding the substitution of the opinion of the arbitrator or an exercise of fresh finding or adjudication of intricate questions of law. The decision further elaborated that this extent interference through modification of award will be a species of "setting aside" only and would be "setting aside to a limited extent". For any further fact finding or adjudication of intricate questions of law, the appropriate decision was to grant parties the right to avail remedies before the forum of their choice.

4. JUDICIAL REVIEW AND MODIFICATION OF ARBITRAL AWARDS: LEGAL POSITIONS IN UNITED KINGDOM, UNITED STATES OF AMERICA, AUSTRALIA AND SINGAPORE

In the **United Kingdom**, under the English Arbitration Act, 1996[40], courts have the authority to alter an award if challenged on substantive grounds or when an appeal is made on a question of law. Courts are empowered to set aside an award, in whole or in part[41], upon hearing an application to challenge the tribunal's substantive jurisdiction[42]. Where the ground for

39. *Union of India v Modern Laminators Ltd* 2008 SCC OnLine Del 956.
40. UK Arbitration Act 1996, s 67.
41. David St John Sutton et al, *Russell on Arbitration* (Sweet and Maxwell, 23rd edn 2007) 361.
42. UK Arbitration Act 1996, s 67(3)(c).

challenge is a serious irregularity[43] or the application is in the nature of an appeal against the award on a point of law[44], the court will only set aside the award (in whole or in part) if it is satisfied that it would be inappropriate to remit it to the tribunal for reconsideration. An application under Section 67 of the English Arbitration Act, 1996, challenging any award as to the arbitrator's jurisdiction confers, on the court, a strictly limited jurisdiction which is confined to determining whether an *award as to jurisdiction should be confirmed, varied or set aside in whole or in part*[45]. If and to the extent that an award covers both jurisdiction and substantive issues as to the merits of the case the court has the power to declare the whole or part of that section of the award which deals with the merits to be of no effect depending on the court's conclusion on jurisdiction[46].

The effects of the Court's intervention with respect to the award are as follows:

1. Where the award is varied, the variation has effect as part of the tribunal's award[47];

2. Where the award is remitted to the tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct[48]; and

3. Where the award is set aside or declared to be of no effect, in whole or in part, the court may also order that any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies, is of no effect as regards the subject matter of the award or, as the case may be, the relevant part of the award[49].

43. UK Arbitration Act 1996, s 68(3).
44. UK Arbitration Act 1996, s 69(7).
45. David St John Sutton et al, *Russell on Arbitration* (Sweet and Maxwell, 23rd edn 2007) 361; s 67(3) of the Arbitration Act 1996.
46. *Ronly Holdings Ltd. v JSC Zestafoni G Nikoladze Ferroalloy Plant England and Wales High Court* [2004] EWHC 1354 (Comm), S 30(1)(b) of the UK Arbitration Act 1996 which is also included in the definition of "substantive jurisdiction" by s 82(1) of the Act.
47. UK Arbitration Act 1996, s 71(2).
48. UK Arbitration Act 1996, s 71(3).
49. UK Arbitration Act 1996, s 71(4).

Fence Gate Ltd v NEL Construction Ltd[50], before the England and Wales High Court has some relevant observations from the Judge, who discusses the dilemma of being statutorily empowered to vary or modify an award, leaning initially in favour of remitting the matter back to the Tribunal, but eventually deciding to vary the award instead, as a remission would entail additional costs and delay of a rehearing before the arbitrator, which would have to be concluded within three months, with the potential for yet further costs and delay in a possible subsequent court challenge of the new award.

The Judge then goes on to discuss an interesting and rare outcome, about the retention of jurisdiction of the original arbitrator, once the Court has exercised the power to modify the award. Leaving it to the parties assent to confirm the same, the Court holds:

> ***107.*** *The further question is whether it would be appropriate for the arbitrator to retain jurisdiction to assess the detailed costs of the claim and the counterclaim under section 63 of the Act and Rule 13.10 of CIMAR once the award, as varied by me, has been finalised. Both parties suggested that it would remain appropriate for the arbitrator to conduct this final stage of the dispute even if I had previously conducted a variation hearing of the costs award. I agree with this jointly held view."*

In the **United States**, the United States Federal Arbitration Act, 1925 Act[51] allows courts to modify or correct an award under three conditions: an evident material mistake; the award addresses an issue not submitted for arbitration or the award is imperfect in form without affecting the merits. The Supreme Court of Mississippi in *D.W. Caldwell Inc v W.G. Yates & Sons Construction Co*[52], expounds on the power of a Court to vary or modify an award, yet construes it in a narrow sense, on account of the volitional choice of parties to enter into the arbitration proceedings:

> *"13. A defining characteristic of arbitration is its finality and the binding disposition of a controversy. See Schaefer v Co, 63 Ohio St. 3d 708, 590 N.E. 2d 1242 (1992). Parties to an arbitration enter the process knowing that the arbitrator's award will signal the factual end of their dispute, rather than leaving open the door to the possibility of future appeals. With this in mind, courts confirm,*

50. 2001 EWHC 456 (TCC).
51. United States Federal Arbitration Act of 1925, s 11.
52. 242 So 3d 92 (Miss 2018).

*or [**10] modify an arbitrator's award do so through an extremely limited lens."*

In **Australia**, courts can only set aside an award under Section 34 of the International Arbitration Act,1974. This section is also similarly worded as Section 34, Arbitration & Conciliation Act, 1996. However, Section 34-A, added later, allows for an appeal through which modifications can be made.

In **Singapore**, courts can not only modify an award under an independent provision but also modify and set aside an award in the same proceeding by combining Sections 51(2), 48, and 49 of the Singapore Arbitration Act, 2001[53]. Section 48 which empowers the Court to set aside an Award is almost identically worded as Section 34 of the Indian Act and it speaks only about setting aside an Award. But Section 49, which provides for a remedy of Appeal, empowers the Court, under subsection (8) even to vary the Award[54].

5. INDIAN JUDICIAL PRONOUNCEMENTS ON S. 34 OF THE 1996 ACT AND THE PERMISSIBILITY OF COURTS TO MODIFY THE ARBITRAL AWARD

The Apex Court, in *Vedanta Ltd v Shenzhen Shandong Nuclear Power Construction Co Ltd*[55], allowed the modification of the award by reducing the interest rate awarded by an arbitral tribunal, reasoning that such interest rate did not reflect the prevailing economic conditions.

The Supreme Court, in *Mcdermott International Inc v Burn Standard Co Ltd*[56] held inter-alia that the court could not correct errors of the arbitrators. It could only quash the award leaving the parties free to begin the arbitration again if it is desired.

In *NHAI v M. Hakeem*[57], the Apex Court observed that Section 34 of the Arbitration Act, 1996 could not be held to include within it, the power to modify an award. It further observed that the Arbitration Act was modelled on the UNCITRAL Model Law on International Commercial Arbitration

53. Singapore Statutes Online, 'Arbitration Act 2001' <https://sso.agc.gov.sg/Act/AA2001?ProvIds=P19-> accessed 14 August 2024.
54. *Gayatri Balaswamy v ISG Novasoft Technologies Ltd* 2014 SCC OnLine Mad 6568 : (2015) 1 Arb LR 354 (Madras) para 49.
55. *Vedanta Ltd v Shenzhen Shandong Nuclear Power Construction Co Ltd* (2019) 11 SCC 465.
56. *Mcdermott International Inc v Burn Standard Co Ltd* (2006) 11 SCC 181.
57. *NHAI v M. Hakeem* (2021) 9 SCC 1.

1985, under which no power to modify an award was given to a court hearing a challenge to an award. While Section 15 of the Arbitration Act, 1940 provided specifically for modification of an award, the Arbitration Act, 1996 did not, as it was in alignment with the Model Law. In jurisdictions like England, the United States, Canada, Australia and Singapore, there were express provisions that permitted the varying of an award but in the case of Section 34 of the Indian Arbitration Act, 1996, the Parliament very clearly intended that no power of modification of an award existed.

The Supreme Court in *Dyna Technologies (P) Ltd v Crompton Greaves Ltd*[58] set aside an arbitral award on the ground of it being unintelligible and unreasoned. Observing that while it could have been cured under Section 34(4) of the 1996 Act by remitting the award back to the arbitral tribunal, the 25 year pendency did not merit that course of action. Accordingly, the Supreme Court set aside the award and directed the respondent therein to pay the claimant an amount to provide quietus to the litigation. Supreme Court further observed that the legislative intent of providing Section 34(4) in the Arbitration Act was to make the award enforceable, after giving an opportunity to the Tribunal to undo the curable defects. Thus, a challenge under Section 34 of the Arbitration Act of 1996 was maintainable only when there was complete perversity in the reasoning. Observing that if a case took too long for its adjudication, remanding the same to the Tribunal was not beneficial as the purpose of arbitration as an effective and expeditious forum itself stood effaced.

6. THE PROBLEM WITH DIVERGENT RULINGS

The divergent interpretations by courts entails that the parties would readily invoke Articles 226/227 of the Constitution of India, or in the alternative, continue the cycle of challenge till the Supreme Court – through an invocation of the statutory provisions of Sections 34 37 of the 1996 Act, followed by a Special Leave Petition ***["SLP"]*** under Article 136, to attempt obtaining relief under Article 142 of Constitution of India. A pertinent question that emerges is whether constitutional and discretionary provisions like the SLP could be banked upon to resolve commercial disputes arising out of a special legislation that places prime importance on expeditious disposal of contractual disputes. The quandary is strange, quite similar to the lack of recognition of irretrievable breakdown of marriage as a ground for divorce, and how the parties after consecutive appeal dismissals, finally reach the Supreme Court to obtain a dissolution of their marriage, which

58. *Dyna Technologies (P) Ltd v Crompton Greaves Ltd* (2019) 20 SCC 1.

is granted by the Supreme Court under Article 142 of the Constitution of India. What separates the Arbitral proceedings, from the example of non-recognition of irretrievable breakdown of marriage as a ground for divorce is the time bound legislative intent to resolve the disputes promptly in the former.

7. THE CONFLICT BETWEEN ARTICLE 142 OF CONSTITUTION OF INDIA AND EXPRESS STATUTORY PROVISIONS

An interesting rationale given by the Supreme Court in *NHAI v M. Hakeem*[59] with respect to modification of arbitral awards was that Article 142 of Constitution of India could be invoked in order to achieve complete justice between parties. It reasoned that although the main goal of arbitration was to ensure minimal judicial interference, practical considerations also came into play. It went on to observe that in instances where the Supreme Court had adjusted awards under Article 142 of the Constitution to correct obvious mistakes and deliver complete justice, such modifications were reasonable and stemmed from judicial insight.

The authors submit that this reasoning is in conflict with established judicial precedents of the Supreme Court itself that have underscored the wide amplitude of powers under Article 142, yet caution exercising it in cases where statutory provisions hold the field. In a recent decision by the Constitutional Bench of the Supreme Court in *High Court Bar Assn v State of U.P.*[60], the Court reiterated the scope of power under Article 142 of the Constitution of India as observed in *Prem Chand Garg v Excise Commr*[61]:

> *"12. ....The powers of this Court are no doubt very wide and they are intended to be and will always be exercised in the interest of justice. But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws. Therefore, we do not think it would be possible to hold that Article 142(1) confers upon this Court powers which can contravene the provisions of Article 32."*

59. *NHAI v M. Hakeem* (2021) 9 SCC 1.
60. *High Court Bar Assn v State of U.P.* (2024) 6 SCC 267.
61. *Prem Chand Garg v Excise Commr* 1962 SCC OnLine SC 37.

Another Constitution Bench, in *Supreme Court Bar Assn v Union of India*[62] held thus:

> *"47. The plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law. There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Court to prevent "clogging or obstruction of the stream of justice". It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to ignore the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly.*
>
> *48.* **…** *Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject."*

62. *Supreme Court Bar Assn v Union of India* (1998) 4 SCC 409.

8. PENDENCY OF S.34 CHALLENGES AND THE NEED FOR JUDICIAL INTERVENTION

While the statute and courts have been circumspect in review of the award, this process of analysing the matters with a hands-off approach without going into the merits has created a bottleneck. The intent of expeditious disposal of the matters under section 34 (within one year from date of service of notice[63]) stands vitiated in practice. Take for example Delhi High Court where, as on 01.07.2024, there are 2,178 petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 pending before the Delhi High Court. The disposal of Section 34 petitions is on average taking 1,368 days or roughly more than 3.5 years.[64] The disposal of enforcement petitions under Section 36 also does not fare better. There are 890 enforcement petitions pending, with an average final disposal taking 1,064 days or around 3 years.[65]

A. Reasons and Necessity for Permitting Modification

The "purposive" view would be that the Court under Section 34 of the Act can "modify" portions of an arbitrator's award and the power under the Section 34 is not restricted to only setting aside the award[66]. Benefits of modification are:

a) Judicial Intervention to cure deficiencies in the arbitral award and course correction to prevent parties from being relegated to *de novo* proceedings before the Tribunal.

b) Expeditious and timely disposal of S. 34 challenges.

c) Judicial and precedential consistency.

d) Minimizing challenges before 226/227 writ courts.

63. Arbitration and Conciliation Act 1996, s 34(6).
64. Amer Vaid, 'Section 34 of Arbitration Act and Timely Disposal: Two Roads that Never Meet' *Bar and Bench* <https://www.barandbench.com/columns/section-34-and-timely-disposal-two-roads-that-never-meet>; Delhi High Court — Institution, Disposal and Pendency of Commercial Cases During the Month of July, 2024 <https://delhihighcourt.nic.in/uploads/CommercialCourt/110466973666b601fab6bb6.pdf≥ accessed 13 August 2024.
65. ibid.
66. Nakul Dewan, *Enforcing Arbitral Awards in India* (New York: LexisNexis, 1st edn 2017).

e) Parties would not be left with a discretionary remedy under Article 142

f) Bring parity with international provisions to challenge arbitral awards.

g) Make India a viable commercial partner/ Ease of doing business (World Bank rank/stats) – India ranks 63 out of 190 countries in the World Bank's Ease of Doing Business[67] rankings. However, in the specific area of Enforcing Contracts, India significantly underperforms and is presently ranked at 163.

9. SOLUTIONS FOR INDIA

A. Severability and the Issuance of Practice Guidelines by HCs to Employ the Severability Test at the Threshold

Both the Model Law[68] and the 1996 Act[69] acknowledge the application of severability while remitting arbitral awards under S.34(4) of the 1996 Act.

An examination of the Model Law's legislative history indicates that the doctrine of severability was very much within the scheme of Art.34[70]. Draft Art. 41 on recourse against the arbitral award prepared by UNCITRAL Secretariat exclusively provided that "a court may, where appropriate, set aside only a part of the award, provided that this part can be separated from the other parts of the award".[71] When the Draft Articles were presented before the Working Group on International Contract Practices in its Fifth and Sixth Session, the Working Group adopted it without any objection, thereby affirming the application of the doctrine of severability while setting aside arbitral awards.

The proviso to S. 34(2)(a)(iv) provides that if the decisions on matters submitted to arbitration can be separated from those not so submitted,

67. World Bank Group, 'Doing Business: Rankings' (Doing Business 2020) <https://archive.doingbusiness.org/en/rankings> accessed 14 August 2024.
68. Pieter Sanders, *The Work of UNCITRAL on Arbitration and Conciliation* (Alphen Aan Den Rijn: Kluwer Law International 2004).
69. *K.K. John v State of Goa* (2003) 8 SCC 193.
70. Howard M Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Alphen Aan Den Rijn: Kluwer Law International 1989) 954-956.
71. United Nations General Assembly, *Report of the Working Group on International Contract Practices on the Work of its Fifth Session* (1983) 32-34.

only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside.[72]

In *J.G. Engineers (P) Ltd v Union of India*[73], Apex Court held that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent.

Recently, a Ld. Single Judge of the Delhi High Court, in *NHAI v Trichy Thanjavur Expressway Ltd*[74], extensively considered the law on this aspect. It was observed that if an award was composed of separate components, each standing separately and independent of the other, there was no hurdle in adopting the doctrine of severability to partly set aside an award. The power so wielded would continue to remain confined to "setting aside", and would thus constitute a valid exercise of jurisdiction under section 34 of the Act. While discussing the judgment in *N. Hakeem*, the Delhi High Court held that the term 'modify' used in Hakeem meant a variation or modulation of the ultimate relief that could be accorded by an arbitral tribunal. However, when a Section 34 Court exercised its power to partially set aside an award, it did not amount to a modification or variation of the award. Such setting aside was confined to the offending and unsustainable part of the award coming to be annulled and set aside. It is this distinction between a modification of an award and its partial setting aside that had to be borne in mind. Therefore, the expression "setting aside" as employed in section 34 included the power to annul a part of an award, provided it was severable and did not impact or eclipse other components of the award.

B. Viswanathan Committee Report Recommendations on Legislative Amendments to Revive a Qualified Equivalent of Section 15 of the 1940 Act

On 07.02.2024, the Viswanathan Committee[75] submitted a report to the Law Ministry, examining the proposal to permit courts to modify or vary an arbitral award, while setting aside such an award in exercise of its Section

72. Arbitration and Conciliation Act 1996, s 34(2)(a)(iv) proviso.
73. *J.G. Engineers (P) Ltd v Union of India* (2011) 5 SCC 758.
74. *NHAI v Trichy Thanjavur Expressway Ltd* 2023 SCC OnLine Del 5183.
75. 'Expert Committee on Arbitration Law Proposes Complete Overhaul of Arbitration and Conciliation Act, 1996' (*LiveLaw* 5 March 2024) <https://www.livelaw.in/arbitration-cases/expert-committee-on-arbitration-law-proposes-complete-overhaul-of-arbitration-and-conciliation-act-1996-251306≥ accessed 14 August 2024.

34 jurisdiction. This is proposed to be achieved by amending sub-section (2) and sub-section (2A) of S. 34 of the 1996 Act. The Committee however, goes on to qualify that such orders must be made only in exceptional circumstances to meet the ends of justice. This will enable a S. 34 Court to provide a quietus to the matter, so as to avoid further litigation. It has proposed to substitute the words *"set aside by the Court"* with the words *"set aside in whole or in part by the Court"* and add a proviso for partly varying the award in exceptional circumstances.

The Committee recommends amendment to sub-sections (2) and (2A) of section 34 to substitute the words "set aside by the Court", with the words "set aside in whole or in part by the Court" and to add a proviso, namely:

> *"Provided that in cases where the Court sets aside the arbitral award in whole or in part, the Court may make consequential orders varying the award only in exceptional circumstances to meet the ends of justice".*

The authors propose that in addition to a mandatory severability assessment by the Section 34 Courts, there could be provision included by the legislature, for grant of leave to modify to ascertain whether modification would be permitted. An example of a salubrious checking provision can be inspired from the Australian Section 34A(8), Commercial Arbitration Act, 2017 which states that

> *"The court must not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration".*

This would tie in harmoniously with Section 34(4) of the Act,1996 in India that already exists. The import of this interpretation would mean that the power to set aside u/s 34 would entail 5 outcomes based on the language of Section 34 that exists as is:

a) Non interference

b) Setting aside severable components of the award.

c) Setting aside of the award completely

d) Remitting the matter back to the Tribunal under Section 34(4), Act, 1996

e) Modifying the offending/assailed part of the award.

10. CONCLUSION

The prevalent legal position that exists today is that the present statutory regime does not permit for modification of the arbitral awards, given that the statute does not expressly provide for it. *Hakeem* explains the 1996 Act to have been modelled on the UNCITRAL regime - completely de hors the 1940 Act. Thus, as per Hakeem, although the awards challenged under the 1940 Act would be amenable to modification but those governed by the 1996 Act are *stricto sensu* barred from being touched on merits by the courts - which can only affirm the award, remand it back, sever the offending parts (if severable) or set it aside - wiping the slate clean and starting the process afresh before the Tribunal.

The authors would respectfully like to disagree with the sweeping scope that the ratio of *Hakeem* attempts to lay down. Even though the dominant textualist view that the courts have taken and the Supreme Court has pre-eminently underscored is that modification is not permissible under Section 34 of the 1996 Act; the second plausible interpretative line that has permitted modification also continues to exist and remains in force for the 34 courts to rely upon as stare decisis, until it is overruled.

In fact the observations of the Supreme Court in *Hakeem*, that the modifications ratified by the Supreme Court were under the powers of Article 142 of Constitution of India, in the opinion of the authors, bolsters the second view - that modification is in fact impliedly permissible under the present statutory regime as the very contours of 142 do not permit the Supreme Court to bypass the statutory framework of Section 34 of the 1996 Act. In *Prem Chand Garg v Excise Commr*[76] and *Supreme Court Bar Assn* v *Union of India*[77] it was the Supreme Court itself, which enunciated that Article 142 could not be exercised to negate the statutory provisions.

Naturally this discordance has manifested itself in the evolving context of commercial disputes, which is why the question has been referred to a larger bench of the Supreme Court. Recognising this schism, the Viswanathan committee recommendations are salient and salutary, as they implore the legislative codification of this latent power to modify. What remains to be seen is whether the larger Supreme Court Bench decides on the permissibility of modification under the present framework first, or the Parliament expressly provides for modification in line with the Committee

76. *Prem Chand Garg v Excise Commr* 1962 SCC OnLine SC 37.
77. *Supreme Court Bar Assn v Union of India* (1998) 4 SCC 409.

recommendations before the Court decides the issue. Regardless, as the authors spelled out earlier in the paper, the power to modify would have to be hedged with strict guidelines to allow for modification in the fittest of cases. As discussed earlier, a self-adopted test by the Court, for grant of leave to modify to ascertain whether modification would be warranted would be a valuable preliminary checkpoint to ward off abuse of the provision for modification. This would be akin to a writ of certiorari or the discretion vested with the Court under Article 136

An interesting upshot of powers to modify awards would be on the approach of the Counsels and in the nature of pleadings in the Section 34 petitions by the litigants. Quite often, whether or not an award is perverse or not, the present approach to Section 34 challenges is akin to sledgehammer litigation, wherein for a minor discrepancy, a possibly defaulting party can avail the right to disturb and vitiate the entire arbitral process. Recognition of modification would not just empower the Court to sequester and pinpoint the infirmity and correct the same; it would also place the onus on the challenging party to narrow down and specify the infirmity, and then get a limited redressal of its grievance, without having the dilatory entitlement to frustrate the entire award. In absence of a definitive ruling, the recourse under Articles 226/227 of the Indian Constitution before the High Courts and through SLPs under Article 136 of the Indian Constitution before the Supreme Court, would continue to be availed by the parties in a disorganised manner that defies the purpose of the arbitration process being a proverbial highway.

INTERNATIONAL ARBITRATION: THE REMEDY TO CROSS-BORDER INSOLVENCY'S ENFORCEMENT WOES IN A POST-MODEL LAW WORLD

—Tejas Vijay Raghav[*] & Arnav Sanjay Mathur[**]

ABSTRACT

*International Arbitration and Cross-Border Insolvency represent distinct yet interconnected areas of law, sharing the common concern of enforceability. While the UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-Related Judgments, 2018 (**'MLRE'**) addresses this within the insolvency domain, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (**'NYC'**) deals with it in the realm of International Arbitration.*

This paper critically examines the MLRE's effectiveness in enforcement, revealing its shortcomings. It identifies specific gaps that hinder its practical application, particularly regarding the harmonisation of recognition and enforcement standards across jurisdictions. Despite the MLRE, the issue of enforceability in cross-border insolvency persists. Contrarily, International Arbitration under the NYC emerges as the most viable alternative to resolving certain Cross-Border Insolvency disputes, notwithstanding possible challenges with enforcement and recognition of arbitral awards.

1. INTRODUCTION

"Judgments are worthless without the ability to enforce them."[1]

With the advent of rapid globalisation and an ever-changing commercial landscape, the frequency and complexity of Cross-Border Insolvencies

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1. *EM Ltd v Republic of Argentina* 720 F Supp 2d 273, 279 (SDNY 2010).

have been on the rise.[2] These factors have also played an instrumental role in International Arbitration becoming the preeminent form of resolving cross-border commercial disputes.[3] However, at a fundamental level, insolvency and arbitration have been regarded as presenting "*a conflict of near polar extremes.*"[4] This characterisation has arisen in the context of analysing insolvency and arbitration at a policy level. According to this policy-level analysis, insolvency follows an approach of centralisation and aims to safeguard stakeholder interests, while arbitration follows a decentralised approach and is founded on party autonomy.[5]

Notwithstanding these policy-level distinctions, *enforceability* stands out as a unifying concern for both insolvency and arbitration. Indeed, while enforceability has long been viewed as a significant challenge in Cross-Border Insolvency,[6] it is simultaneously lauded as a key advantage in International Arbitration.[7] This contrast is particularly relevant in an era marked by the increasing interconnectedness of economies and the complexities inherent in multinational business operations, which create the urgent need for a coherent global regime for Cross-Border Insolvency.[8] Although there have been multiple attempts to strengthen the enforceability of judgments in Cross-Border Insolvency, these efforts have yet to yield consistent, universal solutions.[9] Most recently, the MLRE has aimed to address these issues, yet questions linger regarding its efficacy and efficiency. On the other hand, the NYC continues to stand as a proven framework, ensuring that arbitral awards are recognised and enforced across jurisdictions worldwide.

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2. Contact Group on the Legal and Institutional Underpinnings of the International Financial System, 'Insolvency Arrangements and Contract Enforceability' (2002) <https://www.bis.org/publ/gten06.pdf>.
3. Nigel Blackaby and others, 'An Overview of International Arbitration', *Redfern and Hunter on International Arbitration* (7th edn, OUP 2022).
4. *US Lines Inc, In re* 197 F 3d 631, 640 (2nd Cir 1999).
5. Ishaan Madaan, 'Insolvency and International Arbitration: An Alternate Perspective' (*Kluwer Arbitration Blog*, 15 June 2020) <https://arbitrationblog.kluwerarbitration.com/2020/06/15/insolvency-and-international-arbitration-an-alternate-perspective/> accessed 15 September 2024.
6. Sandeep Gopalan, 'Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap-Filling' (2021) 48 Vanderbilt Law Review 1225, 1227.
7. Blackaby and others (n 3) 1.124.
8. Ian F Fletcher, 'Maintaining the Momentum: The Continuing Quest for Global Standards and Principles to Govern Cross-Border Insolvency' (2006) 32 Brooklyn Journal of International Law 767, 768.
9. Gopalan (n 6) 1228.

This paper seeks to determine whether the enforceability of an award can be leveraged as a factor in favor of adopting International Arbitration as the preferred method of resolving Cross-Border Insolvencies. To achieve this, the paper is structured as follows: *Section II* delves into the enforcement complexities inherent in Cross-Border Insolvency, providing a historical context and evaluating failed attempts at reform through international legal instruments. *Section III* examines International Arbitration's advantage in the enforceability of awards, offering a background on the NYC and showcasing its strengths. *Section IV* explores the practical application of International Arbitration in effectively enforcing Cross-Border Insolvency disputes, addressing specific challenges such as capacity, arbitrability, and public policy concerns. Finally, *Section V* concludes by synthesising the findings and advocating for the strategic use of International Arbitration to enhance enforceability in Cross-Border Insolvency cases.

2. ENFORCEMENT COMPLEXITIES IN CROSS-BORDER INSOLVENCY

A. Historical Context and Challenges

A historical review of Cross-Border Insolvency reveals that the *first* level of resistance emanated from nations' approach to framing their national insolvency legislations. Nations would frame such legislations in accordance with their intrinsic social, political, economic, and policy considerations.[10] These considerations not only impeded the development of a unified and universal framework for Cross-Border Insolvency but also resulted in nations being unwilling to accept insolvency laws of foreign nations and confer upon them extra-territorial effects.[11] Consequently, any Cross-Border Insolvency usually witnessed legal proceedings that were *"diverse and uncoordinated."*[12]

Here, "*resistance*" specifically refers to resistance against recognising and giving effect to foreign insolvency proceedings, including the enforcement of court orders or judgments in another jurisdiction. In practical terms, many nations prioritise protecting their "*local*" creditors and domestic policy interests; for example, traditional admiralty procedures of arrest and attachment allow local creditors to satisfy their claims, notwithstanding the

10. Gopalan (n 6) 1227.
11. Stefan A Riesenfeld, 'The Status of Foreign Administrators of Insolvent Estates: A Comparative Survey' (1976) 24 American Journal of Comparative Law 288.
12. Hannah L Buxbaum, 'Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory' 36 Stanford Journal of International Law 23.

insolvency of a foreign shipowner,[13] which makes them reluctant to extend comity or automatically honour foreign insolvency laws.[14]

The *second* level of resistance faced by Cross-Border Insolvency was a result of how different nations approached insolvency through the lens of private international law. In this regard, Professor Fletcher remarks that insolvency is subjected to the *"long-familiar paradox of the subject of private international law,"* i.e., rules that initially sought to accommodate a divergent set of national laws under a single umbrella have continued to propagate the very divergence that was supposed to be redressed.[15] Due to national systems of private international law seeming inextricable from national considerations, the portions of different national systems of private international law dealing with insolvency also seem virtually irreconcilable.[16] In other words, each jurisdiction's private international law is heavily shaped by that nation's own economic, political, and social values, leading to contradictions in how foreign insolvencies are treated.[17] Consequently, the portions of different national systems of private international law dealing with insolvency tend to be irreconcilable, particularly when courts enforce local priorities and procedures above any external framework.

3. FAILED ATTEMPTS AT REFORM THROUGH INTERNATIONAL LEGAL INSTRUMENTS

Despite the problems posed by national insolvency legislations and national approaches to private international law dealing with insolvency, in the 20th Century, there were several attempts to reform the field of Cross-Border Insolvency through international legal instruments. Examples include the Montevideo Treaties of 1889 and 1940 ('**Montevideo Treaties**'), the Bustamante Code of the Havana Conference of 1928 ('**Bustamante Code**'), the Nordic Bankruptcy Convention of 1933 ('**Nordic Convention**'), the European Council's Project relating to a Bankruptcy Convention

13. Martin Davies, 'Cross-Border Insolvency and Admiralty: A Middle Path of Reciprocal Comity' (2018) 66 The American Journal of Comparative Law 101, 102.
14. ibid 125.
15. Ian F Fletcher, *Insolvency in Private International Law* (2nd edn, OUP 2005).
16. P StJ Smart, 'International Insolvency and the Enforcement of Foreign Revenue Laws' (1986) 35 International and Comparative Law Quarterly 704 <https://uniset.ca/microstates2/35IntlCompLQ704.pdf> accessed 28 February 2025.
17. John A E Pottow, 'Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests"' (2006) 104 Michigan Law Review 1899, 1296.

('**European Council Project**'), the Council of Europe Convention of Istanbul, 1990 ('**Istanbul Convention**') and the European Union Convention on Insolvency Proceedings ('**European Union Convention**').[18]

Although often termed "international," many of these instruments were, in practice, confined to specific regions or blocs of states. Notably, each instrument contained provisions aimed at standardising or simplifying the cross-border enforcement of insolvency decisions: for instance, the Montevideo Treaties provided guidelines on jurisdiction and enforcement among certain South American nations, while the Nordic Convention allowed for recognition of foreign bankruptcy decrees among the Scandinavian countries. Nevertheless, these frameworks focused on geographical or cultural affinities, rather than truly global cooperation.[19]

However, the successes of the Montevideo Treaties, the Bustamante Code, and the Nordic Convention were limited to their respective geographical regions.[20] This is because the nations involved shared linguistic, cultural, and political similarities. Consequently, implementing such instruments would not offer a complete solution to Cross-Border Insolvencies that occur on a more global scale.[21] Further, the European Council Project failed because it proposed to have one liquidator administer the entire insolvency, under all possible legal systems, when there was no mechanism to facilitate the same.[22]

Following the failure of the European Council Project, the Istanbul Convention was introduced in 1990. However, the Istanbul Convention was inherently weak as its 'opt-out' provisions allowed nations to disregard the insolvency proceedings that were underway in the primary forum and also refuse recognition of the powers of a foreign insolvency professional.[23] Lastly, the European Union Convention sought to build upon the framework

18. For an overview of the instruments, *see* Fletcher (n 15) chs 5-7, 221-321.
19. Irit Mevorach, 'Global Frameworks or State-Based Insolvencies — The Problem of Cross-Border Insolvency', *Insolvency within Multinational Enterprise Groups* (Oxford University Press 2009) 66 <https://doi.org/10.1093/acprof:oso/9780199544721.003.0004>.
20. Ian F Fletcher, 'International Insolvency: A Case for Study and Treatment' (1993) 27 International Lawyer 429.
21. ibid.
22. Leslie A Burton, 'Toward an International Bankruptcy Policy in Europe: Four Decades in Search of a Treaty' (1999) 5 Annual Survey of International & Comparative Law 205.
23. Sean E Story, 'Cross-Border Insolvency: A Comparative Analysis' (2015) 32 Arizona Journal of International & Comparative Law 432.

of the Istanbul Convention in another attempt to create an international legal instrument for Cross-Border Insolvency. In particular, the European Union Convention was spearheaded to ensure that judgments relating to Cross-Border Insolvency were recognised and enforced.[24] However, the European Union Convention was rendered futile at the very outset, as it required the signature of all 15 member nations to take effect,[25] and only 14 nations fulfilled this requirement because it was blocked by the United Kingdom at the last minute following a major political incident (Mad Cow Disease).[26]

4. CRITICAL EVALUATION OF MODEL LAWS ON CROSS BORDER INSOLVENCY

Towards the late 1990s, a breakthrough came in the form of the UNCITRAL Model Law on Cross-Border Insolvency ('**MLCBI**').[27] As of February 2024, the MLCBI has become or has influenced the primary law on Cross-Border Insolvency in 59 nations.[28]

However, a significant concern regarding the MLCBI is the lack of any provisions that address the recognition and enforcement of judgments dealing with Cross-Border Insolvency, despite it being a specific point of discussion in the initial stages of the drafting process.[29] The UNCITRAL published the Guide to Enactment and Interpretation which contains background and explanatory information as a tool for the effective interpretation and understanding of MLCBI.[30] It explicitly notes that doctrines of comity or *on exequatur*, by themselves, are not as effective as legislation in ensuring judicial cooperation for recognition and enforcement of foreign judgments dealing with Cross-Border Insolvency.[31] The MLCBI Guide also remarks that recognising a foreign insolvency proceeding may

24. Burton (n 22) 216.
25. David H Culmer, 'The Cross-Border Insolvency Concordat and Customary International Law: Is It Ripe Yet?' (1999) 14 Connecticut Journal of International Law 563.
26. ibid.
27. UNCITRAL Model Law on Cross-Border Insolvency 1997.
28. Data about the MLCBI's adoption status is available at: https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status.
29. Gopalan (n 6) 1233.
30. UNCITRAL Secretariat, 'Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency' 24 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf> accessed 15 September 2024.
31. ibid 21.

not have the same legal effects as recognising a judgment passed by a foreign court in an insolvency proceeding.[32]

In light of such specific references, the lack of any provisions regarding enforceability is all the more puzzling. Such an omission has led to inconsistent judicial pronouncements on enforcing foreign judgments dealing with Cross-Border Insolvency.[33] Against this backdrop, UNCITRAL subsequently introduced the Model Law on Recognition and Enforcement of Insolvency-Related Judgments ('**MLRE**') in 2018.[34] The primary aim of the MLRE was to address existing issues concerning enforceability and provide a unified framework for the recognition and enforcement of foreign judgments dealing with Cross-Border Insolvency.[35]

While the introduction of the MLRE is undoubtedly welcome, it does not offer a complete solution to the enforceability issues in Cross-Border Insolvencies. This is because of the following issues:

Firstly, the MLRE is unclear about the form and manner of its adoption. The preamble to the MLRE seems to indicate that it serves as complementary legislation to the MLCBI.[36] This raises doubts about whether the MLRE would operate as an independent legislation or become an internal part of the MLCBI.[37]

Secondly, the adoption of the MLRE comes at the cost of legal certainty. This is because of an optional provision that allows the non-recognition of a foreign insolvency-related judgment in instances where the judgment was passed in a country whose insolvency proceedings cannot be recognised under MLCBI. Consequently, differences in adopting such clauses may give rise to a situation where the same judgment may be recognised in one jurisdiction but denied recognition in another.[38]

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32. ibid.
33. *Rubin v Eurofinance SA* (2012) 3 WLR 1019 : 2012 UKSC 46.
34. UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment 2019.
35. ibid 11.
36. ibid Preamble 1(f).
37. Irit Mevorach, 'Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?' (2021) 22 European Business Organization Law Review 283.
38. Ilya Kokorin, 'UNCITRAL Model Law on Insolvency-Related Judgments: New Chapter in International Insolvency Law' (*Leiden Law Blog*, 13 September 2018) <https://www.leidenlawblog.nl/articles/uncitral-model-law-on-insolvency-related-judgments-new-chapter-in-internati> accessed 15 September 2024.

Thirdly, concerning practical aspects, the MLRE is still a 'model law.' In order to provide for a harmonised and unified system for recognising and enforcing foreign insolvency judgments, the MLRE will have to be adopted by multiple nations. Such large-scale adoption would have to account for the inherent problems of the MLRE, along with differences that may arise when individual nations try to adopt the MLRE.

In conclusion, the efficacy of the MLRE is essentially a question of *if* and *when*; the MLRE can attain the levels of success it seeks to achieve only *if* nations across the world adopt it consistently and *when* such an adoption takes place.

5. INTERNATIONAL ARBITRATION'S EDGE: ENFORCEABILITY OF AWARDS

A. Background

Before exploring enforceability as a distinct feature of International Arbitration, it is crucial to grasp the conceptual distinction between *'enforceability'* and *'recognition'*. Recognition is the judicial acknowledgment or confirmation of an arbitral award's validity within a particular jurisdiction.[39] This recognition establishes the award's legal standing and precludes the initiation of new proceedings on the same issues covered by the award, and it is, in a sense, a precursor to its enforceability.[40] In contrast, enforceability goes beyond mere acknowledgment and involves implementing coercive state measures to ensure compliance with the arbitral award.[41] It encompasses the execution of sanctions, such as asset seizure or attachment, to compel adherence to the award's terms under local law.[42] While recognition provides a defensive shield against further litigation, enforceability is a proactive mechanism for securing

39. Javier Rubinstein and Georgina Fabian, 'The Territorial Scope of the New York Convention and Its Implementation in Common and Civil Law Countries' in Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The NYC in Practice* (2008) 91-93.
40. ibid.
41. Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2022) para 11.2.
42. Reinmar Wolff (ed), *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958: Article-by-Article Commentary* (2nd edn, Hart Publishing 2019).

compliance and obtaining redress.[43] Enforcement may entail proceedings in jurisdictions other than the arbitral seat.[44]

Following World War II, the international community recognised the value of peaceful commerce to prevent future conflicts.[45] However, the post-war world witnessed significant transformations, most notably the widespread process of decolonisation.[46] This global phenomenon altered the landscape of international relations as formerly colonised nations gained independence and asserted their sovereignty on the world stage.[47] Consequently, the dynamics among national legal systems became more diverse and no longer dominated solely by a handful of industrialised nations.[48]

In this evolving context, the effectiveness of the arbitral process became increasingly crucial. To steer through, arbitration needed to adapt and integrate itself into a broader array of national legal systems.[49] Unlike the pre-war era, where arbitration primarily involved disputes between industrialised nations, the post-war period demanded a more inclusive and flexible approach to arbitration with a particular focus on enforceability.[50]

The legal effects of international arbitral awards and the post-award proceedings available to challenge or enforce such awards are subject to a well-defined legal framework of international and national law.[51] Enforceability stands as the edifice of International Arbitration.[52] It is the

43. *Brace Transport Corpn of Monrovia v Orient Middle East Lines Ltd* 1995 Supp (2) SCC 280.
44. 'UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' <https://uncitral.un.org/sites/uncitral.un.org/files/media documents/uncitral/en/2016_guide_on_the_convention.pdf>.
45. Pierre A Karrer, 'History of Arbitration', *Introduction to International Arbitration Practice: 1001 Questions and Answers* (Kluwer Law International 2014).
46. Erin Myrice, 'The Impact of the Second World War on the Decolonization of Africa' (2015) Africana Studies Student Research Conference.
47. United Nations, 'Post-War Reconstruction and Development in the Golden Age of Capitalism' in *World Economic and Social Survey* (United Nations 2017) 23, 25-32.
48. ibid.
49. Gary Born, 'Chapter 1: Overview of International Commercial Arbitration', *International Commercial Arbitration* (3rd edn Kluwer Law International 2021).
50. 'Awards Set Aside at the Place of Arbitration' in *Enforcing Arbitration Awards under the New York Convention, Experience and Prospects*, Papers presented at "The New York Convention Day", 10 June 1998 (United Nations Publication, 1999) 24.
51. Gary Born, 'Chapter 22: Legal Framework for International Arbitral Awards', *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 22.
52. A J Van Den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1st edn, Kluwer Law and Taxation 1981).

most critical advantage over traditional litigation.[53] The ability to enforce arbitral awards ensures that parties involved in cross-border disputes can obtain meaningful redress and uphold the integrity of their contractual agreements.[54] Without enforceability, even the most meticulously rendered judgments would lack practical value, rendering the arbitration process ineffective in timely and effective resolution to disputes.[55]

B. Introduction to the NYC

In this context, the NYC adopted in New York on 10 June 1958,[56] is described as the most successful treaty in private international law and pivotal in giving International Arbitration its most remarkable feature - enforceability of awards.[57] The NYC seeks to achieve only two things: (1) to ensure that agreements to arbitrate are respected and (2) that awards are enforced.[58] Under Article III,[59] courts must recognise and enforce foreign arbitral awards in accordance with local procedural rules, subject only to the narrow grounds for refusal under Article V.[60] Further, the NYC is also *generally* interpreted uniformly by the courts,[61] which further reinforces the enforceability of arbitral awards at a global scale.[62]

In conclusion, International Arbitration has effectively dealt with the issue of enforceability of awards in cross-border disputes. The NYC provides a robust framework with adequate safeguards that facilitate the enforcement of arbitral agreements and awards. Judge Stephen Schwebel, former

53. A J Van Den Berg, *50 Years of the New York Convention* (Permanent Court of Arbitration and International Council for Commercial Arbitration eds, Kluwer Law International 2009).
54. International Council for Commercial Arbitration, 'ICCA's Guide to the Interpretation of the 1958 New York Convention' <https://www.newyorkconvention.org/resources/publications/guide-to-interpretation> accessed 15 September 2024.
55. Franco Ferrari and Friedrich Rosenfeld, *Autonomous Versus Domestic Concepts under the New York Convention*, vol 61 (Wolters Kluwer 2021).
56. NYC, 330 UNTS, No. 4739 (1958).
57. Herbert Kronke, 'The New York Convention Fifty Years on: Overview and Assessment', *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010).
58. Anna Joubin-Bret, 'Foreword: Celebration of the 60th Anniversary of the NYC' in Katia Fach Gómez, *60 Years of the New York Convention: Key Issues and Future Challenges* (Wolters Kluwer 2019).
59. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 art III.
60. ibid V.
61. Berg (n 52) 54-55.
62. ibid 168-169.

President of the International Court of Justice, in just two words, captured the entire enforceability framework in International Arbitration when he said:

> *"It works."*[63]

6. THE USE OF INTERNATIONAL ARBITRATION TOWARDS EFFECTIVE ENFORCEMENT IN CROSS-BORDER INSOLVENCY

A. Preliminary Findings

From the foregoing sections, it is evident that guarantees of enforceability continue to evade the field of Cross-Border Insolvency. While the MLRE is undoubtedly a positive development, it does not fully alleviate enforceability concerns. Considering these factors, the authors wish to posit the increased use of International Arbitration to resolve Cross-Border Insolvency disputes. This is primarily because the enforceability of an arbitral award is a distinct and unmatched advantage of International Arbitration.[64] Additionally, by agreeing to submit their disputes to arbitration, parties will also benefit from the neutrality, predictability, and reliability offered by the arbitration process.[65]

The NYC significantly bolsters the enforceability of arbitral awards. Lauded as the most successful instrument in international commercial law, it is currently in force in nearly 170 jurisdictions – an extent of adoption the MLRE may never attain.[66] Built on a pro-enforcement premise,[67] the NYC obligates courts to interpret its provisions uniformly,[68] allowing refusal of recognition or enforcement only on the narrow and exhaustive grounds of Article V.[69] By contrast, the MLRE's optional provisions and uncertain adoption practices risk inconsistent outcomes.[70] Consequently,

63. S M Schwebel, 'A Celebration of the United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1996) 12 Arbitration International 83.
64. Joubin-Bret (n 58); Ferrari and Rosenfeld (n 55); Berg (n 52).
65. Jay Lawrence Westbrook, 'International Arbitration and Multinational Insolvency' (2011) 29 Penn State International Law Review 635.
66. Data regarding contracting states to the NYC <https://www.newyorkconvention.org/countries>.
67. Andreas F Lowenfeld, *International Litigation and Arbitration* (3rd edn, Thomson/West 2006).
68. Westbrook (n 65) 642.
69. 'UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (n 44) 125.
70. Wolff (n 42).

the NYC consistently emerges as the superior framework for addressing enforceability challenges in Cross-Border Insolvency. Nevertheless, it is important to acknowledge potential hurdles in enforcing arbitral awards, which the following sections will explore in detail.

7. LACK OF CAPACITY: ARTICLE V (1) (A) NYC

The first concern/challenge stems from Article V(1)(a) NYC,[71] which provides that an arbitral award may be denied recognition or enforcement if "*the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity.*" From the wording of the provision, the relevant assessment period should be when the arbitration agreement was concluded.[72] Further, courts worldwide have followed such an interpretation in most cases.[73]

However, an alternative interpretation may be taken in light of the background of Article V(1)(a), wherein concerns regarding the proper representation of the parties throughout the arbitration proceedings were expressed.[74] In the Elektrim Insolvency Case, the Supreme Court of Switzerland dealt with concerns about party representation in arbitration.[75] Elektrim , a Polish company, faced bankruptcy under Polish law while involved in an ICC arbitration in Geneva. Due to Polish law, which deemed arbitration agreements by bankrupt entities void, the ICC tribunal halted proceedings. The Swiss Supreme Court upheld this decision, highlighting conflicts between Polish bankruptcy law and arbitration agreements.[76]

However, on 16 October 2012, the Swiss Supreme Court reconsidered its position in the Elektrim Case and held that the previous decision could not serve as a general precedent applicable to other jurisdictions or legal systems.[77] This is because of the specific provisions of the Polish legal

71. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art V(1)(a).
72. 'UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (n 44) 140.
73. ibid 141.
74. Westbrook (n 65) 650.
75. Stefan Kröll, 'Arbitration and Insolvency' in Stefan Kröll, Andrea Bjorklund and Franco Ferrari (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (1st edn, Cambridge University Press 2023) para 58.4.3. <https://www.cambridge.org/core/product/identifier/9781108378390%23CN-bp-58/type/book_part> accessed 8 January 2025.
76. Culmer (n 25).
77. Nathalie Voser, 'Insolvency and Arbitration: Swiss Supreme Court Revisits Its Vivendi vs. Elektrim Decision' (*Kluwer Arbitration Blog*, 5 December 2012) <https://

system, which were relevant in the particular context of the Elektrim Case.[78] While the new decision of the Swiss Supreme Court affords greater clarity, parties choosing to arbitrate disputes relating to Cross-Border Insolvency must exercise continued caution to understand the possible implications of legal provisions such as Article 142 of the Polish Bankruptcy and Reorganization Act.[79]

8. ARBITRABILITY: ARTICLE V (2)(A) NYC

The second concern/challenge is that of non-arbitrability. Non-arbitrability refers to the inherent limitation preventing the use of arbitration for specific issues right from the start.[80] The NYC allows states to deny recognition and enforcement of an award if "*[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country*."[81]

In Cross-Border Insolvency, the issues are primarily divided into 'core' and 'non-core.'[82] Core proceedings involve the administrative aspects of insolvency proceedings, wherein the courts or insolvency administrators function akin to enforcement authorities. They entail adjudicating rights established by national bankruptcy law, which are specific to bankruptcy proceedings or which could not have arisen outside of such proceedings.[83] Further, matters classified as 'core' are consistently deemed non-arbitrable.[84]

Notably, one reason many jurisdictions categorise insolvency matters as 'non-arbitrable' is the distinction between rights *in rem* and rights *in personam*.[85] Insolvency typically concerns rights in rem, affecting the entire pool of creditors and stakeholders, whereas arbitration is restricted to contractual or private (*in personam*) claims between specific parties.

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arbitrationblog.kluwerarbitration.com/2012/12/05/insolvency-and-arbitration-swiss-supreme-court-revisits-its-vivendi-vs-elektrim-decision/> accessed 15 September 2024.

78. Polish Bankruptcy Reorganization Act 2003, art 142.
79. Pierre A Karrer, 'Views on the Decision by the Swiss Supreme Court of March 31, 2009, in Re Vivendi et al. v. Deutsche Telekom et Al.' (2010) 28 ASA Bulletin 111, 112.
80. Berg (n 52).
81. NYC, 1958, art V(2)(a).
82. A N Resnick, 'The Enforceability of Arbitration Clauses in Bankruptcy' (2007) 15 American Bankruptcy Institute Law Review 183.
83. *Mitsubishi Motors Corpn v Soler Chrysler-Plymouth Inc* 1985 SCC OnLine US SC 203 : 87 L Ed 2d 444 : 473 US 614 (1985).
84. 'Fulham Football Club (1987) Ltd v Sir David Richards and Ors' (2011) 2011 Arbitration Law Reports and Review 363.
85. Gary Born, *International Commercial Arbitration. Part 1: International Arbitration Agreements / Gary B. Born* (3rd edn, Kluwer Law International BV 2021) s 6.04 [F].

Singapore, for example, treats disputes that arise upon the onset of insolvency as non-arbitrable,[86] reflecting a strong policy to protect collective creditor interests.[87] By contrast, English courts have shown more flexibility; in cases such as *Riverrock Securities Ltd v. International Bank of St Petersburg (JSC)*,[88] they have permitted the arbitration of certain 'insolvency' claims that do not undermine the collective nature of insolvency or prejudice the rights of third parties.[89]

Consequently, parties need to evaluate whether issues are suitable for arbitration, as it may not be a practical substitute for *all* insolvency-related disputes and cannot entirely assume the responsibilities of national courts in insolvency proceedings.[90] Instead, arbitration could aid in resolving contentious issues that have proven challenging to settle in cross-border insolvencies, thereby simplifying the process.[91]

The following are three insolvency-related disputes where arbitration and its mechanisms for enforcing awards could expedite and enhance resolution efficiency:

9. CLAIMS ALLOWANCE

Typically, the claims allowance process involves establishing a deadline for creditors to submit claims against the debtor's estate, followed by the bankruptcy court's examination and potential objection to these claims. This process allows the debtor to counterclaim against filed claims, potentially seeking recovery for preferential or fraudulent transfers.[92]

86. *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* 2011 SGCA 21 (Singapore Court of Appeal) 24-26.
87. Clyde & Co, 'The Law Applicable to Arbitrability — The Singaporean Approach' (*Insights*, 13 December 2023) <https://www.clydeco.com:443/insights/2023/12/the-law-applicable-to-arbitrability-the-singaporea> accessed 8 January 2025.
88. *Riverrock Securities Ltd v International Bank of St Petersburg (JSC)* 2020 EWHC 2483 [67] [72].
89. ibid 87 (ii).
90. Allan L Gropper, 'The Arbitration of Cross-Border Insolvencies' (2012) 86 American Bankruptcy Law Journal 201.
91. Velislava Hristova and Andrés Eduardo Alvarado Garzón, 'International Arbitration and Cross-Border Insolvency — Friends or Foes? Revisiting the Role of Arbitration in Resolving Cross-Border Insolvency-Related Disputes' (2021) 12 Journal of International Dispute Settlement 693.
92. Jimerson Birr, 'Recovering from Non-Debtor Entities' (*Bankruptcy and Restructuring*, 23 April 2020) <https://www.jimersonfirm.com/services/bankruptcy-and-restructuring/recovering-from-non-debtor-entities/> accessed 8 January 2025.

Given the diverse geographical locations of creditors in multinational insolvency cases, arbitration panels closer to their domicile may offer a more convenient forum for resolving claims allowance disputes.

Similarly, multinational debtors may refer specific claims allowance issues to arbitration, mainly if there are concerns about foreign creditors' compliance with decisions rendered by the bankruptcy court. This consideration becomes more pronounced if the debtor intends to assert counterclaims and enforce judgments in its favor arising from such counterclaims.

10. DISPUTES BETWEEN AFFILIATES

According to the MLCBI, the primary case typically resides in the debtor's "center of main interest," while ancillary cases operate in jurisdictions where the debtor holds assets or conducts business.[93] Each case asserts control over distinct estates of the debtor's assets, resulting in multiple "estates" for the multinational debtor. Disputes may arise among these cases regarding determining the true center of paramount interest and the designation of the primary case. Additionally, conflicts may emerge among the estates concerning the allocation and utilisation of the debtor's assets across various jurisdictions. Arbitration can be used to resolve a dispute between two ancillary cases of a multinational debtor regarding the allocation of assets in different jurisdictions.

For example, the Nortel cases exemplify the challenges of resolving disputes efficiently across multiple jurisdictions.[94] Despite initial agreements documented in an 'Interim Funding and Settlement Agreement,' disputes arose over the allocation of proceeds from asset sales among the estates in Canada, the United States, and the United Kingdom. Attempts at mediation failed, leading to motions filed in the U.S. and Canadian courts seeking an allocation protocol.[95] The joint proceedings incurred avoidable costs, including technology expenses and increased legal fees due to duplication of representation and prolonged trials. The bankruptcy fees amounted to around $2 billion and finally took seven years to resolve.[96]

93. MLCBI, art 2.
94. Lauren L Peacock, 'A Tale of Two Courts: The Novel Cross-Border Bankruptcy Trial' (2015) 23 American Bankruptcy Law Journal 543.
95. Leif M Clark, 'Managing Distribution to Claimants in Cross-Border Enterprise Group Insolvency' (2014) 9 Brooklyn Journal of Corporate, Financial & Commercial Law 112.
96. Daniel Fisher, 'Nortel Bankruptcy Fees Near $2 Billion as Creditors, Pensioners Fight Over Assets' *Forbes* <https://www.forbes.com/sites/danielfisher/2016/04/05/

Arbitration could have streamlined the process and reduced duplicate proceedings, legal costs, and technology expenses while also eliminating the possibility of separate appeals due to its enforceability mechanisms, ultimately offering a more cost-effective solution.

11. WORKOUT PLANS & DEBT RESTRUCTURING

When an organisation's assets are spread across various regions, restructuring efforts may require a workout arrangement as the most feasible course of action.[97] However, these workouts often demand significant resources and time and, most importantly, are not binding on the parties.[98] Many countries have adopted statutory alternatives reminiscent of the pre-packaged reorganisation plan utilised in the United States to address such challenges.[99] These alternatives aim to facilitate mutually agreeable solutions between organisations and their primary creditors, minimising debt adjustments among critical stakeholders to expedite necessary resolutions.[100]

Adopting arbitration principles provides a promising avenue for establishing a more streamlined, fair, and cost-effective process compared to traditional pre-packaged plans for resolving conflicts among primary creditors of organisations and ensuring enforceability.

For instance, through contractual arrangements, borrowers could choose to arbitrate specific post-default issues with their primary institutional lenders, major suppliers, and bondholders. An arbitration expert specialising in international restructuring could mediate disputes, including the equitable distribution of enterprise value among stakeholder groups. Consequently, integrating arbitration into workout plans presents an opportunity to secure

nortel-bankruptcy-fees-approach-2-billion-as-court-hears-arguments-over-assets/> accessed 15 September 2024.

97. Topher McCulloch, 'What is the Difference Between Creditor Workouts and Bankruptcy?' (*LP*, 21 September 2020) <https://www.lplegal.com/content/difference-between-creditor-workouts-bankruptcy/> accessed 8 January 2025.
98. Jose M Garrido, 'Out-of-Court Debt Restructuring' (World Bank 2012) Study 66232 para 16 <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/417551468159322109/out-of-court-debt-restructuring>.
99. Dennis F Dunne, 'Prepackaged Chapter 11 in the United States: An Overview' (*The Art of the Pre-Pack*, 2nd edn, 4 March 2022) <https://globalrestructuringreview.com/guide/the-art-of-the-pre-pack/edition-2/article/prepackaged-chapter-11-in-the-united-states-overview> accessed 15 September 2024.
100. Sudhaker Shukla and others, *Creditor Led Resolution Approach in Fast-Track Corporate Insolvency Resolution Process* (Insolvency and Bankruptcy Board of India 2023) 21.

enforceable outcomes across multiple jurisdictions, thereby enhancing the efficiency and efficacy of debt restructuring efforts amidst economic crises.

Therefore, while arbitrability concerns hinder the resolution of specific 'core' insolvency issues, the parties can nonetheless use arbitration as an effective dispute resolution mechanism for 'non-core' issues, especially the ones elaborated above.

12. PUBLIC POLICY: ARTICLE V (2) (B) NYC

The third concern/challenge is the public policy restriction, as outlined in Article V(2)(b) of the NYC.[101] It provides a mechanism for a court to decline recognition and enforcement of an arbitral award if it violates the public policy of the country in question.[102] This provision serves as a crucial safeguard against undue interference with the legal frameworks of individual states. However, public policy is interpreted restrictively across jurisdictions.[103]

When considering insolvency matters, it is essential to understand the role of public policy within this context. Insolvency laws are deeply ingrained in domestic legal systems and aim to ensure equitable treatment of creditors, maximise asset value, and facilitate efficient resolution of insolvency proceedings.[104] These laws often reflect the fundamental economic and social values of a nation.[105]

In practice, the main public policy concern regarding insolvency and arbitration often revolves around equal treatment of creditors. Courts in various jurisdictions, such as France and Germany, have consistently upheld that individual creditors should not pursue their claims outside of insolvency proceedings to the detriment of other creditors' interests.[106] Given this backdrop, it is imperative for arbitration panels to exercise caution when arbitrating cross-border insolvency-related disputes. When

101. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art V(2)(b).
102. Wolff (n 42).
103. P Mayer and A Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 Arbitration International 249.
104. United Nations Commission on International Trade Law, 'Legislative Guide on Insolvency Law' <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf>.
105. ibid.
106. *Société de Bâtiment et de Béton Moulé (SBBM) v Saret* (1992) Case No 90-12569 (France, Cour de Cassation).

handling insolvency-related disputes, they must proactively consider the public policy dimensions of the jurisdiction(s) in which enforcement is sought.The impact on and balance of creditors' interests must be carefully considered to avoid running afoul of public policy restrictions.

In conclusion to this section, while challenges persist in enforcing cross-border insolvency matters, utilising International Arbitration under the NYC offers a superior avenue. Its enforceability, neutrality, and predictability outweigh concerns associated with incapacity, arbitrability, and public policy, providing a promising framework for resolving disputes efficiently and effectively in cross-border insolvency.

13. CONCLUSION

The enforceability of awards stands as the cornerstone of International Arbitration, elevating it above traditional litigation in the realm of cross-border commercial disputes. This unparalleled advantage is fortified by the NYC, whose widespread adoption and consistent judicial interpretation provide a robust and predictable framework across nearly 170 jurisdictions.

In stark contrast, cross-border insolvency grapples with significant enforcement challenges. Despite the introduction of the MLRE, the field remains hindered by uncertainties. The MLRE's optional provisions and ambiguities regarding its integration with existing laws undermine its efficacy, rendering it incapable of offering the same guarantees of enforceability as the NYC.

While potential obstacles such as issues of capacity, arbitrability, and public policy may arise during the enforcement of insolvency-related arbitral awards, these challenges are not insurmountable. Through meticulous drafting of arbitration agreements and strategic navigation of the arbitration process, parties can effectively mitigate these risks. Arbitration offers a flexible and efficient mechanism to resolve non-core insolvency disputes thereby, enhancing the overall efficiency of cross-border insolvency proceedings.

In conclusion, while the MLRE represents a commendable effort toward harmonising insolvency laws globally, it currently falls short of delivering the requisite assurances of enforceability. International Arbitration, buttressed by the NYC's proven track record, offers a superior framework for resolving cross-border insolvency disputes. By leveraging this mechanism, parties can achieve enforceable and equitable outcomes, thereby advancing the efficacy and integrity of international commercial law.

WHEN CODES MEET COURTROOMS- EXAMINING THE ENFORCEABILITY OF BLOCKCHAIN BASED ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION AND INDIAN LAW

—Piyush Senapati[*] & Parul Anand[**]

ABSTRACT

One of the most intriguing and perhaps trail-brazing phenomena that the modern day blockchain revolution has produced is the emergence of crowdsourced, blockchain based dispute resolution platforms. This article seeks to probe into a description of the functioning of these blockchain based arbitrations, along with some of the advantages they present as compared to traditional arbitrations. The major focus of this article, however, would be to probe into the question of enforceability of the awards resulting from blockchain based arbitrations, both under the New York Convention as well as Indian law. This will be done by focusing on four key issues- the requirements of agreement in writing, a seat of arbitration, due process, and reasoning of awards. Where the agreement in writing aspect is concerned, the article will be probing into the recommendations of the 246th Law Commission in the Indian context, beyond examining the solutions presented in this regard for the New York Convention. Where the issue of seats is concerned, the article seeks to draw an analogy between blockchain arbitral awards and 'a-national' awards enforced under the New York Convention. Further, it disputes the 'Hybrid Model' which has been commonly advanced in literature as a solution to the issue, and presents alternatives. For both due process and the reasoning requirements, the focus is on party autonomy, as the article examines the extent to which parties to a blockchain arbitration can contract out of such requirements and still have their award enforced. For all the four

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issues, this article finds that blockchain arbitration is often at odds with the existing legal requirements. While the paper proposes solutions in this regard, ultimately, both the law and blockchain arbitration platforms may have to shift to accommodate each other for blockchain arbitration to become a mainstream form of dispute resolution mechanism.

1. INTRODUCTION

In December 2023, exciting news came from Mexico- it unveiled its new general law on ADR,[1] which became the first law in the world regulating decentralised justice systems, also known as blockchain based arbitration systems. Chapter VI of the law regulates Online Dispute Resolution including decentralised justice systems, and lays down key definitions as well as rights and obligations of parties and facilitators of these systems.[2]

Like almost everything else in the current Web3 driven '*information age,*'[3] arbitration has also gone on-the-chain. This includes the entire process being digitised, than merely offline proceedings being mediated through video-conferencing or communication messengers.[4] Blockchain arbitration is then, simply put, arbitration that occurs entirely on the blockchain, from filing a claim to enforcement of the award. It combines the best traits that blockchain has to offer such as privacy,[5] security,[6] transparency,[7] with contemporary arbitration's needs and parties' desire for a heightened privacy[8] and security,[9] less delays,[10] and concerns regarding independence

1. General Law on Alternative Dispute Mechanisms, approved 5 December 2023 (Mexico).
2. ibid ch 6.
3. Cambridge Dictionary, 'Information Age' <https://dictionary.cambridge.org/dictionary/english/information-age> accessed 28 December 2024.
4. Marina Kasatkina, 'Dispute Resolution Mechanism for Smart Contracts' (2022) 16(2) Masaryk University Journal of Law and Technology 143, 149-154.
5. Saah, AE, Yee, J-J and Choi, J-H, 'Securing Construction Workers' Data Security and Privacy with Blockchain Technology' (2023) 13 Applied Sciences 13339.
6. ibid.
7. Javier Canosa and Bruno Banfi, 'Blockchain: An Innovative Tool for Enhanced Transparency' <https://www.financierworldwide.com/blockchain-an-innovative-tool-for-enhanced-transparency> accessed 16 August 2024.
8. Teramura, N and Trakman, L, 'Confidentiality and Privacy of Arbitration in the Digital Era: Pies in the Sky?' (2024) Arbitration International.
9. Norton Roose Fulbright, *Data Protection and Cyber Risk Issues in Arbitration* <https://www.nortonrosefulbright.com/en-in/knowledge/publications/3974fe18/data-protection-and-cyber-risk-issues-in-arbitration> accessed 17 August 2024.
10. Pandey, A, 'Speedy Justice and Lengthy Delays, the Arbitration Process' <https://www.livelaw.in/articles/speedy-justice-and-lengthy-delaysthe-arbitration-process-240252>

and bias of arbitrators.[11] Blockchain arbitration aims to strike the delicate balance between innovative technological potential and ground legal realities.

2. WHAT IS BLOCKCHAIN ARBITRATION?

To understand blockchain arbitration, it is important to understand blockchain first. Blockchain can be defined as '*an immutable (unchangeable, meaning a transaction or file recorded cannot be changed) distributed digital ledger (digital record of transactions or data stored in multiple places on a computer network) with many use cases beyond cryptocurrencies.*'[12] Essentially, Blockchain Arbitration is a case in which Blockchain is used as a method of arbitration. It is not merely a digital venue for an offline process, nor a mere record-keeping service for parties' claims, evidences and documents – rather, it involves the whole activity to occur not just *via* Blockchain but *on* and *off* it.

An important actor to understand Blockchain Arbitration before going into its functioning directly is the concept of a smart contract. Smart contracts involve a '*self-executing computer program that automatically executes the terms of a contract without the involvement of third parties.*'[13] A misnomer of sorts, these are not in the form of legal contracts but are merely lines of code, based on '*if-then*' statements written into the Blockchain[14] (the immutable, decentralised ledger) to execute desired terms and conditions. For example, let us imagine a sale transaction between a freelance website designer and a business owner. Both of them decide to create a smart contract. It is decided that the payment for this website will be Rupees 5000, which is stored as a deposit in the smart contract by integrating it with any available wallet. No one can touch this money meanwhile. After the website is finished, and both parties assent the same on the smart contract, the money is automatically transferred to freelancer's wallet.

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accessed 17 August 2024.

11. Dunoff, J, Giorgetti, C, Hamamoto, S, Nottage, L, Ratner, S, Schill, S, and Waibel, M., 'Lack of Independence and Impartiality of Arbitrators' (2019) UvA-DARE (Digital Academic Repository).
12. Ameer Rosic, 'What is Blockchain Technology: A Step-By-Step Guide for Beginners' <https://blockgeeks.com/guides/what-is-blockchain-technology/> accessed 28 December 2024.
13. Nick Barney, 'Definition — Smart Contract' <https://www.techtarget.com/searchcio/definition/smart-contract> accessed 28 December 2024.
14. IBM, 'What are Smart Contracts on Blockchain?' <https://www.ibm.com/topics/smart-contracts> accessed 28 December 2024.

There is no need for a bank or a third party to hold the money or make sure the agreement is followed, all of this is done by the smart contract.

The connection between Blockchain arbitration and smart contracts is established by connecting a smart contract to a blockchain arbitration platform. The smart contract's dispute resolution clause is instantly triggered when a party alleges a breach, which initiates instantly a case on a blockchain arbitration platform like Kleros.[15] Smart contracts can form both the subject matter of disputes to be solved by Blockchain Arbitration,[16] and are the tools used to enforce decisions arrived at by Blockchain arbitration – for instance, by triggering a smart contract to execute an award by sending money to an escrow account.[17] Thus, the arbitral award can be instantly executed via a smart contract without any need for a third party, such as courts.

The disputes that blockchain arbitration invites can involve elements regarding Web3 and allied technologies which offer integration with the Blockchain ecosystem such as disputes regarding coding and content of smart contracts (on the chain dispute).[18] Or it could concern other disputes which do not directly concern Blockchain or any allied integration but rather the chosen method to solve the dispute can still be Blockchain arbitration such as a freelancing contract dispute arbitrated in Kleros (off the chain dispute). Application of the technology has already contemplated for construction work industry[19] and e-commerce sector[20] disputes.

Coming to how exactly arbitration occurs on Blockchain, it is important to note that this can be done in many ways however, this paper focuses on the Crowdsourced Blockchain Arbitration model, most commonly employed

15. Kleros, 'Decentralised Justice Based Blockchain Arbitration Platform' <https://kleros.io/> accessed 28 December 2024.
16. Gide Loyrette Nouel, 'Blockchain, Smart Contracts and Alternative Dispute Resolution' <https://www.gide.com/en/news/blockchain-smart-contracts-and-alternative-dispute-resolution> accessed 28 December 2024.
17. Zhen Er Low, 'Execution of Judgements on the Blockchain — A Practical Legal Commentary' <https://jolt.law.harvard.edu/digest/execution-of-judgements-on-the-blockchain-a-practical-legal-commentary> accessed 28 December 2024.
18. Amy J Schmitz, 'Metaverse Arbitration for Resolving Blockchain Disputes 1.0….' (2022) Ohio State Legal Studies Research Paper No 713 1,2.
19. Pham Vu Hong Son and Pham Ngoc Lien, 'Blockchain Crowdsourced Arbitration in Construction Project Delay Resolution' (2022) 16(4) JSTCE - HUCE 1, 7.
20. Shrinivaas Balaji and Mohammed Zuhayr, 'A Study on Implementation of Blockchain Arbitration in the E-Commerce Sector' (2022) 5(6) IJLMH.

by services such as Kleros, Aragon, and Jur.[21] Blockchain, Crowdsourcing *(involving a wide range of jurors in dispute resolution),* and Game theory *(a mathematical method for studying optimal strategies in games)* remain three basic components of this system.[22] To illustrate an excellent use case, this article relies on the Kleros model to explain the whole process.[23]

The Kleros dispute resolution system involves voting on the blockchain with tokens (cryptocurrency) to come upon an arbitral decision by completely anonymous, independently chosen jurors. 'Jurors' is a term to describe the arbitrators for a dispute on Blockchain arbitration. Essentially, everyday people buy tokens, such as the PNK cryptocurrency for Kleros through fiat money.[24] These jurors then stake these tokens, and an algorithm assigns these jurors to various disputes. The jurors are then shown evidence for the dispute and given time for voting.[25] Jurors lose tokens if their vote was on the losing side (against the majority choice) and get rewarded for the opposite.[26] Thus, for an average juror, it becomes financially necessary to choose the option that would be chosen by the majority (which would be the most palatable to all).

This relies on the game theory concept of 'Schelling's Focal Point'[27] where people always inevitably come across a common point to resolve disputes in absence of any communication or trust.[28] Moving further in the process, the jurors are compensated according to their decisions. After the decision is made, the same is enforced either automatically via a smart contract or by court arbitral award enforcement. If there are any issues, the parties can also file an appeal and the same process will begin again.

21. James Metzger, 'The Current Landscape of Blockchain-Based, Crowdsourced Arbitration' (2019) 19 Macquarie L J 81, 92-99.
22. Elena Ermakova, 'Blockchain, Metaverses and NFT in Civil Procedure and Arbitration in Russia, China and USA' (2023) 27(1) RUDN Journal of Law 148, 154.
23. Federico Ast, Clément Lesaege and William George, 'Whitepaper Kleros' <https://kleros.io/whitepaper.pdf> accessed 28 December 2024.
24. Amy J Schmitz, 'Resolving NFT and Smart Contract Disputes', in N G Packin (ed), *The Cambridge Handbook of Law and Policy for NFTs* (Cambridge: Cambridge University Press (Cambridge Law Handbooks 2023) 372, 386.
25. ibid.
26. ibid.
27. Thomas C Schelling, *The Strategy of Conflict* (Harvard University Press 1960).
28. ibid; Elena Ermakova, 'Blockchain, Metaverses and NFT in Civil Procedure and Arbitration in Russia, China and USA' (n 22).

3. BENEFITS OF BLOCKCHAIN ARBITRATION

The wisdom of the crowds over an individual turns out to be one of the most attractive features of Blockchain arbitration.[29] Pluralism of opinions and diverse backgrounds of jurors is said to facilitate fairness and justice.[30] Moreover, as discussed above, by its very nature, it also incentivises fair, honest and independent decision making. An interesting comparison furthering the argument of heightened fairness provided by blockchain arbitration over ordinary arbitration proceedings is that of the Rawlsian '*Veil of Ignorance*'[31] and blockchain arbitration.[32] Tulsayan argues that jurors behind the blockchain arbitration decision making act as if behind the 'proverbial veil of ignorance' since they have no relation or knowledge of a relation to the disputants, freeing them from personal biases to render a '*fair*' decision (present economic incentives in blockchain arbitration = self-interest after the veil is lifted); and decisions are being made on *ex aequo et bono* basis rather than 'legal' correctness which is similar to how actors behind the 'veil' would have decided.[33]

Blockchain arbitration's appeal over traditional arbitration lies in its added advantages that blockchain offers for privacy[34] and security concerns.[35] This is because of Blockchain's strong potential for ensuring confidentiality via its almost airtight cybersecurity.[36] Blockchain arbitration also offers a *trustless* method of dispute resolution which can be better than traditional system, which relies on personal relationships to a certain extent. This is because the parties to the dispute do not have to trust the jurors personally or even know them (which preserves the privacy of parties as well), the parties can rest easy on the fact that a fair decision will be made owing to

29. Aleksei Gudkov, 'Crowd Arbitration: Blockchain Dispute Resolution' (2020) 3 Legal Issues in the Digital Age 59, 65.
30. ibid.
31. John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press 1971).
32. Aryan Tulsyan, 'Arbitration Tech Toolbox: The Rawlsian "Veil of Ignorance" and Blockchain Arbitration' <https://arbitrationblog.kluwerarbitration.com/2023/07/17/arbitration-tech-toolbox-the-rawlsian-veil-of-ignorance-and-blockchain-arbitration/> accessed 28 December 2024.
33. ibid.
34. Javier Canosa and Bruno Banfi, 'Blockchain: An Innovative Tool for Enhanced Transparency' (n 7).
35. Sharath Mulia and Romi Kumari, 'Smart Contracts, Blockchain and Arbitration' <https://www.foxmandal.in/blockchain-arbitration-the-future-of-dispute-resolution/> accessed 28 December 2024.
36. ibid.

game theory principles rather than any presence of a personal relationship. This also capitalises on transparency benefits offered by Blockchain which records everything, and remains visible to all involved actors and is extremely difficult to change or tamper with due to its immutable nature.[37] The Blockchain this way holds the potential to be one of the most disruptive technologies by '*promising to mediate interactions of mutually distrusting individuals without a trusted third party.*'[38] This trustless and transparency promise of the Blockchain is highly appealing against the backdrop of the contemporary legal and adjudicative community rife with nepotism,[39] mistrust,[40] corruption,[41] and bias allegations.[42]

Moreover, the immutability of blockchain and decentralised decision making helps Blockchain Arbitration comply to present justice systems as well.[43] This is because the computer code mandated procedure will conform to a predictable *due process,* and fairness is promoted as no single individual can make any decision.[44] Additionally, decreased costs offered by Blockchain Arbitration will inevitably increase access to justice.[45]

Its benefits also become highly relevant for the uniquely Indian context. It offers the most compelling advantage of over traditional arbitration by addressing guerilla tactics: a present menace for dilatory practices in

37. Norton Roose Fulbright, *Data Protection and Cyber Risk Issues in Arbitration* (n 9).
38. Yannick Gabuthy, 'Blockchain Based Dispute Resolution: Insights and Challenges' (2023) 14 Games 34, 1.
39. Avani Bansal, 'Where Dynasty Rocks: Nepotism is Serious not Just in Politics and Bollywood, but also in the Legal Profession' <https://timesofindia.indiatimes.com/blogs/toi-edit-page/where-dynasty-rocks-nepotism-is-serious-not-just-in-politics-and-bollywood-but-also-in-the-legal-profession/?source=app&frmapp=yes> accessed 28 December 2024.
40. *See* Shreya Tinkhede, 'Encounters don't Kill Tendency to Rape, Show Mistrust in Law' *Times of India* <https://timesofindia.indiatimes.com/city/nagpur/encounters-dont-kill-tendency-to-rape-show-mistrust-in-law/articleshow/72447106.cms> accessed 28 December 2024.
41. Upasana Sajeev, 'Corruption in India Pervades All Levels, Not Even Sparing IAS, IPS and Judicial Service: Madras High Court' <https://www.livelaw.in/high-court/madras-high-court/madras-high-court-corruption-pervades-all-levels-including-ias-ips-and-judicial-service-232704> accessed 28 December 2024.
42. Alok Prasanna Kumar, 'Two Papers on Judicial Bias in India' Law and Society <https://www.epw.in/journal/2021/8/law-and-society/two-papers-judicial-bias-india.html> accessed 28 December 2024.
43. ibid; Elizabeth Chan and Emily Hay, 'Something Borrowed, Something Blue: The Best of Both Worlds in Metaverse-Related Disputes' (2022) 15(2) Contemp Asia Arb J 205, 217-218.
44. ibid.
45. ibid.

the Indian arbitration space.[46] These tactics which can include delays, bribery, intimidation, etc. are all subverted by Blockchain rbitration by its very design. Bribery is reduced dramatically by the anonymous nature of arbitrator-jurors in Blockchain arbitration. The same is true for intimidation and harassment. Owing to the incredibly cyber-secure nature of Blockchain; wire-tapping and surveillance is also practically near impossible for an average party to arbitration and his aides to undertake.

4. EXAMINING THE ENFORCEABILITY OF BLOCKCHAIN BASED ARBITRAL AWARDS

In the previous chapters, the article elaborated on the functioning and advantages of blockchain based arbitrations. This section will probe into the question of enforceability of arbitral awards arising from such systems, and analyse the challenges and solutions in this regard. It is important to clarify that there can be broadly two types of enforcement of awards resulting from blockchain-based arbitrations – on-chain and off-chain. On-chain enforcement takes place completely on the blockchain–once rendered, the award is automatically executed by a smart contract, which can be programmed to partially or totally release funds in escrow, or transfer funds between digital wallets.[47] Since the process is completely automated and self-executing, it bypasses the need to approach any court for enforcement of the award, and resultantly, enforcement regimes under the New York Convention and domestic arbitral laws become irrelevant.[48]

However, there can be a need for enforcement off-chain as well, aka situations wherein blockchain based arbitral awards would need to be enforced via the court mechanism, the same way any other arbitral award would be. These include instances where the assets or compensation involved is non-digital in nature, where the amount ordered to be paid exceeds the amount available in the escrow account, where compliance of third parties or interim measures are needed, etc.[49] All these situations could force an unsuspecting party to approach national courts seeking enforcement of the award. Thus, the main objective of this section would

46. Vijayendra Pratap Singh, Abhijnan Jha and Abhisar Vidyarthi, 'The More Things Change, the More they Stay the Same: Guerrilla Tactics in Arbitration in India' <https://www.azbpartners.com/bank/the-more-things-change-the-more-they-stay-the-same-guerrilla-tactics-in-arbitration-in-india/> accessed 28 December 2024.
47. Elizabeth Chan and Emily Hay, 'Something Borrowed, Something Blue' (n 43) 217-218.
48. ibid.
49. ibid.

be to gauge the reaction of a court if enforcement is sought before it for an award from a blockchain arbitral system on four aspects which could affect its enforcement – agreement in writing, the seat of arbitration, due process requirements, and the lack of reasoning in the award This will be done first through the lens of the New York Convention, since it is the framework treaty at the multinational level setting the minimum standards for enforcement of foreign arbitral awards,[50] implemented by states through their domestic law, which may impose additional requirements above the same.[51] The same issues will then be analysed under Indian law.

A. Agreement in Writing

The New York Convention, as well as most domestic arbitration legislations stipulate that an arbitration agreement must be an '*agreement in writing*.' This requirement has been traditionally understood to mean a physical agreement on paper. However, the advent of the digital age and the e-commerce revolution has put this understanding to a test, and most jurisdictions do recognise the 'agreement in writing' requirement to be satisfied through electronic means as well. In this section, the question to be explored through the lens of both the New York Convention and Indian law is whether the 'agreement in writing' requirement can cover arbitration agreements embedded in smart contracts, so as to establish their legal validity and guarantee the enforceability of the awards arising out of the same.

1. 'Agreement in Writing' Under the New York Convention

Article II(1) of the New York Convention stipulates that the contracting states shall recognise *'an agreement in writing*' under which parties undertake to submit to arbitration all or any differences that have arisen or may arise between them.[52] Article II(2) further states that the term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters and telegrams.[53]

50. Mark Baker, 'Marking the 60th Anniversary of the New York Convention' <https://www.nortonrosefulbright.com/en/knowledge/publications/c0f0d4f3/marking-the-60th-anniversary-of-the-new-york-convention> accessed 7 January 2025.
51. ibid.
52. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (opened for signature 10 June 1958, entered into force 7 June 1959) art II(1) ('New York Convention').
53. ibid, art II(2).

Given that the New York Convention was drafted shortly after World War II, in an era where digital arbitration agreements were unfathomable, an argument can definitely be made that Article II should be interpreted broadly to include agreements in the digital form. It must be noted that Article II(2) does not define per se the term 'agreement in writing,' just states that it *includes* an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters and telegrams.[54] The usage of the word '*includes*' has led commentators to suggest that this Article is non-exhaustive in nature,[55] and includes types of arbitral agreements besides those expressly mentioned. Indeed, validity has been granted to arbitral agreements existing in the digital format under various soft law instruments, such as the UNCITRAL's recommendation in its 39th session to extend the application of Article II(2) to electronic communications.[56] Similarly, the International Council for Commercial Arbitration's guide to judges applying the New York Convention states that Article II(2) can reasonably cover modern means of communication.[57] Thus, the trend has been construing Article II of the New York Convention liberally so as to include within its ambit arbitral agreements in digital forms. Given the inclusive and non-exhaustive nature of Article II, an argument can be put forward that it can be interpreted to include blockchain based arbitral agreements.

However, there are multiple issues that put this argument to a test. Firstly, it must be kept in mind that Article II of the New York Convention is an autonomous standard that does not get altered by the abovementioned soft law instruments.[58] While it has been advanced that the UNCITRAL's recommendations in its 39th session operates as a subsequent agreement between parties to the New York Convention extending Article II's application to digital arbitral agreements, the same is arguable.[59] Hence,

54. ibid, art II(2).
55. Toby Landau and Salim Moollan, 'Article II and the Requirement of Form' in E Gaillard and D Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards — The New York Convention 1958 in Practice 189* (2008) 244-47.
56. Recommendation regarding the interpretation of art II, para 2, and art VII, para 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006). Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17), paras. 177-81 and Annex II <www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf>.
57. International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention, a Handbook for Judges* (ICCA Publishing 2011) 50.
58. Elizabeth Chan and Emily Hay, 'Something Borrowed, Something Blue' (n 43) 219.
59. ibid.

the plain text of Article II(2) does not by itself extend validity to digitally concluded arbitral agreements, much less blockchain-based arbitral agreements. Granted, the inclusive nature of Article II still stands. However, if we are to take the abovementioned soft law instruments out of the picture, all we get is an inclusive definition of 'agreement in writing,' with no clarity as to where exactly the inclusivity ends.

This brings us to the next point- serious doubts exist as to what extent can the liberal interpretation of Article II covering digital agreements be stretched. The abovementioned soft law instruments recommended broadening Article II(2)'s scope to include 'modern means of communications' or 'electronic communications. This would include, generally speaking, widely used means of communications such as emails or fax. However, arbitral agreements concluded through blockchain are radically different from the ones contained in these 'modern means of communication.' They are composed entirely of code, and hence are unreadable.[60] This aspect of unreadability further worsens the case for blockchain arbitral agreements under the New York Convention. Under Article IV(b) of the New York Convention, at the time of enforcement, parties are required to present before the court a copy of their arbitral agreement.[61] If the agreement in question is in a coded format, how can we expect the court to read the same, much less enforce the award arising out of the same? Thus, it is doubtful as to whether blockchain based arbitral agreements can fall under Article II(2).

However, there is still an 'escape hatch' of sorts out of this predicament. Article VII of the New York Convention states that it shall not deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.[62] This provision allows a party to rely on a *more favourable treaty or domestic law* concerning enforcement, instead of the New York Convention. Thus, the parties can avail more favourable provisions in the prevailing domestic law or treaty regime in the jurisdiction where the award is sought to be enforced, even if they contradict or lack certain requirements under the New York Convention. Indeed, courts have utilised this Article to allow enforcement even when the arbitral agreement in question satisfied the

60. ibid, 222.
61. New York Convention, art IV(b).
62. New York Convention, art VII.

more liberal conditions stipulated in domestic law, but not the New York Convention.[63]

How would this Article be of aid to a party seeking enforcement of a blockchain based arbitral award? The validity of digital arbitral agreements does not hinge solely on the soft law instruments mentioned above. In addition to those, various domestic laws, such as that of India,[64] and international treaties expressly grant validity to contracts concluded through digital means, which include the arbitral agreements contained therein. The treaty regime relevant to our discussion is United Nations Commission on International Trade Law's Model Law on Electronic Commerce, 1996 (*hereinafter*, 'UNCITRAL Model Law'),[65] and the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (*hereinafter*, 'Convention on Electronic Communications').[66]

The UNCITRAL Model Law provides under Article V that an instrument should not be invalidated if it is in the form of a *data message*.[67] Article VI lays down that where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is *accessible so as to be usable for subsequent reference*. Per the UN Commentary on the UNCITRAL Model Law, '*accessible*' is meant to imply that information in the form of computer data should be *readable and interpretable*, and that the software necessary to render such information readable should be retained.[68] The Convention on Electronic Communications, which applies to formation and performance of contracts between parties from different states, provides under Article 9(1) that a

63. Arijit Sanyal, 'Arbitration Tech Toolbox: Can the New York Convention Stand the Test of Technology Posed by Metaverse Awards?' <https://arbitrationblog.kluwerarbitration.com/2022/12/20/arbitration-tech-toolbox-can-the-new-york-convention-stand-the-test-of-technology-posed-by-metaverse-awards/> accessed 13 December 2024.
64. *See* ch III(A)(ii).
65. United Nations Commission on International Trade Law's Model Law on Electronic Commerce, 1996 (adopted 12 June 1996) ('UNCITRAL Model Law').
66. United Nations Convention on the Use of Electronic Communications in International Contracts (adopted 23 November 2005, entry into force 1 March 2013) ('Convention on Electronic Communications').
67. UNCITRAL Model Law, art V.
68. United Nations Commission on International Trade Law, *UNCITRAL Model Law on Electronic Commerce, with Guide to Enactment, 1996: With Additional Article 5 Bis as Adopted in 1998*, 36 <https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce>.

contract or any communication need not be evidenced in a *particular form*.[69] Additionally, it states under Article 9(2) that when national laws require the contract to be evidenced in writing, such a requirement is satisfied if the information contained in the contract is accessible in a manner which makes it '*usable for subsequent reference*.'[70]

Thus, unlike the New York Convention, these regimes grant express validity to contracts concluded through digital means. To qualify as an agreement 'in writing' under these regimes, the agreement in question will have to be accessible for subsequent reference. If an arbitration agreement is embedded in a blockchain, it could provide an accessible record of an agreement.[71] However, the Commentary on the Model Law stresses the element of readability and interpretability as qualifying elements for being '*accessible*.'

Could blockchain agreements ever be readable and interpretable? Surprisingly, yes. Herein, it is important to introduce the concept of *Ricardian Contracts*. Ricardian contracts are blockchain-based contracts that include two components. One is the digital based component in code that can be read by machines, and the other is a text-based component that can be read by humans.[72] Thus, Ricardian contracts, containing both digital code as well as its 'translation' of sorts in other languages- could definitely be read and interpreted by courts, meeting the agreement in writing requirement under both the abovementioned treaties. Moreover, such a blockchain arbitral agreement also solves the issue regarding its presentation at the time of enforcement under Article IV(b) mentioned above. In recent years, Ricardian contracts have seen increased popularity, with adoption by platforms like Mattereum, a blockchain-based project dealing with the transfer of digital assets,[73] and Aragon, a blockchain-based dispute resolution platform.[74] Indeed, the adoption of Ricardian contracts seems the best way forward for blockchain-based arbitral agreements to meet the 'agreement in writing' requirement.

69. Convention on Electronic Communications art 9(1).
70. Convention on Electronic Communications art 9(2).
71. Elizabeth Chan and Emily Hay, 'Something Borrowed, Something Blue' (n 43) 222.
72. Diego Geroni, 'What are Ricardian Contracts? A Comprehensive Guide' <https://101blockchains.com/ricardian-contracts/> accessed 8 December 2024.
73. Mattereum, 'Working Paper' <https://mattereum.com/2020/02/03/working-paper/> accessed 15 December 2024.
74. Aragon Network, 'White Paper' <https://github.com/aragon/whitepaper> accessed 10 December 2024 ('Aragon White Paper').

Thus, the parties under Article VII of the New York Convention, may use provisions of the UNCITRAL Model Law and the Convention on Electronic Communications to establish the validity of blockchain-based arbitration agreements contained in Ricardian contracts, if the jurisdiction where they seek to enforce the award is a signatory of these treaty regimes.

2. 'Agreement in Writing' Under the Indian Law

Just like the New York Convention, the Indian Arbitration and Conciliation Act, 1996 (*hereinafter*, 'Arbitration Act') also stipulates that an arbitration agreement must be '*in writing*' in Section 7(3).[75] The Arbitration Act further mentions that an arbitration agreement is 'in writing' if it is contained in a document signed by the parties or an exchange of letters, telex, telegrams or other means of telecommunication, *including communication through electronic means* which provide a record of the agreement.[76]

While the validity of arbitral agreements through electronic means is established under the Arbitration Act, the practical issues remain, since the legislature omitted to define '*electronic means*.' Indian law requires parties to present before the court the arbitral agreement at the time of enforcement of the award, under Section 47(b) of the Arbitration Act in case of a foreign seated award.[77] In case of a domestically seated award, there is no explicit stipulation to present the arbitration agreement, but the court may still examine the validity of the same if a party seeks to set aside the award under Section 34.[78] The fact still remains that a blockchain arbitration agreement would not be capable of being read or interpreted, unless it is contained in a Ricardian contract. Thus, simply according formal validity to blockchain arbitration agreements would only be a job half done-the execution of blockchain arbitral awards needs to be made practically workable. In this light, the Report of the 246th Law Commission is of immense utility.

Unlike the legislature which omitted to define the scope of the word 'electronic means,' the Report of the 246th Law Commission (*hereinafter*, 'the Report') recommended the insertion of Section 3A in the Arbitration Act, which would state that 'an arbitration agreement is in writing if its

75. Arbitration and Conciliation Act 1996 s 7(3) ('Arbitration Act').
76. Arbitration Act 1996 s 7(4)(b).
77. Arbitration Act s 47(1)(b).
78. Arbitration Act s 34.

content is *recorded in any form*.'[79] The Report further recommended the insertion of Section 3B, which stated that the requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is *accessible so as to be useable for subsequent reference*. These stipulations were added in order to bring Indian law in line with the UNCITRAL Model Law.[80]

This stipulation provided for in the Report is much more apt, compared to the Arbitration Act's current provisions. The requirement of being accessible and retrievable for a subsequent reference, is of immense practical utility, since as discussed above, courts at times may need to examine the arbitration agreement. If this requirement is stipulated, only those agreements which be read and interpreted by the courts would be covered by the Section. As explained above, the requirement of being readable and interpretable can be fulfilled by Ricardian contracts.

B. Requirement of the Seat of Arbitration

An essential feature of arbitration is the seat or place of an arbitral proceeding. The seat of an arbitration is its '*legal home'* or '*anchor,*' the country or place whose laws regulate the conduct of the arbitration proceedings (*lex loci arbitri*), and whose courts exercise jurisdiction over the same. While seats are a commonplace feature of traditional arbitrations, blockchain arbitrations are unique in this aspect. Parties often omit to designate a seat in the blockchain arbitration agreement as their expectation would be that the entire process would take place within the blockchain environment, without any involvement from the courts.[81] Moreover, the parties are anonymous vis-à-vis each other and may be located in different parts of the same country or different countries altogether, making it very hard for them to mutually agree on a seat.

Ordinarily, in a physical arbitration or Online Dispute Resolution (*hereinafter*, 'ODR'), it would have been the arbitral tribunal that would determine the seat in case of a failure by the parties to do specify one in the arbitration agreement. In a physical arbitration, the arbitrators would use tests such as 'the closest and most intimate connection' test, to designate

79. Law Commission of India, 246th Report on Amendments to the Arbitration and Conciliation Act, 1996 (5 August 2014) 42.
80. ibid.
81. Jun Hong Tan, 'Blockchain "Arbitration" for NFT-Related Disputes' (2023) 16(1) Contemp Asia Arb J 145, 170.

a place the parties or the contract is closely connected with as the seat.[82] In the context of ODR, arbitrators may use connecting factors, such as the location of the website where the case is administered, the servers, computers, e-arbitration providers, in addition to traditional factors such as the nationality and place of business of the parties.[83] However, blockchain arbitrations are truly a different ball game altogether. In blockchain arbitration, jurors typically have limited binary voting rights on the merits of the case and do not make procedural decisions.[84] Thus, they may not be able to designate the seat on behalf of the parties. Moreover, unlike ODR, where all relevant characters are geographically dispersed but readily identifiable,[85] parties to a blockchain arbitration are completely anonymous, and the arbitrators would be ignorant of the relevant factors regarding the parties that could aid them to conclude what the seat ought to be. For the same reasons, this task cannot be delegated to the enforcing courts either, as would usually occur in traditional arbitrations if the arbitral tribunal failed to designate the seat.

In this section, we examine whether the lack of a seat in blockchain based arbitrations can be reconciled with the New York Convention and the Indian law, and how the potential enforcement hurdles stemming from the same can be overcome.

1. Under the New York Convention

The New York Convention does not explicitly mandate arbitrations to have a seat. However, it operates on a *presumption of territoriality*, i.e., that the award is tied to the legal system of a state. This is reflected in Article I(1), which provides that the New York Convention shall apply to the recognition and enforcement of arbitral awards *made in the territory of a State* other than the State where the recognition and enforcement of such awards are

82. Alok Vajpeyi, 'Determination of Seat Law by the Indian Courts' <https://www.scconline.com/blog/post/2019/07/29/determination-of-seat-law-by-the-indian-courts/#:~:text=Principally%2C%20parties%20are%20required%20to,Arbitration%20and%20Conciliation%20Act%2C%201996.> accessed 5 December 2024.

83. Cemre Kadioglu, 'Virtual Hearings to the Rescue: Let's Pause for the Seat?' <https://arbitrationblog.kluwerarbitration.com/2020/07/13/virtual-hearings-to-the-rescue-lets-pause-for-the-seat/> accessed 21 December 2024.

84. Despoina Kottaridou, 'The Use of Arbitration for the Resolution of Disputes Arising from the Use of Blockchain Technology' (LLM Thesis, International Hellenic University 2023) 95.

85. Michael Buchwald, 'Smart Contract Dispute Resolution: The Inescapable Flaws of Blockchain-Based Arbitration' (2020) 168(5) U Pa L Rev 1369, 1400.

sought.[86] Moreover, several provisions of the New York Convention imply that arbitral awards must be subject to a national law, i.e., the law of the seat. Article V(1)(a) states that an enforcing court may refuse enforcement where the arbitration agreement is invalid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the country where the award was made.[87] Article V(1)(e) further states that a court may also refuse an award that has been set aside by a court of the country in which, or under the law of which, that award was made.[88]

Based on a reading of these provisions, most importantly the territoriality condition set out in the first part of Article I(1), many commentators have advanced that blockchain arbitral awards will not fall under the New York Convention and cannot be enforced under the same.[89] The reason for the same is evident in the very nature of blockchain arbitrations. They are completely delocalised, and cannot be said to be attached or related to any particular State- they are not made in any '*territory*' at all. There is no physical or virtual link to any nation, as the award is embedded within the blockchain.[90]

However, a reading of the second part of Article I(1) can lead us to a totally opposite conclusion.[91] It states that the New York Convention shall also apply to awards '*not considered as domestic awards*' in the state where the recognition and enforcement is sought. The drafting history of this Article suggests that the second part was inserted on account of some state's apprehensions that the first part of Article I(1) was placing too much emphasis on the seat of the arbitration as a factor to bring awards within its ambit.[92] It was inserted in order to enable courts to consider factors other

86. New York Convention art I(1).
87. New York Convention art V(1)(a).
88. New York Convention art V(1)(e).
89. Mauricio Virues Carrera, 'Accommodating Kleros as a Decentralised Dispute Resolution Tool for Civil Justice Systems: Theoretical Model and Case of Application' (2020) 8-9 ('Carrera Report').
90. ibid.
91. Lafi Daradkeh, 'Blockchain Investment Award under New York Convention of 1958: The Need for New Interpretation to Motivate Blockchain Investments' (2020) 8 Kilaw Journal 69, 81.
92. United Nations Commission on International Trade Law, Guide to the 1958 New York Convention, art I, <https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=617&opac_view=-1#:~:text=Article%20I%20(1)%20provides%20that,%2C%20whether%20physical%20or%20legal%E2%80%9D> accessed 21 December 2024.

than the seat of arbitration for the application of the New York Convention.[93] Thus, satisfying either the first or second part of Article I(1) is enough to bring the award within the New York Convention's ambit.[94]

Where blockchain based arbitral awards are concerned, there is judicial precedent available which strongly supports the enforcement of such 'a-national' or 'non-national' awards under the New York Convention. Based on a reading of the second part of Article I, the United States Court of Appeals for the Ninth Circuit has held that the language of the Article makes it evident that it does not contain a separate jurisdictional requirement that the award be rendered subject to a national law for enforcement.[95] Similarly, the Dutch Supreme Court held that the intention of the New York Convention was to recognise as arbitral awards also those awards which cannot be deemed to be connected with the law of any specific country.[96] Beyond judicial pronouncements, this recognition of a-national awards has also been granted by nations such as Egypt[97] and Jordan,[98] which permit the enforcement of an arbitral award if no seat has been designated by the parties. Thus, the second part of Article 1(I) suggests that blockchain arbitration awards may be enforced under the New York Convention.

2. Under Indian Law

However, such a recognition of 'a-national' or 'non-national' awards is far from universal. A cursory look at the majority of arbitration legislations around the globe would reveal that they mandate a seat to be designated by the parties or require the arbitral tribunal or the courts to designate a seat in case of a failure by the parties to designate the same. India falls in this category. Part I of the Arbitration Act applies only to arbitrations seated in India.[99] Section 31 contained therein mandates the arbitral award must mention the place of arbitration, aka the seat.[100] Part II of the Arbitration

93. ibid.
94. ibid.
95. *Ministry of Defense of the Islamic Republic of Iran v Gould Inc, Gould Mktg, Inc, Hoffman Export Corpn, and Gould International, Inc*, 969 F 2d 764 (9th Cir 1992).
96. Société Européenne d'Etudes et d'Entreprises (S.E.E.E.) v. Federal Republic of Yugoslavia, Supreme Court, Netherlands, 7 November 1975, I Y B Com Arb 195 (1976).
97. Law No 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, art 28.
98. Law No 31 of 2001 Jordan Arbitration Law, art 27.
99. Arbitration Act pt I.
100. Arbitration Act s 31.

Act deals with foreign seated arbitral awards,[101] and mirrors the New York Conventions stipulations regarding the court's power to refuse enforcement of the award if the agreement is invalid under the law of the place to which parties have subjected their proceedings or where the award was made, or has been set aside by the courts of the same place.[102] Thus, before enforcement of an award, Indian courts will necessarily have to inquire whether the arbitration is seated in India or outside,[103] and are mandated by judicial precedent to determine the seat in case of a failure by the parties or the arbitral tribunal to designate the same.[104]

Thus, the designation of a seat in the blockchain arbitration agreements is one that cannot be bypassed in all circumstances. Moreover, having a seat is not just a matter of mere legalistic formality to make the award enforceable under the relevant law. Many practical aspects of an arbitration proceeding relating to the parties' rights, the remedies available, and the substantive conduct of the parties' hinge on the law of the seat.

Therefore, the next question to be probed is to establish how exactly we reconcile blockchain arbitrations, with the expectation that awards must be based on the national law of some State? In the following sub-section, we examine the potential modes by which the seat of arbitration on the blockchain may be determined.

3. Evaluating the Hybrid Model as a Method of Designating the Seat

One interesting and unique viewpoint called the 'Hybrid Model' has been advanced in the Carrera Report.[105] It is based on a 2020 case in Mexico involving Kleros, a popular blockchain based arbitral platform.

The case concerned a leasing dispute where the arbitration agreement provided that after receiving the claims of the parties, the arbitrator would draft a Procedural Order addressed to Kleros which would then issue a decision.[106] The arbitral clause directed the arbitrator to *incorporate the decision received from Kleros* into his arbitral award to govern the substance of the ruling.[107] Thus, the decision by Kleros was incorporated

101. Arbitration Act pt II.
102. Arbitration Act s 48.
103. Alok Vajpeyi, 'Determination of Seat Law by the Indian Courts' (n 82).
104. ibid.
105. Carrera Report (n 89) 16-19.
106. ibid.
107. ibid.

in the final arbitral award by the arbitrator.[108] Subsequently, the landlord requested enforcement of the arbitral award before a local Mexican court, which was granted.[109]

the idea herein is to use the blockchain arbitration platform as a tool to adjudicate the *merits* of the dispute. Once that is done, the decision on the merits will be incorporated and adopted into the final award by the subsequent arbitral tribunal in the final award. The final award will be one that emerges from the traditional arbitration process, and thus will be having a seat and connected to a national legal system.[110] The subsequent arbitral tribunal would thus be indirectly giving legality to the blockchain arbitral award, which, under the existing arbitration framework, might have been denied enforcement.

At the first glance, the Hybrid Model seems like an ideal solution, a sort of 'best of both worlds' approach to dealing with the question of enforcement of blockchain arbitral awards. However, the true picture is not that rosy. The 'Hybrid Model' is based on the peculiar facts of the Mexican case. Therein, the parties were located in the physical world, knew each other beforehand, and thus, agreeing on the details, modalities, and seat of the subsequent arbitration would not have been that cumbersome. Moreover, the contract in question was not a smart contract. In contrast, consider a scenario of two parties to a smart contract located on different sides of the globe, completely anonymous vis-a-vis each other, trying to reach an agreement as to the modalities of the subsequent arbitration. Determining the seat that is mutually convenient to both parties, selecting an arbitrator(s), and institutional arbitral rules that are mutually agreeable may prove to be a hassle. Moreover, the parties may have to reveal their identities and sacrifice their anonymity in the subsequent arbitration, as the anonymity of parties may not be permitted in most domestic arbitral regimes or institutional rules. Moreover, having to reveal their identities may be against the parties' wishes themselves, given that anonymity is one of the advantages of blockchain arbitrations. Adding to these complications is the fact that the hybrid model makes the parties go through two arbitrations for essentially the same dispute, increasing the complexity and time taken of the whole process. As explained above,[111] the simplicity, flexibility, and

108. ibid.
109. ibid.
110. ibid.
111. *See* ch I.

speed of blockchain arbitrations make them an attractive option, and such an approach could negate the same.

Even if all of these issues are overcome or ignored, there is nothing *per se* stopping the subsequent arbitrator(s) from annulling the decision on merits by the blockchain arbitral platforms and issuing another decision on merits contrary to it, or at least modifying the same.[112] This is not a hypothetical possibility, but an actual probability. As was elaborated in the introduction,[113] the decision-making process in blockchain arbitration platforms is starkly different from traditional ones and involves minimal legal discussions- this may not be agreeable to arbitrators in the real world. An overruling of the decision on merits or a modification of the same would frustrate the very purpose of submitting it to blockchain arbitral platform in the first place.

To remedy this, it could be argued that parties could stipulate a condition curtailing the subsequent arbitral tribunal's decision-making powers on the merits. Granted, the parties are empowered to tweak to a substantial degree the arbitrators' powers to rule on the merits. For example, they can stipulate that the arbitrator can rule *ex aequou et bono*, i.e., with reference to notions of fairness and justice as opposed to any legal standards.[114] Theoretically, the notion of party autonomy can allow them to exclude the arbitrators' decision-making powers altogether, for example, in an agreement where the dispute is settled by a coin toss or a race where the arbitrator merely acts as the referee. However, depending on the applicable national law, such agreements may be held invalid on grounds of violating public policy.[115] Thus, it is unclear if using the subsequent arbitral tribunal as only a rubber stamp of sorts for ensuring enforceability of the award on the merits with no decision-making power would be acceptable.

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112. Maxime Chevalier, 'Arbitration Tech Toolbox: Is a Mexican Court Decision the First Stone to Bridging the Blockchain Arbitral Order with National Legal Orders?' <https://arbitrationblog.kluwerarbitration.com/2022/03/04/arbitration-tech-toolbox-is-a-mexican-court-decision-the-first-stone-to-bridging-the-blockchain-arbitral-order-with-national-legal-orders/> accessed 11 December 2024.
113. *See* ch I.
114. Nobumichi Teramura, 'Ex Aequo et Bono: An Overlooked and Undervalued Opportunity for International Commercial Arbitration' <https://arbitrationblog.kluwerarbitration.com/2018/11/18/ex-aequo-et-bono-an-overlooked-and-undervalued-opportunity-for-international-commercial-arbitration/> accessed 11 December 2024.
115. Anothony J Sebok, 'The Unwritten Federal Arbitration Act' (2016) 65(2) DePaul L Rev 687, 698.

It can also be argued that the doctrine of *res judicata* ought to preclude the subsequent arbitral tribunal from modifying or overruling the blockchain arbitral platform's decision. However, the operation of this doctrine depends on whether the former regards the latter as a legitimate authority whose decision must be respected.[116] This again, may depend from arbitrator to arbitrator, and many may not be inclined to do so because of the nature of decision making in blockchain arbitral platforms. Moreover, this doctrine only applies to awards which have become final and binding in nature.[117] Given that awards by some blockchain arbitral platforms can be appealed in the system itself,[118] this doctrine may not be attracted. In any case, even if the appeal procedure is complete or that the platform in question does not have one, the fact of submitting an award to another arbitrator to make it enforceable itself implies that it has not become final. Thus, the Hybrid Model may not be the most feasible way of connecting the blockchain award within some nation's legal system.

The way out of this predicament, thus, would be if parties were to designate a seat in their arbitration agreement when entering into the smart contract, given the vagrancies of the Hybrid Model. It is understandable if parties generally omit to do so since it would be difficult to predict if recourse to courts would actually be needed in the blockchain arbitral process. Further, mutually agreeing upon a seat in a digital, anonymous environment is naturally challenging. However, the designation of a default seat may help overcome these challenges. Default seats are commonplace in the rules of many arbitral institutions in the real world, in case of a failure by the parties to reach an agreement. Where disputes in the blockchain world are concerned, the UK's Digital Dispute Resolution Rules, 2021, for instance, stipulate the UK as the default seat.[119] Parties can incorporate a reference to such rules in their arbitration agreement to avail the benefits of having a seat. Another solution could be for the blockchain platforms to grant the parties an option to mutually choose the seat of arbitration, *ex ante* the dispute arising, if the parties have omitted to designate the same in their

116. Maxime Chevalier, 'Arbitration Tech Toolbox' (n 112).
117. Selin Ece Tekin, 'Res Judicata: An Analysis for the Sake of Public Policy' < https://arbitrationblog.kluwerarbitration.com/2019/02/24/res-judicata-an-analysis-for-the-sake-of-public-policy/> accessed 19 December 2024.
118. Ibrahim Shehata, 'Arbitration of Smart Contracts Part 3 – Issues to Consider When Choosing Arbitration to Resolve Smart Contracts Disputes' <https://arbitrationblog.kluwerarbitration.com/2018/08/30/arbitration-smart-contracts-part-3/> accessed 22 December 2024.
119. UK Digital Dispute Resolution Rules (April 2021) r 16.

arbitration agreement.[120] However, the parties must ensure that the selected seat is a jurisdiction that validates arbitration agreements embedded within smart or digital contracts.[121] This is because under both the New York Convention[122] and most domestic laws such as the Arbitration Act,[123] the enforcement of an award may be refused if the underlying agreement is not valid under the law applicable to the arbitration proceedings.

C. Requirements of Due Process

Some of the differences present in blockchain based arbitrations compared to their off-chain counterparts, raise concerns regarding due process, a basic feature of arbitration. Due process underpins not only the legal soundness of any adjudicatory mechanism, but also determines the people's faith in the same. In this light, examining the due process concerns that arise out of blockchain arbitrations differences becomes imperative.

But first, clarity is needed with regards to what exactly due process entails in the arbitration context. Under Article V(1)(b) of the New York Convention, due process rights of the parties involve two elements - proper notice of the proceedings, and the ability of a party to present its case.[124] Domestic legislations mimic these requirements- the two abovementioned grounds can be used to refuse enforcement of a foreign seated award under Section 48 of the Indian Arbitration Act.[125] For arbitrations seated in India, Section 21 stipulates notice of the arbitral proceedings as a mandatory requirement for the commencement of the proceedings,[126] and Section 18 mandates that the parties ought to be treated equally and have an equal opportunity to present their case.[127] A violation of these due process requirements are grounds for challenging the enforcement of domestic awards.[128]

120. Despoina Kottaridou (n 84) 102.
121. Aishwarya Julinka Anand and Shreya Gupta, 'Smart Legal Contracts – The Only Viable Approach to the Arbitration of Blockchain Disputes?' <https://www.rgnulcadr.in/post/smart-legal-contracts-the-only-viable-approach-to-the-arbitration-of-blockchain-disputes> accessed 22 December 2024.
122. New York Convention art V(1)(a).
123. Arbitration Act s 48(1)(a).
124. New York Convention art V(1)(b).
125. Arbitration Act s 48(1)(b).
126. Arbitration Act s 21.
127. Arbitration Act s 18.
128. Saniya Mirani, 'Due Process Concerns in Virtual Witness Testimonies: An Indian Perspective' <https://arbitrationblog.kluwerarbitration.com/2020/11/17/due-process-concerns-in-virtual-witness-testimonies-an-indian-perspective/> accessed 23 December 2024.

Thus, the requirements of notice and equal opportunity to present the case are the two-criterion based on which blockchain based arbitral platforms will need to be evaluated. For this analysis, we will be taking Kleros as a representative example. Surprisingly, Kleros' platform infrastructure is mostly compliant with the due process framework, since compliance with due process requirements is a built-in feature of the protocol since proper notice and exchange of evidence and comments of the parties are executed automatically by smart contracts.[129]

To initiate the proceedings in the Kleros System, the claimant has to complete a simple form explaining its claim, and Kleros sends an email to the respondent notifying it that a dispute has been raised-this appears to fulfil the notice requirement.[130] However, in proceedings where a party resists the enforcement of an award on grounds of non-receipt of notice, courts tend to assess the fulfilment of the notice requirement *based on the conduct and knowledge of the parties*.[131] However, this assessment becomes near impossible in the blockchain arbitration context where the proceedings are virtual with hardly any interaction between the parties. While courts may in the future adopt a different frame of analysis with regards to assessment of notice in blockchain arbitrations, platforms would nevertheless be advised to ensure availability of evidence of the notice delivery and receipt so there is proof regarding the adequacy of the notice. This can take the form of an acknowledgement of receipt sent to the platform and the opposing party once the respondent has opened the notice.[132]

Where the ability of a party to present its case is concerned, a breach occurs when a party is prevented from submitting crucial evidence, from receiving evidence from an opposing party, or is denied the right to comment on or respond to evidence and arguments from the opposing

129. Kleros.IO, 'Dispute Revolution: The Kleros Handbook of Decentralized Justice' (2020) 184.

130. Joe Tirado and Gabriela Cosio, 'Lex Cryptographia: Guidelines for Ensuring Due Process in Transnational Blockchain-Based Arbitration' <https://www.ibanet.org/lex-cryptographia-due-process-blockchain-based-arbitration#:~:text=Ensuring%20due%20process%20in%20Arbitration,arbitration%20available%20to%20the-%20public.> accessed 22 December 2024.

131. United Nations Commission on International Trade Law, Guide to the 1958 New York Convention Article, V(1)(b) < https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=622&opac_view=-1> accessed 26 December 2024.

132. Joe Tirado and Gabriela Cosio, 'Lex Cryptographia: Guidelines' (n 130).

party.[133] While the Kleros system permits the parties to submit evidence to support their respective cases, it does not provide for the parties to have an opportunity to rebut to the evidence and arguments submitted by the opposing party This can be remedied by a simple modification in the platform architecture to provide for an opportunity to rebut the opposite parties' submission. This would be in line with the UNCITRAL's Notes on Organising Arbitration Proceedings as well, which prescribe the structure of the written submissions to include submissions by the Claimant and Respondent along with rebuttals.[134] While this could prove to be a lengthier process, it would still function to grant the parties reasonable opportunities to analyse and rebut each other's evidences, and the insights reached from this process could in turn enable the jurors to reach a better conclusion. Moreover, this could also make the blockchain arbitral process more adjudicatory in nature, resembling traditional arbitration, as it has been criticised for lacking this aspect.[135]

Thus, presently, Kleros' infrastructure is not completely compliant with the standards of due process expected in arbitration. There could be other platforms which perform even more poorly in due process considerations. In cases where parties choose to submit their disputes to such platforms, the question arises as to whether the parties can be said to have waived their due process rights. Indeed, due process requirements do not have to be followed to a 't'- parties also have a right to modify and contract out of them. This is recognised in Article V(1)(d) of the New York Convention,[136] which asserts the supremacy of the parties' agreements with respect to the procedure of the arbitration.[137] However, while a limited waiver of the rights relating to notice and equal treatment under Article V(1)(b), such as waiving off certain procedures and deadlines,[138] is possible, courts would not be inclined to accept a *full waiver* of all due process requirements.

133. ibid.
134. United Nations Commission on International Trade Law, Notes on Organising Arbitration Proceedings (2016) 65.
135. Alex Yueh-Ping Yang, 'The Crowd's Wisdom in Smart Contract Dispute Resolution: Is Crowdsourced Dispute Resolution Arbitration?' (2022) 15(2) Contemp Asia Arb J 175, 189-196.
136. New York Convention art V(1)(d).
137. Kleros Handbook on Decentralised Justice (n 129).
138. United Nations Commission on International Trade Law, Guide to the 1958 New York Convention art V(1)(b) <https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=622&opac_view=-1#:~:text=Article%20V%20(1)(b)%20requires%20that%20a%20party,are%20aware%20of%20the%20proceedings> accessed 21 December 2024.

The Dutch case of *X* v. *Y* is an example.[139] In that case, bitcoin loans were concluded on an online platform. The terms of use of the platform provided for automatic triggering of the arbitration process in case of a default with no notice requirement, and as a result the defendant was not notified of the proceedings and was unable to contest the claims. While it could be argued that agreeing to the terms of use could imply a waiver of the notice requirements, the Amsterdam Court of Appeal refused to enforce the award.[140] Thus, it appears that parties cannot waive off due process requirements in a wholesale manner. Therefore, platforms whose system infrastructures at the present does not provide for notice and equal case presentation opportunities may render unenforceable awards.

D. Requirement of Reasoning in Arbitral Awards

Another major difference the blockchain based arbitral process presents as compared to traditional arbitration is the lack of reasons being specified in the award.[141] While some blockchain arbitral platforms, such as Kleros,[142] require the Jurors to give reasons for their decision, many omit to do so.[143] This is a corollary of the principle behind the working of the blockchain arbitrations, i.e., to reduce, if not eliminate, legal discussions.

Where the question of enforcement hurdles stemming from this lack of reasoning is concerned, the New York Convention does not mandate awards to contain a reasoning. However, Article V (1)(d) enables courts to refuse recognition and enforcement of awards wherein the arbitration procedure was not in accordance with the agreement of the parties, or failing the same, the agreed upon national law.[144] Thus, if the parties' agreement, or the agreed or the agreed upon national law, require the award to contain reasons, the failure to provide reasons may be a ground for refusal of enforcement of the award.[145] Where blockchain based

139. Sophie Nappert and Elisabeth Zoe Everson, 'The Model Law for Decentralized Autonomous Organizations – Reinventing Due Process' <https://delosdr.org/the-model-law-for-decentralized-autonomous-organizations-reinventing-due-process/> accessed 28 December 2024.
140. ibid.
141. Jun Hong Tan, 'Blockchain "Arbitration" for NFT-Related Disputes' (2023) 16(1) Contemp Asia Arb J 145, 172-173.
142. Kleros Handbook on Decentralised Justice (n 129) 271.
143. Jun Hong Tan, 'Blockchain Arbitration'(n 141).
144. New York Convention art V(1)(d).
145. United Nations Commission on International Trade Law, 1958 New York Convention Guide, art V(1)(d) <https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=628&opac_view=-1> accessed 26 December 2024.

arbitration is concerned, it can be argued that submitting a dispute to the same amounts to an implicit agreement waiving the reasoning requirement. Moreover, even if the national law agreed upon by the parties stipulates the reasoning requirement to be mandatory, the same should not prove to be an enforcement concern as parties' agreements with regards to the procedure of the arbitration overrides provisions of the national law under Article V(1)(d).[146]

However, it has also been held in certain case laws that *the requirement of reasoning of arbitral awards does not fall under the 'procedure' of the arbitration* in the first place.[147] While this interpretation is not universal, going by the same, the parties' agreement regarding the reasoning requirements, whether explicit or not, would not be covered under '*arbitral procedure*' mentioned in Article V(1)(d). The national law would then be the determining factor for assessing the validity of the arbitral procedure where the reasoning requirement is concerned. Thus, if the parties' agreed upon national law mandates arbitral tribunals to provide reasonings for awards, their agreements to the contrary may not override the same under Article V(1)(d) and the lack of reasoning in the blockchain arbitral award may prove to be an enforcement hurdle.

Where Indian law is concerned, the Arbitration Act does mandate awards to be reasoned, unless parties have agreed that the award shall not contain any reasons.[148] Again, it can be argued that the very act of submitting a dispute to platforms which do not require awards to specify reasons should amount to an implicit waiver of the reasoning requirement. Nevertheless, all domestic laws may not allow waiving off the reasoning requirement, and if mandatory, enforcement hurdles are may follow, going by the interpretation which regards reasoning requirements to not be a matter of procedure.

Beyond enforcement issues, being appraised of the logic and legal basis behind every decision in an adjudicatory process is a basic expectation that any party would have. The requirement to provide reasonings behind legal decisions has been a principle of natural justice and fair play since time

146. ibid.

147. *Food Services of America, Inc (Amerifresh) v Pan Pacific Specialties Ltd*, Supreme Court of British Columbia, Canada, 24 March 1997, A970243, XXIX YB Com Arb 581 (2004).

148. Arbitration Act s 31(3).

immemorial.[149] Further, the lack of reasoning in the awards bolsters the criticisms that blockchain based arbitrations are not merit based or even adjudicatory in nature.[150] Therefore, where the reasoning requirement is concerned, Kleros' platform architecture seems to be the best out of all the blockchain arbitration platforms. Jurors at Kleros are mandated to write a short paragraph explaining the reasoning for their decision, which is revealed to the parties as well as to other jurors after the voting is complete.[151] Although there is currently no international standard establishing the level of detail and particularity the reasons in the award must contain, succinct statements dealing with the arguments, evidences, and explaining the basic rationale behind the decision are generally considered sufficient.[152] This is reflected in the Chartered Institute of Arbitrators' Guidelines on Drafting Arbitral Awards.[153] Thus, for a seamless enforcement process, a practice similar to the Kleros Model would be recommended for all blockchain arbitration platforms.

5. CONCLUSION

Through this article, the objective of the authors was to delve deep into the world of crowdsourced, blockchain based arbitrations. In this journey, we outlined some of the major advantages these systems have to offer from an arbitral policy perspective. Beyond policy benefits, our major focus was on the compatibility of blockchain arbitral awards with the enforcement regimes under the New York Convention and Indian law. By no means are the issues analysed above the only ones that can arise in the blockchain arbitration award enforcement context. There are certain additional concerns which, beyond potential enforcement concerns, may also influence the legislators' attitudes towards assimilating blockchain arbitrations in the legal system. Many of these hurdles may arise due to the requirements of the law, ranging from those regarding the form and content of the

149. V S Chauhan, 'Reasoned Decision: A Principle of Natural Justice' (1995) 37(1) JILI 92.
150. Yueh-Ping Yang 'The Crowd's Wisdom in Smart Contract Dispute Resolution' (n 135) 184.
151. Kleros, 'Kleros FAQ' <https://docs.kleros.io/kleros-faq> accessed 5 January 2025.
152. Roman Pekob and Peter Pethő, 'The Standard of Reasoning in Arbitral Awards' in Alexander J Bělohlávek and Naděžda Rozehnalová (eds), *Czech (& Central European) Yearbook of Arbitration* vol 8 (LexLata 2018) 157, 164.
153. Chartered Institute of Arbitrators, Drafting Arbitral Awards Part I — General (CIArb 2021) 12.

awards,[154] public policy concerns,[155] requirements of disclosure of names of parties which contradicts the anonymity of blockchain arbitrations,[156] etc. However, it is beyond the scope of the article to analyse these issues.

It must be remembered that if blockchain based arbitrations are to become a mainstream, and most importantly a legally compatible avenue of dispute resolution, both the law and these platforms may have to shift to accommodate each other. It is only through a symbiotic process of mutual adjustments in different spheres can this goal be actualised. For instance, where due process is concerned, arbitration law's positive attitude towards minor waivers grants some leniency to these platforms. The same may also be true for the lack of reasoning in blockchain based arbitral awards. However, where fundamental incompatibilities are present, blockchain based arbitral platforms must strive to rectify the same. They should also ideally grant parties the option of designating a seat. Making such changes would be very favourable for these platforms. Rendering awards capable of smooth off-chain enforcement in addition to automatic on chain enforcement would naturally make them an attractive avenue for parties to submit their disputes. Empirical studies have found that even in industries such as crypto trading and NFT's, traditional arbitration and litigation have remained the primary methods of resolving disputes.[157] Due to the limited scale of business and intensive competition, blockchain based arbitral platforms may encounter challenges.[158] Thus, enhancing their platform design which facilitate awards capable of smooth enforcement should be a priority in their business strategies.

Additionally, if the arbitral system of any nation seeks to absorb the policy benefits of blockchain arbitrations, the legislators may have to undertake some amendments in the law to facilitate enforcement. In the Indian context, a more comprehensive definition of '*electronic means*' in the Arbitration Act, as envisioned in the 246th Law Commission Report, would be an example. In conclusion, the interaction of blockchain based arbitrations with arbitration law as it stands today, presents to us both a

154. Raghav Saha and Harshit Upadhyay, 'Blockchain Arbitration in India: Adopting the Hybrid Model Envisaged by Mexican "Kleros" Case' <https://indiacorplaw.in/2022/06/blockchain-arbitration-in-india-adopting-the-hybrid-model-envisaged-by-mexican-kleros-case.html> accessed 29 December 2024.
155. Elizabeth Chan and Emily Hay, 'Something Borrowed, Something Blue' (n 43) 239.
156. ibid 223.
157. Yueh-Ping Yang, 'The Crowd's Wisdom in Smart Contract Dispute Resolution' (n 135) 199.
158. ibid.

challenge and an opportunity. Off-chain enforcement concerns are one of the challenges, and adapting arbitration to the rapidly digitalising world to overcome some of its traditional drawbacks is an opportunity. It remains to be seen, however, how legislators and policymakers all over the world and in India, respond to these twin sets of challenges and opportunities.

ASSIGNMENT OF ARBITRATION AGREEMENT: MAKING A CASE FOR AUTOMATIC TRANSFER APPROACH IN INDIA

—*Arunoday Rai*[*]

ABSTRACT

In domestic and international business transactions, the assignment of contracts containing an arbitration agreement is a routine practice where third-party interest is created by the original parties to the contract. In such an assignment of the contract, an issue arises when the assignor tries to rely on the arbitration agreement to compel the obligor to arbitrate or vice versa. No uniformly accepted conflict of law rules or substantive rules exist to guide the arbitrators or the courts while adjudicating on such an issue. The jurisprudence of several popular arbitration nations indicates two broad approaches to the issue: automatic transfer and express assignment approach. This paper traces the Indian position on such assignment of arbitration agreements and argues for the automatic transfer of an arbitration agreement upon assignment of the contract. It starts by fleshing out the relationship between a contract and an arbitration agreement which is necessary to understand the underlying basis for the two approaches. It contends for limited autonomy of arbitration agreement from the contract. It argues that it forms a part of the contract that is transferred along with other rights and obligations during the contract. It carves out and defends the legal doctrines that have been utilised by the courts to allow the automatic transfer of arbitration agreements during the assignment of the contract.

1. INTRODUCTION

In domestic and international business transactions, the assignment[1] of contracts containing an arbitration agreement is a routine practice where

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1. Assignment has been defined as a transfer of rights or interests in a contract from one person to the other. The consists of three parties: the party assigning the contract (assignor), the party who gets assigned the contract (assignee), and, the other party to the original contract (obligor).

third-party interest is created by the original parties to the contract. In the context of contract assignment, a legal issue arises when the assignor seeks to invoke the arbitration agreement to compel the obligor to arbitrate, or conversely, when the obligor attempts to enforce arbitration against the assignor. There is no universally established set of conflict-of-laws principles or substantive legal rules that uniformly guide arbitrators or courts in resolving such disputes.[2] Such lacunae in leading international instruments such as the New York Convention, the UNCITRAL Model Law, and the European Convention on International Commercial Arbitration has led several commentators to suggest that such issues have been left to be resolved by the national legal systems.[3] These Conventions ought to have been resolved by these International instruments as they seek to promote uniformity and certainty in International arbitration.

Indian courts have previously found that the assignment of the arbitration agreement is governed by the contractual provisions of assignment and the Indian Contract Act, 1872.[4] However, Indian courts are yet to conclusively decide questions arising from the law applicable to assignment of contracts in cases of international commercial arbitration.[5] The scope of this paper has been limited to domestic arbitration where the 'entire' contract is assigned voluntarily (not statutorily) and consent has been taken from the assignor, assignee, and obligor.[6]

2. Daniel Girsberger and Christian Hausmaninger, 'Assignment of Rights and Agreement to Arbitrate' (1992) 8 Arbitration International 121.
3. Albana Karapanco, 'Assignment of the Arbitration Agreement: Perspectives of Leading Jurisdictions' (2015) Central European University 39, 11.
4. *Kotak Mahindra Prime Ltd v Sanjeev Sadaram Chavare* 2008 SCC OnLine Bom 1004, 21.
5. There exists no uniformly accepted substantive rule or conflict of laws governing the issue of assignment of the arbitration agreement. Therefore, it requires determination of the applicable law. Such determination may be made, depending on whether the case is considered by the State court or by the Arbitral Tribunal, on the basis of a statutory conflict of laws rule or on the basis of the conflict of laws rule which the arbitrators deem the most appropriate. For the debate, See Anita Garnuszek, 'The Law Applicable to the Contractual Assignment of an Arbitration Agreement' (2016) 82 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\AMDM\AMDM2016054.pdf> accessed 4 August 2024.
6. Statutory assignments requires the party to abide by the terms of the statute and would involve entirely different principles. Whereas, voluntary assignments are private agreements between the parties that does not need compliance with any statutory formalities.

The jurisprudence of several leading nations in the practice of arbitration indicates two broad approaches to the issue: *first* is the 'automatic transfer' approach where the assignee is automatically bound by the arbitration agreement upon the assignment of the contract, and *second* is the 'express assignment' approach where the assignee needs to provide express consent to be bound by the arbitration agreement.[7] This paper traces the Indian position on such assignment of arbitration agreements and argues for the automatic transfer of an arbitration agreement upon assignment of a contract. The paper has been broadly divided into two parts: the *first* part describes the relationship and interplay between an arbitration agreement and a contract where it refutes several arguments presented against the automatic transfer approach, and the *second* part carves out the legal principles involved in such automatic transfer of arbitration agreements.

2. RELATIONSHIP BETWEEN THE CONTRACT & ARBITRATION AGREEMENT

The root of this issue, which is often ignored by the authors writing on this subject area, is based on the perceptions on the location of the arbitration agreement in the contract.[8] The proponents of the two approaches mentioned above locate the arbitration agreement in two different manners, leading to two different conclusions The supporters of the 'automatic transfer' approach argue for lesser autonomy to the arbitration agreement within a contract whereas the supporters of the 'express assignment' approach argue for a higher degree of autonomy to the arbitration agreement within a contract.[9] This part highlights and refutes three arguments presented by the Indian courts in support of the 'express assignment' approach indicating the manner in which they see the arbitration agreement in a contract.

Indian courts have focussed on three key principles justifying the requirement of express consent while assigning the contract: (i) Arbitration agreement is a distinct clause in the contract that is personal to the parties, (ii) Arbitration agreement is autonomous from the contract, and (iii) Arbitration agreement is an obligation that cannot be assigned. This part of the paper shows that all three arguments are misplaced and limited in nature.

7. Daniel Girsberger (n 2) 136.
8. ibid.
9. ibid.

A. Arbitration Agreement is a Distinct Clause in the Contract

The Delhi HC in *Delhi Iron & Steel Co Ltd v U.P. Electricity Board* held that there is no automatic transfer of arbitration agreement in assignment of the contract as the arbitration agreement is personal to the parties.[10] Such a clause is catered to personal needs and individual differences and cannot be assigned to some other party.[11] This argument finds its support in leading commentaries such as Russel on Arbitration where an arbitration agreement is defined as a personal covenant incapable of assignment.[12] Therefore, it is argued that such a clause cannot be assigned due to its personal nature.

The said argument regarding the personal nature of the arbitration agreement was negatived by the Supreme Court in *Khardah Co Ltd v Raymon & Co (India) (P) Ltd*.[13] The Supreme Court was dealing with the scope of assignability of a contract. It held that a contract can be assigned unless it is personal in nature or is incapable of assignment under the law. The Court relied on the English Court of Appeal case of *Shayler v Woolf*[14] where the argument about the personal nature of an arbitration agreement was negatived. The Court of Appeal in this case was dealing with the issue as to whether presence of an arbitration clause in a contract would render the contract unassignable. It held that if there is nothing barring the assignment of the contract, the argument that the arbitration agreement is personal in nature cannot be accepted. Therefore, the court concluded that arbitration agreement is not personal in nature and cannot prevent the assignment of a contract.

The findings of the Supreme Court in *Khardah* are defensible as an arbitration agreement deals with the dispute arising out of the contract. The arbitration agreement cannot be seen in isolation as it does not have an independent existence. As highlighted by the court in *Khardah*, the arbitration clause is a non-personal clause that forms a part of the contract. Therefore, if there is no legal bar on the assignment of a contract due to its non-personal nature, then there should be no bar on the assignment of the arbitration agreement which deals with disputes arising out of the contract. Further, even if we accept that the arbitration agreement is concluded *intuitu personae*; i.e., tailored to original contracting parties, the parties enter

10. 2001 SCC OnLine Del 491, 15.
11. ibid.
12. David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (23rd edn Sweet & Maxwell 2015) 65.
13. 1962 SCC OnLine SC 28, 11.
14. 1946 Ch 320, 322-323.

into an agreement to arbitrate because of reasons that extend beyond their personal benefit. These reasons are less cost, efficiency, party autonomy, and other added advantages of arbitration.[15] It is correct that certain aspects of arbitration agreements such as governing law, arbitrator's appointment, seat, *et cetera* are chosen by the original parties based on their preferences. However, such choices do not necessarily make the agreement entirely *intuitu personae*. The key distinction lies in the fact that party autonomy allows parties to decide whether these elements remain strictly personal or can extend beyond the original signatories. For instance, while governing law may be chosen by the original parties, these aspects often reflect commercial convenience or neutrality rather than a personal relationship. Many arbitration agreements survive corporate mergers, assignments, or restructuring without affecting the validity of these choices. In exceptional circumstances where a particular condition is inherently personal in nature, the court may recognize it as an anomaly and deviate from the automatic transfer approach, refusing to enforce it in such rare instances. Thus, while some elements of arbitration agreements may have a personal component, the broader purpose of arbitration extends beyond the individuals involved, making it more than just an *intuitu personae* arrangement. Consequently, the focus shifts from the parties to the inherent advantages arbitration brings to the resolution of the dispute.

A very similar view to *Delhi Iron & Steel Co Ltd case* was taken by the Bombay High Court in *Vishranti CHSL v Tattva Mittal Corpn (P) Ltd*[16] on the distinct nature of the arbitration agreement, where it held against the automatic assignment of the arbitration agreement. The High Court held that an arbitration agreement is separate from other clauses in the contract as it has nothing to do with the performance or obligations in the contract. It is an optional clause that has been made mandatory after its insertion in the contract by the parties. Therefore, it held that specific consent is required to be bound by an arbitration agreement due to its distinct nature.

The finding of the High Court is misplaced as an arbitral clause is like any other clause in a contract that is discussed, deliberated, and negotiated between the parties. The separability of arbitration agreement from the contract has been dealt with by the author in Section B of this paper. In the 21st century where contracts are regularly assigned, it can be reasonably inferred that the original parties can foresee the assignment of the contract. Further, it is reasonable for the parties to contemplate assignment of the

15. Daniel Girsberger (n 2)141.
16. 2020 SCC OnLine Bom 7618, 17.

contract during the stage of its drafting. Most of the commercial contracts contain the 'assignment' clause. If the parties do not provide the need for 'explicit' consent to be provided by the assignee to be bound by the arbitration agreement, a different and higher standard of consent cannot be read into the contract as it would go against the intent of the parties. The Supreme Court in *Nabha Power Ltd v Punjab State Power Corpn Ltd*,[17] while explaining the doctrine of business efficacy, has held that the contract should not be read in a manner which the parties as reasonable businessmen could not have intended. Applying the contractual principle to this case, if the parties as reasonable businessmen do not provide for the requirement of explicit consent for the assignment of arbitration agreement even after providing for an 'assignment' clause, the doctrine of business efficacy dictates that such a requirement of explicit consent cannot be read down in the contract.

Additionally, such an understanding of the arbitration agreement by the Bombay High Court in *Vishranti* is incomplete as it fails to tell us why we need explicit consent for it to be assigned even if it is distinct. The distinct nature of a clause, that is not related to performance and obligation in a contract *per se,* cannot be a ground for explicit consent to be provided by the assignee.

A. Arbitration Agreement is Autonomous of the Contract

The Delhi High Court in *Delhi Iron & Steel* has held that the consent to the assignment of the contract would not amount to the consent to be bound by the arbitration agreement due to the independent nature of the latter.[18] The principle has been adopted in leading arbitral institution rules[19] as well as the Indian Arbitration and Conciliation Act, 1996 which provides that, "the arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void."[20] The principle of separability was explained by the Supreme Court in *NN Global* where it stated that an arbitration agreement is a collateral term to the contract and is autonomous in nature.[21]

17. (2018) 11 SCC 508, 34-49.
18. *Delhi Iron & Steel* (n 10) 13.
19. See ICC Arbitration Rules, art 6(9).
20. Arbitration and Conciliation Act 1996, s 16(1)(b).
21. *Interplay between Arbitration Agreements under Arbitration and Conciliation Act 1996 & Stamp Act 1899, In re* (2024) 6 SCC 1, 98-100.

This argument of separability is considered one of the strongest arguments for the 'express assignment' approach. The proponents argue that the autonomous and distinct nature of the arbitration agreement makes the clause different from other clauses in the contract. Due to the nature of the arbitration clause, it cannot be assigned along with the contract. It requires express consent from the parties as it is considered autonomous of the contract.

However, the argument is based on an incorrect understanding of the principle. The principle was adopted to prevent termination of the arbitral clause upon the termination or invalidity of the underlying contract.[22] The principle protects the arbitration agreement and ensures its survivability which might have been affected had it not been seen as independent of the underlying contract. It ensures that even if the main contract is found to be void, voidable, or terminated, the arbitration clause remains valid and enforceable. It prevents parties from evading their obligation by merely disputing the validity of the main contract. Therefore, the principle creates a legal fiction where the arbitration agreement is deemed as independent from the contract. However, it needs to be understood that such deeming fiction is created only for the purposes of survival of the arbitration agreement stemming from the invalidity of the contract.[23]

The cases where this principle has been used by the courts are to preserve the arbitration agreement from the invalidity of the contract. The arbitration agreement has been considered to be autonomous of the contract only to preserve the same from the invalidity of the contract. The usage of such a principle indicates that the deeming fiction has been created for a limited purpose. In essence, the principle of separability cannot be used beyond the limited purpose for which it was created. Apart from this limited deeming fiction, the arbitration agreement clause is just like any other clause in the contract. Therefore, in cases of transfer of contract such as assignment, such a principle cannot be applied.

It is also argued that the separability of the arbitration agreement is not sacrosanct and can be diluted in certain circumstances.[24] The courts have created several exceptions where third parties or non-signatories can take

22. ibid.
23. Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn Oxford University Press 2015), 158.
24. Jim James and Ben Ridgeon, 'Arbitration Agreements — Becoming Involved Despite Not Being a Party' (*Lexology* 7 October 2014) <https://www.lexology.com/library/detail.aspx?g=a63956e7-31e5-48cb-b291-6f0ddd619462> accessed 4 August 2024.

recourse to arbitration even when they have not expressly consented to the arbitration agreement. One such instance was the development of the Group of Companies Doctrine where the courts have allowed the joinder of non-signatories based on their mutual intention to be bound by the arbitration agreement.[25] Similarly, assignment presents an exception where a third party is allowed recourse to arbitration even if it has not expressly consented to the arbitration agreement.

Further, the principle of separability was adopted for two reasons: (i) party autonomy as parties expect to resolve the dispute through arbitration arising from the contract, and (ii) promoting arbitration.[26] The use of this principle in cases of assignment would render the two objectives redundant as parties expect the arbitration agreement along with the contract to be carried forward when they assign the same. Similarly, if the arbitration agreement requires a higher threshold of explicit consent, it can enable the assignee to escape arbitration even when the contract has been assigned to them. It would go against the objective of promoting arbitration because providing express consent whenever a contract is transferred would make it burdensome and difficult for the parties, especially in situations where there is a chain of contracts.

It is because of these reasons this argument has been explicitly rejected by French courts.[27] It has been held that the autonomy of arbitration agreements does not mean that arbitration clauses should necessarily be accepted separately.[28] This is because the principle of autonomy does not require the parties to showcase two distinct intentions. A similar approach has been endorsed by the Swedish Supreme Court.[29] Indian courts should follow a similar approach as that of leading arbitration jurisdictions because of the acceptance of arbitration as a widespread mechanism for resolving a dispute. In commercial transactions, it is efficacious to presume that the consent of the parties to the assignment of a contract amounts to consent

25. *Cox & Kings Ltd v SAP India (P) Ltd*, (2024) 4 SCC 1.
26. Albana Karapanco (n 3) 43.
27. *Montané v Compagnie des chemins de fer portugais* (Cass civ, 12 July 1950) 77 JDI 1206; *Soules v Henry* (Cass com, 4 February 1986) 1988 Rev Arb 718.; Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) ch 4, 417-446, 427.
28. Frédéric Leclerc, 'Les Chaînes De Contrats En Droit International Privé' (1995) 122 JDI 267, (408)-(492).
29. *MS Emja Braack Shiffahrts KG v Wärtsilä Diesel Aktiebolag*, 1998 REV. ARB. 431 (Sweden).

to be bound by an arbitration agreement as the parties expect to assign the contract as a whole.

B. Arbitration Agreement Amounts to an Obligation Requiring Express Consent

A contract can be assigned by either transferring rights or obligations under a contract. However, the Supreme Court in *Khardah Co.*[30] has distinguished the assignment of rights from the assignment of obligations under the contract. It stated that obligations under a contract cannot be assigned without the consent of the assignee (the party receiving the assigned obligation). It further stated that when such consent is given by the assignee, the contract would amount to a novation resulting in the substitution of liabilities. It would amount to novation as it assigns an obligation to the assignee. An arbitration agreement is seen as an obligation as the parties can be compelled to arbitrate after they have provided their consent to be bound by the arbitration agreement initially. Therefore, it is argued that the assignment of the arbitration agreement would amount to the novation of a contract under Section 62 of the Indian Contract Act 1872, and would require 'express consent' from the assignee as it amounts to an obligation. The argument also derives support from the common law principle which considers that arbitration agreement gives rise to an 'obligation'.[31] Similarly, the French Court of Appeal in *SMABTP v Statinor*[32] has held that the assumption of obligations, in contrast to a right, requires knowledge of such obligations on the assignee because of the view that arbitration agreements create mostly duties and not rights.

It is clear that the Supreme Court in *Khardah* Engineering was discussing the 'obligation of performance of the contract and not the 'obligation to arbitrate'. In *M. Dayanand Reddy v A.P. Industrial Infrastructure Corpn Ltd*[33], the Supreme Court hinted that the arbitration clause does not impose any obligation on the other party. A similar indication was provided by the Bombay High Court in *Vishranti CHSL v Tattva Mittal Corpn (P) Ltd*[34]. However, we have yet to come across a case where such a detailed

30. *Khardah Co Ltd v Raymon & Co (India) (P) Ltd* 1962 SCC OnLine SC 28, 7; *Kapilaben v Ashok Kumar Jayantilal Sheth* (2020) 20 SCC 648, 30.
31. *GMAC Commercial Credit LLC v Springs Industries* 171 F Supp 2d 209 (SDNY 2001) 214.
32. *SMABTP v Statinor* (Cour d'appel de Paris 22 March 1995), reprinted in (1997) Rev Arb 550, 552.
33. (1993) 3 SCC 137, 8.
34. 2020 SCC OnLine Bom 7618.

discussion on whether the arbitration agreement amounts to an 'obligation' has been made by the Supreme Court. Therefore, there is a need to look into the policy reasons and discussions that have been held in the foreign jurisdictions on this issue where they have moved away from treating an arbitration agreement as an obligation.

The treatment of an arbitration agreement as an obligation makes it difficult for the parties to enter into a series of contracts and ensure that every time an assignment occurs, express consent is taken from the assignee to make him bound by the arbitration agreement. It is because of such commercial hardship and to increase business efficacy, that leading jurisdictions such as the USA, France, and Singapore have moved away from the idea of arbitration as an obligation. The New York City Court in *GMAC Commercial Credit LLC v Springs Industries*[35] was dealing with the issue of whether a financial assignee can be exempted from contractual arbitration as it amounts to an obligation. It emphasised that the common law view of arbitration as an 'obligation' has been replaced in recent times.[36] It is because this view was based on the idea that the assignee never stands in any better position than the assignor and is thus subject to all equities and burdens that the assignor had to bear.[37] The court held that such an idea is based on an elementary ancient understanding and is sensible only to the extent that 'obligations' refers to performance obligations in a contract, and not to the obligation to arbitrate.[38] It stated that the underlying basis for the arbitration agreement as an obligation does not hold true in the current context as the assignee can be in a better position than his assignor and need not take all rights and burdens through the assignment. The concern of the court was that if the arbitration agreement is treated as an obligation requiring specific consent, the parties can escape arbitration by selective assignment where only rights or partial obligations are transferred.[39] Therefore, it stated that an arbitration agreement should be seen as a contractual 'remedy' and not as an obligation. A contractual remedy has been defined as a right that is available to an aggrieved party to which they are entitled with or without

35. *GMAC Commercial Credit LLC* (n 31).
36. ibid.
37. ibid.
38. To better understand this argument, it is necessary to appreciate that there exist two types of obligations arising from the contract containing an arbitration agreement: (i) obligation of performance of the contract; and (ii) obligation to arbitrate.
39. *GMAC Commercial Credit LLC* (n 31); also See *Banque De Paris Et Des Pays-Bas v Amoco Oil Co* 573 F Supp 1464 (SDNY 1983); *Hosiery Manufacturers' Corpn v Goldston*, 238 NY 22, 28, 143 NE 779 (1924).

resorting to a tribunal.[40] Justice Sofaer in *Banque De Paris Et Des Pays-Bas v Amoco Oil Co*[41] stated that "an assignee or other party whose rights are premised on a contract is bound by the remedial provisions bargained for between the original parties to the contract." Leading commentaries also consider an arbitration agreement as a legal remedy that does not require specific consent of all the parties involved in the assignment contract.[42]

Recently, a similar position has been taken by the Singapore High Court in *Cassa Di Risparmio Di Parma e Piacenze SpA v Rals International Pte Ltd* [43] where it discussed whether an assignee is bound by an arbitration agreement entered into between the assignor and the obligor. The judge explained that an arbitration agreement is a 'procedural right' that provides an opportunity for the parties to enforce the rights and obligations arising from the contract. Therefore, a transfer of benefits/rights would necessarily carry the "procedural fetter" of the obligation to arbitrate. It held that there is no need for express consent as the parties cannot break apart the right and the remedy provided in the contract as they are seen as an indivisible whole.

Although the French courts have seen arbitration agreements as an obligation, they have also diluted the need for express consent by interpreting it in a different manner. They have held that in circumstances where the assignee has accepted the underlying contract as a whole, there is a presumption that they have expressed their consent to be bound by the arbitration agreement.[44] Therefore, even if the arbitration agreement is seen as an obligation, there is no need for specific consent as there is a presumption of consent to be bound by the arbitration agreement upon the assignment of the contract.

Therefore, Indian courts should seek guidance from the leading arbitration jurisdictions mentioned above in this paper. It should either treat the arbitration agreement as a remedy (USA and Singapore) that compulsorily goes along with the rights assigned or treat them as an obligation with a

40. *GMAC Commercial Credit LLC* (n 31) 216.
41. *Pays-Bas* (n 39).
42. Daniel Girsberger, 'The Law Applicable to the Assignment of Claims Subject to an Arbitration Agreement' in Franco Ferrari and Stefan Kröll (eds), *Conflict of Laws in International Commercial Arbitration* (1st edn January 2019).
43. *Cassa Di Risparmio Di Parma e Piacenze SpA v Rals International Pte Ltd* (2016) 1 SLR 79.
44. Nelson GOH, 'An Assignee's Obligation to Arbitrate and the Principle of Conditional Benefit' (2016) 28 Singapore Academy of Law Journal 262, 271.

presumption that consent to the assignment of contract amounts to the consent to be bound by the arbitration agreement (France).

3. PRINCIPLES GOVERNING AUTOMATIC TRANSFER OF ARBITRATION AGREEMENT

Part I of this paper has shown that an arbitration agreement is an integral (not distinct and autonomous) part of the contract and is seen as a remedy (not an obligation) that goes along with the rights assigned in the contract. It also showed that the premises on which 'express assignment' theory is based do not hold true. Once such a relationship between the contract and the arbitration agreement is established, this part proceeds to deal with the legal principles and doctrines that govern the automatic transfer of arbitration agreement upon the assignment of the contract.

The advocates of the 'automatic transfer' approach do not negate the idea that consent and privity of contract are involved in the assignment of the arbitration agreement. They differ from the 'express assignment' approach in the nature and extent of consent that is required by the parties involved in the assignment of a contract. They argue that it is more pragmatic and efficient to infer the consent of the parties rather than looking for express consent to be bound by the arbitration agreement. Such an understanding is in line with the broadening ambit of consent in the Indian arbitration jurisprudence. The position of such a wide understanding of consent was summarised by the Supreme Court in *Cox & Kings Ltd v SAP India (P) Ltd*[45], where the Court discussed the issue of consent and privity in multi-party or chain contracts. It was held that in view of commercial reality, a third party or a non-signatory can be bound by an arbitration agreement through means other than signature. The only consideration is to figure out whether the third party intended to effect legal relations with the signatory parties and be bound by the arbitration agreement.[46] This paper presents three legal principles through which the assignee can exercise a right or be compelled to arbitrate.

C. Doctrine of Implied or Constructive Consent

The doctrine of implied consent is the most widely used doctrine to bind third parties to an arbitration agreement in India.[47] This doctrine is used

45. *Cox & Kings* (n 25).
46. ibid.
47. *Cox & Kings* (n 25), 71.

to bind the parties to the arbitration agreement in an independent capacity. The underlying basis for this theory is based on the theory of implied consent by conduct which has been accepted by the Supreme Court.[48] The doctrine looks into the conduct or omission of the parties while entering into the contract to determine their consent. In the context of the arbitration agreement assignment, it will look into the conduct of the involved parties during and after the contract assignment to determine their intention. Part I of the paper has argued that the arbitration agreement is a part of the contract which is a relevant starting point for this doctrine. According to this doctrine, the consent provided to the assignment of the contract would amount to the consent to be bound by an arbitration agreement because the latter forms a part of the former. Therefore, there lies a rebuttable presumption that parties have impliedly consented and intended to be bound by the arbitration agreement unless there is an indication to the contrary. Several High Courts have applied this doctrine to shift the right and burden of arbitrating on the assignee after the assignment of the Contract. The Bombay HC in *DLF Power Ltd v Mangalore Refinery & Petrochemicals Ltd*[49] held that the respondent has treated the petitioner as the successor of DLF Industries Limited who has taken all other rights, obligations, and benefits through assignment. Therefore, the respondent cannot say that all other rights and obligations have been transferred except the right to arbitrate. The court has held that the respondent has provided implied consent through their conduct providing the petitioner with the right to arbitrate. Similarly, the Delhi HC *in Rajesh Gupta v Mohit Lata Sunda*[50] held that the assignee would be bound by the arbitration agreement as it was 'aware' of the arbitration agreement present in the main contract. Therefore, if it has undertaken entire rights and obligations and not specifically excluded the arbitral clause through assignment despite being aware of the same, it is presumed that it has impliedly consented to the same.

It is reasoned that the assignee has the opportunity to review the terms of the contract before the assignment of the contract and decide what commercial risks it wishes to take. If they enter into an assignment contract after knowing the existence of the arbitration agreement between the original contracting parties, there lies a strong rebuttable presumption against them.[51] The doctrine of implied consent takes into account the needs of

48. *Haji Mohammed Ishaq v Mohd Iqbal and Mohd Ali & Co* (1978) 2 SCC 493.
49. 2016 SCC OnLine Bom 5069.
50. 2020 SCC OnLine Del 2563, 35.
51. Emmanuel Gaillard (n 27) 428.

modern commerce and trade and ensures that there is a presumption of consent to be bound by the arbitration agreement in a contract inferred through the conduct or omission of the parties. This is crucial in modern commerce, where transactions are increasingly complex, involving multiple parties and regular assignment of contracts. Such a presumption allows parties to enter into multi-party and chain of contracts without worrying about the requirement of specific consent for the arbitration agreement. It states that the obligor or the assignee would be bound by the arbitration agreement after assignment if the circumstances demonstrate that they have impliedly consented to be bound by the agreement.

D. Doctrine of 'Claiming Through or Under'

Section 8 of the Arbitration and Conciliation Act,1996 states that a party can be referred to arbitration by the courts if they are parties to the contract or are claiming through or under them. In contrast to the 'implied consent' doctrine, this doctrine is used to bind the parties in a derivative capacity. The Supreme Court in *Chloro Control India (P) Ltd v Severn Trent Water Purification Inc*[52] held that a third party can be bound by the arbitration agreement if it is claiming through or under the signatory. The court in Cox & Kings[53] also held that the typical scenarios where this doctrine is used are "assignment, subrogation, and novation." Through this doctrine, a third party does not become a 'party' to an arbitration agreement but claims in a derivative capacity on behalf of the signatory. In these circumstances, the original contract is not diminished but assigned to a new party who steps into the shoes of the assignor. The assignee is a third party who has the right to compel the obligor to arbitrate in a derivative capacity.

In an assignment contract, the assignee enters into the shoes of the assignor and can bring a claim for arbitration on behalf of the assignor. The assignee derives the right to arbitrate from the assignor as they become the successor of the signatory party. This doctrine can be described as one of the subsets of the implied consent doctrine where consent is inferred from the contractual relationship that exists between the parties. It is presumed that when a contract of assignment occurs, the parties intend to transfer every right including the right to arbitrate to the assignee. Although the courts in India have yet to make explicit use of this doctrine to allow the assignee to exercise the right to arbitrate in a derivative capacity, they have allowed the assignee to arbitrate independently on similar reasoning. For

52. *Chloro Controls India (P) Ltd v Severn Trent Water Purification Inc* (2013) 1 SCC 641.
53. *Cox & Kings* (n 25), 8.5.

instance, the Bombay High Court in *DLF Power Ltd*[54] has held that if a party has stepped into the shoes of the other through the assignment of the contract and has taken rights, obligations, and duties, it cannot exclude the arbitration agreement unless expressly provided. Similar reasoning has been provided by the Delhi High Court in *Bestech India (P) Ltd v MGF Developments Ltd*[55] where they held that an assignee can exercise the right to arbitrate if it has stepped into the shoes of the assignor. Thus, there is no need for specific consent to the arbitration agreement if the assignee claims in a derivate capacity under this doctrine.

Several authors have argued that even when the assignee claims in a derivative capacity, it is possible to submit the claims to arbitration under its own name.[56] In such circumstances, it would not be necessary for the assignor to be joined in the arbitration proceedings. However, the doctrine in itself is limited as it only speaks about a 'right' and not the duty to arbitrate; i.e., the assignee has a 'right' to compel the obligor to arbitrate but cannot be compelled to arbitrate. Therefore, this doctrine is seen with the doctrine of estoppel and conditional benefit where the duty is said to accompany the right to arbitrate.

E. Doctrine of Estoppel & Conditional Benefit

The doctrine of estoppel was used by the Delhi HC in *Tomorrow Sales Agency*[57] to bind the assignee to an arbitration agreement where it was held that an "assignee of a contract who enjoys the benefit of the rights assigned cannot avoid the application of the arbitration clause contained in that contract." Further, the same court, in *Shapoorji Pallonji and Co. (P) Ltd v Rattan India Power Ltd*[58] has noted that deriving benefits from the contract containing an arbitration clause is an important factor in compelling the said beneficiary to arbitrate. Recently, the theory of estoppel was properly explained and applied by the Delhi High Court in *Gaurav Dhanuka v Surya Maintenance Agency (P) Ltd*[59] where it explained the 'direct benefits'

54. *DLF Power* (n 49).
55. *Bestech India (P) Ltd v MGF Developments Ltd* 2009 SCC OnLine Del 698.
56. *Rumput (Panama) SA and Belzetta Shipping Co SA v Islamic Republic of Iran Shipping Lines*, The "Leage" (1984) 2 Lloyd's Rep 259; Stephen Jagusch and Anthony Charles Sinclair, 'The Impact of Third Parties on International Arbitration – Issues of Assignment' in Loukas A Mistelis and Julian D M Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 291-319.
57. *Tomorrow Sales Agency (P) Ltd v SBS Holdings Inc* 2023 SCC OnLine Del 3191.
58. 2021 SCC OnLine Del 3688.
59. (2023) 7 HCC (Del) 53.

estoppel. It stated that it is an equitable doctrine that prohibits a party from taking an inconsistent position or "having it both ways by relying on it when it works to its advantage and ignoring it when it works to its disadvantage." It is based on the idea of fairness that the burden and rights of the parties go together. The doctrine was also explained by the English Court of Appeal in *Jay Bola*[60] case, where it held that the company cannot enforce its right, obtain through enforcement without also recognising the obligation to arbitrate. Similarly, the English court while dealing with subrogation has held that it would be inconsistent to enforce contractual rights without accepting the obligation to arbitrate.[61]

Along the same line, the doctrine of conditional benefit has been explained by the court in *Tito v Waddell*[62] where it was held that the right and burden to arbitrate are intrinsic in nature where they have been annexed to each other *ab initio*. Therefore, one cannot pick out the good and reject the bad and hence the benefit/right to arbitrate is only a conditional benefit that cannot exist without the burden. The courts have also stated that an assigned benefit can be a conditional benefit only in conditions where the burden cannot exist independently of the relevant benefit.[63] In cases of arbitration agreements, it is clear that the burden to arbitrate is intrinsic to the right to arbitrate. Therefore, it fulfils and is covered by the conditional benefit principle. Such an approach has also been statutorily incorporated in legislations such as the English Contract (Right to Third Parties) Act, 1999 which mentions that a party expecting to enforce his contractual rights through arbitration should also be bound by arbitration. Hence, if the assignee steps into the shoes of the assignor and claims the right to arbitrate 'through or under him' or even in an independent capacity, they would be bound by the arbitration agreement as they are deriving the benefit from the contract through the assignment of rights.

4. CONCLUSION

The automatic transfer approach is widely recognised and followed in major jurisdictions like USA, UK, France, and Singapore. Most of these jurisdictions have shifted to this approach because of its pragmatic nature

60. *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH* (The Jay Bola) (1997) 2 Lloyd's Rep 279 (16 April 1997).
61. *West Tankers Inc v Ras Riunione Adriatica Di Sicurta* (2005) 2 All ER (Comm) 240 : (2005) 2 Lloyd's Rep 257, 261-62.
62. *Tito v Waddell* 1977 Ch 106.
63. ibid.

and the need arising from the rise in commercial transactions. Most of these contracts contain an arbitration agreement where the parties expect their dispute to be resolved through arbitration. The automatic transfer approach promotes arbitration and preserves party autonomy by ensuring that the other parties don't escape obligation during the assignment of the contract. India needs to follow this approach as it is pro-arbitration and is in line with the broad idea of consent provided by the Supreme Court in *Cox & Kings*. Until clarity is achieved on this issue, the parties should explicitly state in the assignment contract whether or not the right and burden to arbitrate is transferred to the assignee.

THIRD-PARTY FUNDING CODIFICATION IMPERATIVE: AUGMENTING EQUITABILITY IN INDIAN DOMESTIC ARBITRATION

—Swaraj Pushkar[*] & Avanti Mahajan[**]

ABSTRACT

*Arbitration, although quicker than traditional litigation, can still financially strain parties due to its exorbitant costs. This issue is addressed by Third-Party Funding ('**TPF**') mechanisms, involving a third-party funder who is then entitled to a share in the award. With TPF gaining traction globally, India requires a legislation to regulate it in the domestic arbitration sphere. Hence, this essay proposes a favourable legislation for better uniformity and accountability nationwide. It begins by enlisting and analysing the problems with the current uncodified TPF regime in India, substantiated by verified research and relevant case laws. Furthermore, insights from foreign jurisprudence are applied to strengthen the argument. This is followed by providing the reader with a clear understanding of dominus litis and its distinction from the funding party, for it is essential to prioritise party autonomy and confidentiality in arbitration. After analysing the same, the authors lay out a legal framework that seeks to guarantee not only confidentiality, but also justice and efficiency, with special attention to a 'light-touch' approach harmoniously constructed with 'soft-law'. With this paper, the authors aim to synchronise and simplify the interlinked function of arbitration and TPF in all spheres of domestic arbitration in India.*

1. INTRODUCTION

Consider you are a major corporate player in India facing a legal dispute with another market player. Seeking convenience and speed, you opt for arbitration over traditional litigation.[1] However, arbitration still poses

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1. Department of Legal Affairs, *Alternative Dispute Resolution in India,* para 2.

financial risks, exorbitantly emptying the pockets of the parties, thereby making Third-Party Funding ('***TPF***') the most suitable way out. The mechanism of TPF can be loosely understood as an arrangement where an unrelated third-party provides financial support to one party in the dispute in exchange for a share in the award if successful.[2]

The significance of TPF was first felt in India when the first-of-its-kind deal was struck between Hindustan Construction Company ('***HCC***') and BlackRock Inc., involving over Rs. 1,750 Crores.[3] This amount was identified as a pool of arbitral awards and claims that formed a consortium to reduce the debt of HCC. The importance of TPF is further highlighted by cases like *Yukos Universal Limited v Russian Federation (2005),*[4] where the claim exceeded a gargantuan 98 billion USD. With arbitration claims escalating every day, the absence of TPF regulation could impact India's goal of becoming an arbitration hub.[5]

Furthermore, the Law Minister's response to Unstarred Question No. 1225 in the Rajya Sabha[6] highlighted the need for India to adopt a suitable national legislation for third-party funding in arbitration. The Honourable Law Minister emphasised that albeit third-party funding is not illegal in India *per se*, it urgently requires codification for better accountability of parties and more secure transactions. In response to the above situation, amendments to Order XXV[7] of the Code of Civil Procedure by Maharashtra, Karnataka, and Madhya Pradesh have facilitated the funding process by backing it with legislative grounds. However, provided the limited and

2. International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (The ICCA Reports No. 4, 2018), para 53.
3. Rachita Prasad, 'HCC in Pact with BlackRock to Raise Rs 1750 Crore via Monetization of Claims' (*The Economic Times* 26 March 2019) <https://economictimes.indiatimes.com/markets/stocks/news/hcc-to-sell-litigation-claims-to-blackrock-led-investors/articleshow/68579183.cms?from=mdr> accessed 7 September 2024.
4. *Yukos Universal Ltd (Isle of Man) v Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227.
5. Tariq Khan, 'Making India a Hub of Arbitration: Bridging the Gap between Myth and Reality' (*SCC Times* 17 February 2021) <https://www.scconline.com/blog/post/2021/02/17/making-india-a-hub-of-arbitration-bridging-the-gap-between-myth-and-reality/> accessed 7 September 2024.
6. Ministry of Law & Justice, Government of India, Department of Legal Affairs, *Rajya Sabha Unstarred Question No. 1225*, (5 December 2024) <https://legalaffairs.gov.in/sites/default/files/AU1225_0.pdf> accessed 8 February 2025.
7. Code of Civil Procedure 1908, or 25.

localised nature of these amendments, the requirement of a national code still persists.

Thus, given this understanding of TPF, the authors shall delve into the issues arising from this absence of a TPF code of conduct in domestic arbitration followed by analysing foreign jurisdictions for wider interpretations. Following this head, the paper shall entail the necessity to demarcate the funded party from the funding party for the reasons stated within the head. After having outlined the existing problems, the authors shall, with the help of cases and foreign law, give recommendations by way of potential amendments and additions the Arbitration and Conciliation Act, 1996.[8]

2. TPF IN THE UNCODIFIED REGIME

A. Identifying the Milestones in the Evolution of TPF

The trend traces its roots to ancient Greek and Roman civilizations[9], where a primitive form of Third-Party Funding (or "litigation funding") was practiced, wherein legal maintenance[10] and the doctrine of champerty[11] also emerged. While scholars have had conflicting views on champerty being a doctrine opposing[12] or supporting public policy, the legal developments in the early 21st century UK have overturned the outlook toward TPF completely. Cases like *Arkin v Borchard Lines Ltd*[13] have shown that TPF is not only a vehicle for greater access to justice but also an essential element of arbitration.[14]

This is bound to pique curiosity about India's stance on the same, which can be satiated by observing *Ram Coomar Coondoo v Chunder Canto*

8. Arbitration and Conciliation Act 1996.
9. Lisa Bench Nieuwveld & Victoria Shannon Sahani, 'Third-Party Funding in International Arbitration, Second Edition' (*Wolters Kluwer* 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3046300> accessed 8 September 2024.
10. Nicholas Thompsell, 'Funding Litigation — the Good, the Bad and the Ugly' (*Fieldfisher* 2016) <https://www.fieldfisher.com/en/insights/funding-litigation-the-good-the-bad-and-the-ugly> accessed 7 September 2024.
11. Max Radin, 'Maintenance by Champerty' (1935) 24 Cal L Rev 48, 49, 51.
12. J Bentham, *The Works of Jeremy Bentham* 3(1) A Defence of Usury, Letter XII, Maintenance and Champerty 1843 at 19; *See also* Lord Neuberger, President of the Supreme Court, Harbour Litigation Funding First Annual Lecture, 8 May 2013, 4.
13. *Arkin v Borchard Lines Ltd* 2005 ECWA Civ 655, ¶¶16, 38 (England and Wales Court of Appeal).
14. *UK Trucks Claim Ltd v Fiat Chrysler Automobiles N.V.* 2019 CAT 29 (Competition Appeal Tribunal, United Kingdom); *Road Haulage Assn Ltd v Man SE* 2019 CAT 26 (Competition Appeal Tribunal, United Kingdom).

Mookerjee (1876)[15], a Privy Council case, which laid down the seeds of TPF in India. It formed the groundwork for TPF in Indian litigation, setting a practical trend that was followed in many subsequent cases.[16] As the country's legal system evolved, the scope of the principle established extended to the arbitration proceedings as well, owing to country's industrial growth and economic skyrocketing, notably post FY 2022-2023.[17] It was reaffirmed in the 2018 Supreme Court case of *BCI v A.K. Balaji* [18], where the Hon'ble court upheld the validity of TPF in domestic arbitration, and simultaneously held that advocate-sourced funding is unconstitutional. This case marks a watershed moment for arbitration in India, since it provides the perfect foundation to formulate a separate law dedicatedly dealing with third-party funding in India.

Yet, arbitration proceedings involving third party funders are not completely immune to critical oversight by the judiciary and adjoining parties, as illustrated by the 2017 petition in High Court of Telangana.[19] In the petition, an arbitral award was challenged on the sole ground that it was primarily funded by a third party. Although withdrawn later, cases like these cause the proposed codification to stagger in its materialisation. Nevertheless, validation of TPF in the Report of the Justice B.N. Srikrishna Committee is one promising avenue for creating a TPF-conducive environment in domestic arbitration.[20] The report was instrumental in establishing that a supporting legislation for TPF as those passed in Singapore and Hong Kong along with the one under process in Paris is essential for making India emerge as an international arbitration hub.

15. *Ram Coomar Coondoo v Chunder Canto Mookerjee* 1876 SCC OnLine PC 19: (1876-77) 4 IA 23.
16. *Spentex Industries Ltd v Quinn Emanuel Urquhart* 2020 SCC OnLine Del 2484; *Essar Oilfields Services Ltd v Norscot Rig Management (P) Ltd* 2017 Bus LR 227; *Jayaswal Ashoka Infrastructure (P) Ltd v Pansare Lawad Sallagar* 2019 SCC OnLine Bom 578.
17. 'About Indian Economy Growth Rate & Statistics' (*India Brand Equity Foundation* 2024) <https://www.ibef.org/economy/indian-economy-overview> accessed 7 September 2024.
18. *BCI v. A. K. Balaji* (2018) 5 SCC 379 : AIR 2018 SC 1382.
19. Sameer Jain et al, 'Third Party Funding in International Arbitration: An Indian Perspective' (*PSL Chambers* 1 August 2018) <https://www.pslchambers.com/publication/third-party-funding-in-international-arbitration-an-indian-perspective/> accessed on 8 September 2024.
20. Justice B N Srikrishna, *Report of the High Level Committee to Review the Institutionalization of Arbitration Mechanism in India* (30 July 2017) 43.

B. Types of TPF Recognised in Different Jurisdictions

There are four main domains under the methods of TPF, namely insurance, attorney financing, loan agreements and claim assignments. Insurance is further subdivided into 'Legal expenses insurance' and 'Liability insurance'.[21] This essay primarily focuses on Insurance and Claim assignments[22], as they are most commonly used.

Attorney financing, where the attorney finances the client's claim, is ruled out not only due to the clear prohibition of the same held by the Apex Court in *A.K. Balaji v BCI*[23], but also because the provisions of Bar Council of India's Standards of Professional Conduct and Etiquette[24] become prone to violation. Secondly, loan agreements, typically with banks, eliminate any chance of liability mitigation in the event of lost proceedings.[25] Hence the focus on the abovementioned two forms (of TPF).

3. FUNDING PARTY VS. DOMINUS LITIS: A BLURRED DISTINCTION

In simple terms, *Dominus Litis* is a party to the proceeding/suit, having *locus standi* in the issue not arising out of a particular concern of one party, but the subject matter of the proceeding as a whole. With this prerequisite information, one can *per se* identify the most apparent issue: liability of each of the three parties and how fairly the same is distributed.

The theory of fairness[26] suggests that the entitlement of the third-party to a portion of the desired arbitral award should also come with carrying the costs in adverse awards, i.e. being made liable for the costs. While it does sound equitable and just at the first glance, a deeper understanding reveals a

21. Kaira Pinheiro & Dishay Chitalia, 'Third-Party Funding in International Arbitration: Devising a Legal Framework for India' (2021) 14 NUJS L Rev 2.
22. Byron Sequeira & Yusuf Tariq, 'Third-Party Funding: The Next Step for Arbitration in India' (National Law School Business Law Review 1 April 2022) <https://www.nlsblr.com/post/third-party-funding-the-next-step-for-arbitration-in-india#:~:text=TPF%20is%20an%20agreement%20through%20which%20an%20unrelated,the%20funding%20is%20only%20for%20a%20single%20claim> accessed on 8 September 2024.
23. *BCI v. A. K. Balaji*, (2018) 5 SCC 379 : AIR 2018 SC 1382.
24. Bar Council of India's Standards of Professional Conduct and Etiquette Rules 1975, pt VI, ch II, read with the Advocates' Act 1961, §49(1)(c) and the proviso thereto.
25. ibid 10.
26. Michelle Maiese, 'Principles of Justice and Fairness' (Beyond Intractability July 2020) <https://www.beyondintractability.org/essay/principles_of_justice> accessed on 8 September 2024.

better option would be to keep liability insurance at the parties' discretion. The TPF Agreement ("TPFA") should explicitly state whether the insurance sought is purely legal expenses-based or is also inclusive of the liability in adverse awards. Doing so will help create a clearer distinction between the Funding Party and Dominus Litis, which would also enhance the 'party autonomy', which is one of the most important hallmarks of Indian ADR (Alternative Dispute Resolution). Essentially, funding party will be the party financing the proceeding and the Dominus Litis would be the actual person involved in it.

A. Does TPF Compromise Party Autonomy?

Here, a valid concern arises: given that the involvement of a third person often exacerbates matters, how can TPF still ensure party autonomy? To address this concern, it should first be known declaratively that the funder's sole duty is to financially support the claimant throughout the arbitration. The funder has no responsibility whatsoever in appointing the arbitrators, choosing the forum of the proceedings, etc. apart from supporting the claiming party.[27] This also satisfies the criteria of challenging the appointment of arbitrators, as it remains an autonomous decision of the parties, entirely within their control. The third-party neither intervenes with this decision nor goes beyond its singular monetary goals, thus minimising the possibility of its involvement causing an undesirable shift in party autonomy.

Additionally, referring to the preceding head, the authors advocate in favour of the "light-touch" approach[28] in India, where TPF is still in a nascent stage; the reason being that both the parties could benefit from autonomy without compromising confidentiality[29]. The NDAs signed before the commencement of the proceedings shall entitle the arbitrator, and the opposing party, to the knowledge of the identity of the funder used by the claimant, as per the HKIAC Rules.[30] This will, firstly, ensure that there is no conflict of interest between the funder and the arbitrators/opposing party[31]; secondly, increase the credibility of the award, adding to the quality

27. Public Consultation on the Draft Civil Law (Amendment) Bill 2016 (n 57).
28. Michelle Maiese, 'Principles of Justice and Fairness' (n 26).
29. Association of Litigation Funders ('ALF'), *The Code of Conduct for Litigation Funders* (November 2011) <https://associationoflitigationfunders.com/code-of-conduct/> accessed on 8 September 2024.
30. Institutional Arbitration HKIAC Administered Arbitration Rule (2018), art 44.
31. ibid.

of the proceedings.[32] And thirdly, most importantly, significantly reduce the chances of challenging the award on the grounds of non-disclosure of funder, leading to even quicker and more convenient arbitration.[33]

B. Understanding the liability of Dominus Litis in TPF

Black Law Dictionary defines *Dominus Litis* as:

> *"The master of the suit; i.e., the person who was really and directly interested in the suit as a party, as distinguished from his attorney or advocate. But the term is also applied to one who, though not originally a party, has made himself such, by intervention or otherwise, and has assumed entire control and responsibility for one side, and is treated by the court as liable for costs."*[34]

This aptly highlights the need to mark a distinction between the Funding Party and *Dominus Litis*. *Eskosol S.P.A. in Liquidazione v Italian Republic* (2017)[35] encapsulated the very essence for not making the funding party liable in case of adverse award, wherein its status as a party to the proceeding was observed as the main matrix based on which its liability (if any) could be calculated. It was observed that "*imposing the additional financial burden of a security for costs order would be unfair and would effectively reward Italy (responding party) for the misconduct that was alleged to have driven Eskosol (claimant) into the financial distress that necessitated the need for TPF.*"[36]

The third-party funders have no purpose to serve in the proceedings apart from paying for the proceeding costs and receive a pre-decided portion of the arbitral award in case the proceedings succeed. Fundamentally, the principal motive of TPF in arbitration is, for the funder, to earn profit, which in no way makes the funder a party to the dispute.

C. Implications of Equating the Funder and the Funded

Wherein both of the above are equated, the party being funded itself would require a special legal team of its own, with capable lawyers that would

32. Oliver Gayner & Susanna Khouri, *Singapore and Hong Kong: International Arbitration Meets Third Party Funding* (n 56).
33. ibid.
34. 'Dominus litis' (Black's Law Dictionary) <https://thelawdictionary.org/dominus-litis/> accessed 8 September 2024.
35. *Eskosol S.P.A. in Liquidazione v Italian Republic,* ICSID Case No. ARB/15/50.
36. ibid.

represent it. Subsequently, it would lead to more mandatorily drafted legal agreements, and add even more legal complexity to the process. An added encumbrance would be that it could increase the risk of issues and conflicts arising during the proceedings.[37] This could divert the claimant's attention from the main arbitration, leading to unnecessary legal complications irrelevant to the arbitral subject matter. Consequently, the process would become even more costly, defeating the purpose of third-party funding for smooth arbitration.[38] Moreover, the funding party could face unnecessary legal charges initially directed at the claimant, further complicating its position.

In furtherance of the same, *Tomorrow Sales Agency (P) Ltd v SBS Holdings, Inc* (2023),[39] is referred to by the authors, in which the Delhi High Court ruled that including the funding party as a party to the conflict is not legally valid since it merely funded one party in the arbitral proceedings, and is thus not a signatory to the arbitral agreement as a whole.[40] Hence, it creates a clear demarcation between the claimant and the funding party, leaving no room for overlaps. This distinction adds on to the fairness and justiciability of the preceding, making it stand even more stalwart on the scales of the principles of natural justice.[41]

Since it has been already established that the funding party does not have any interest in the subject matter of the proceedings except the possible successful outcome, making it a party to the arbitration is meaningless, and worse, a step that would complicate this already complex arena of legal dispute resolution.

D. Distribution of Liability

After establishing the difference between the funding party and the funded, the next step is to consider liabilities. If the proceedings favour the funded party, the funding party would share in the award. But what about unfavourable outcomes?[42] The Delhi High Court, in *Tomorrow*

37. ICCA Report, ibid 2.
38. ibid 29.
39. *Tomorrow Sales Agency (P) Ltd v SBS Holdings, Inc* C.A. No.-007664-007664 / 2023.
40. ibid.
41. B A Hepple & B A H, 'Natural Justice' (1969) 27(1) The Cambridge Law Journal 13-16 <https://www.jstor.org/stable/4505268?seq=1> accessed 27 April 2024.
42. Prateek Dhir & Mohit Kandpal, 'Third-Party Funding of Arbitrations in India – Risks & Liabilities' (*Mondaq* January 2024) <https://www.mondaq.com/india/

Sales Agency (P) Ltd v SBS Holdings, Inc[43], has emphasised that imposing liability on third-party funders without their agreement is neither desirable nor permissible as it would be counterproductive. However, it does not settle the principle of basic law, i.e., it does not make the funder aware of the liability associated with the funding agreement. Parallelly, based on multiple scholarly debates, the authors believe that the parties should determine liability distribution amongst themselves.[44] The same can be mentioned in the TPFA, whether they want liability insurance or only legal expense insurance. This would uphold party autonomy and ensure the free will of both the funded and the funding party, since the opinions on both sides of the fence are duly appreciated.

4. RECOMMENDATIONS AND WAY AHEAD

The lack of codification of TPF in domestic arbitration in India has led to several shortcomings, as discussed earlier. Codification is the obvious solution, and specific provisions require more attention, particularly the definition and scope of third-party funders involved in proceedings.

A. Amendments to the Arbitration and Conciliation Act, 1996

i Section 2:

Drawing inspiration from the Task Force Report (2018) of the International Council for Commercial Arbitration,[45] which provides comprehensive overviews of TPF, the authors aim for legal clarity in defining Third-Party Funders. These reports govern international arbitration and offer reliable, multifaceted and concrete insights applicable to the Indian legal system. The definition of the Third-Party Funder is as follows:

> *"A.3. For the purposes of disclosure, the term "third-party funder" refers to any natural or legal person who is not a party to the*

arbitration--dispute-resolution/1408892/third-party-funding-of-arbitrations-in-india--risks--liabilities-> accessed on 27 April 2024.

43. ibid.
44. Victoria Shannon Sahani, 'Judging Third-Party Funding' (2016) 63(2) UCLA Law Review 388-448 <https://heinonline.org/HOL/Page?handle=hein.journals/uclalr63&div=11&g_sent=1&casa_token=SZNTDoW49uEAAAAA:DABYTMxp7vBP2hD0s6xNHVspoi5AcgD8-z5C73QdOls_YiPnyl6sS2reR6Sg4zYoBP7OAASZIufv&collection=journals> accessed 8 January 2025.
45. International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, ICCA Reports Nos. 4, 18 (April 2018).

> *dispute and is not a party's legal counsel, but who enters into an agreement either with a party, an affiliate of that party, or a law firm representing that party:*
>
> *a) in order to provide material support for or to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and*
>
> *b) such support or financing is provided through a donation, or grant, or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the dispute."*[46]

The authors propose this definition to be included as an amendment in Section 2 of the Act.[47] This would codify a concrete understanding of the said 'Third-Party' in domestic arbitration, which is essential for ensuring functionality of the legislation.

ii Section 42A:

The insertion of Section 42A to the Indian Arbitration Act in 2019[48] has already made a substantive move towards adding an additional layer of confidentiality in ADR proceedings. The section reads:

> *"42A. Confidentiality of information - Notwithstanding anything contained by any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentially of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award."*[49]

However, this can create clashes with third-party funders and potentially exclude them from the proceedings. With there already being criticisms about ambiguity regarding the extent and manner of disclosure,[50] there arises a need to amend the same and add a provision wherein, when opting for third-party funding, section 42A won't be applicable to such a funder.

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46. ibid.
47. Arbitration and Conciliation Act 1996, s 2.
48. Arbitration and Conciliation Act 1996, s 42A.
49. ibid.
50. Subhiksh Vasudev, 'The 2019 Amendment to the Indian Arbitration Act: A Classic Case of One Step Forward Two Steps Backward?' (*Kluwer Arbitration Blog* 25 August 2019) <http://arbitrationblog.kluwerarbitration.com/2019/08/25/the-2019-amendment-to-the-indian-arbitration-act-a-classic-case-of-one-step-forward-two-steps-backward/?print=pdf> accessed 3 May 2024.

A proviso can be added for the same. The inspiration for the same can be taken from the voluntary Code of Conduct published by the Association of Litigation Funders in England and Wales, wherein, the funder can *"observe the confidentiality of all information and documentation relating to the dispute to the extent that the law permits, and subject to the terms of any Confidentiality or Non-Disclosure Agreement agreed between the Funder and the Funded Party."*[51] *Instead of adding a proviso, alternatively a provision for NDAs can also be added.*

iii Section 31(8):

Through this section, the tribunals get the discretion to determine the bearer of costs, which includes "any other expenses incurred in connection with the arbitral proceedings and the arbitral award"[52]. This section has the potential to include Third-Party Funding under its ambit. So, it can very well be amended to erase questions regarding the funder's liabilities in the absence of an NDA.

B. Releasing of Guidelines as "soft-law"

Speaking of application of such laws, it becomes imperative to study the procedure in which the suggested changes may be introduced, bringing us to the following sub-heads;

1. The 'soft-law' approach

Procedural soft-law assists in stepwise application of proposed law, commencing with guidelines, followed by regulations, para-regulatory texts[53], and when the time is right and social-impact-assessment[54] is appropriately done, the new law/amendment is enacted.

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51. Association of Litigation Funders ('ALF'), *The Code of Conduct for Litigation Funders* (November 2011) <https://associationoflitigationfunders.com/code-of-conduct/> accessed on April 2024.
52. Maharashtra National Law University Mumbai, *Third-Party Funding in India: Survey Report 2021* <https://www.google.co.in/books/edition/Third_Party_Funding_in_India_Survey_Repo/8omWEAAAQBAJ?hl=en&gbpv=1&dq=distribution+of+liabilities+in+third+party+funding+in+india&pg=PR5&printsec=frontcover> accessed on 5 May 2024.
53. Favalli, Daniele, *An Overview of Existing Para-Regulatory Texts ("PRTs"): Analysis, Facts and Figures*, ASA Special Series No. 37, pp 1-16; Daniel p 4
54. Emma Wilson, *What is Social Impact Assessment?* (Indigenous Peoples and Resource Extraction in the Arctic: Evaluating Ethical Guidelines 1 January 2017) <https://www.researchgate.net/publication/315550573_What_is_Social_Impact_Assessment> accessed on 8 September 2024.

2. The 'hard-law' approach

This approach mainly focuses on the direct codification, application, and enforcement of the law in question. It imposes laws from the perspective of judges and legislators and aims at providing a set framework directly.[55]

Jurisdictions such as Hong Kong, Australia, Singapore and other have been seen following the soft-law procedure, complementing it with the "light-touch" approach.[56] This approach can be loosely defined as "precedence to party autonomy with disclosure as the central tenet"[57], meaning that the NDAs would bar the signatory parties from divulging information to any other person, while simultaneously utilising it to raise the credibility of the arbitral proceedings.

If India were to introduce third-party funding mechanisms, the very first decision to make would be choosing between the two abovementioned approaches. The authors firmly believe that soft-law approach would be the way forward. That is because the whole concept of TPF is still in its nascent stage, wherein flexibility is the key, which soft-law approach provides.[58] Hard-law approach, on the other hand would be too rigid and wouldn't provide the scope needed to adapt to the Indian arbitration scenario and deal with any unprecedented issues.

C. Mandating Non-Disclosure Agreements

When we talk about NDAs, there are two NDAs in question, one before the TPFA is signed, where the parties involved would be just the potential funder and funded party, and the second one would be where the parties involved would additionally have the opposing party(ies) and the arbitrators. Our suggested mandate for NDAs would be employing a "light-touch" approach, wherein the funders would distance themselves from the day-to-day proceedings.[59] This will give "precedence to party autonomy and

55. King & Wood Mallesons, *IA Fundamentals / 3. Hard Law and Soft Law in IA* (Lexology 3 July 2020) <https://www.lexology.com/library/detail.aspx?g=5436b6de-0d8 a-4a78-bdb9-baf031f79ce8> accessed on 6 September 2024.
56. Oliver Gayner & Susanna Khouri, 'Singapore and Hong Kong: International Arbitration Meets Third Party Funding' (2017) 40(3) Fordham International Law Journal 1037, art 13.
57. Public Consultation on the Draft Civil Law (Amendment) Bill 2016 ('Amendment Bill'); Civil Law (Third Party Funding) Regulation 2016, 12 (Singapore).
58. ibid 20.
59. Matthew Saunders & Emmanuelle Cabrol, 'Third Party Funding in International Arbitration' *Ashurst*, <https://www.ashurst.com/en/news-and-insights/legal-updates/

flexibility" and simultaneously treat disclosure as the central tenet to TPF arrangements.[60]

5. CONCLUSION

The evolution of Third-Party Funding has witnessed significant milestones, from ancient roots to modern acceptance as a vital element of arbitration. Recent legal developments in the UK and India have highlighted the importance of TPF in enhancing access to justice and supporting arbitration. Different jurisdictions have adopted various approaches to TPF, with some, like Hong Kong and Australia, favouring a soft-law approach emphasising party autonomy and disclosure.

The authors suggest that a useful distinction be made between the funding party and *Dominus Litis* to ensure party autonomy and confidentiality. A 'light-touch' approach would ensure this, and NDAs would *inter alia,* enhance transparency and award credibility while reducing challenges based on non-disclosure. Furthermore, as suggested, there is also a need to make certain amendments to the arbitration act, namely in sections 2, 31(8), and 42A to make the Indian laws more TPF-friendly. Plus, as a precursor, releasing guidelines as "soft-law" and mandating NDAs before and during TPF arrangements can provide the flexibility required to adapt to the evolving nature of arbitration, while simultaneously ensuring that ethical standards are not compromised. With these recommendations, the authors conclude on a hopeful note, envisioning legislation for TPF that aligns seamlessly in the ever-changing arena of alternative dispute resolution in the Indian legal landscape.

quickguide---third-party-funding-in-internationalarbitration/#:~:text=Third%20party%20funding%20is%20where,exchange%20for%20an%20agre> accessed on 5 May 2024.

60. Public Consultation on the Draft Civil Law (Amendment) Bill 2016 (Singapore); Civil Law (Third-Party Funding) Regulations 2016 (Singapore).

PROTECTIVE PRELIMINARY ORDERS UNDER THE 2025 SIAC RULES: ANALYSING ENFORCEABILITY IN INDIAN COURTS

—*Kanishk Srinivas*[*]

ABSTRACT

The new 2025 SIAC Rules introduce the tool of Protective Preliminary Orders ['PPOs'] to strengthen the emergency arbitration process and enable an applicant to obtain urgent interim reliefs without notifying the opposing party. PPOs represent an expedited component of emergency arbitration to protect the applicant from the actions of a recalcitrant opposing party. However, given that emergency arbitration itself is an expedited procedure intended to grant similar urgent reliefs, the necessity and utility of PPOs is contentious. In this article, the author argues that PPOs may be enforceable in India under the same framework and principles adopted for the enforcement of interim reliefs from emergency arbitration and the critiques levelled against the PPO process may be misplaced. The enforceability of PPOs in India is assessed from the lens of the existence of consent for the PPO mechanism as well as the fairness of the framework adopted by the Rules for granting the relief.

1. INTRODUCTION

The Singapore International Arbitration Centre ('SIAC') recently introduced the seventh edition of its institutional arbitration rules. The new Rules ('Rules') have come into effect from 1st January 2025. While the Rules introduce changes to multiple components of the earlier edition,[1] this article focuses on the incorporation of the power to provide protective preliminary orders ('PPO') in emergency arbitration.

The SIAC has been a pioneer in emergency arbitration – it was the first arbitral institution in the region to incorporate emergency arbitration as

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1. Highlights of the SIAC Rules 2025 <https://siac.org.sg/wp-content/uploads/2024/06/Highlights-of-the-SIAC-Rules-2025.pdf> accessed 25 February 2025.

part of its arbitral tools back in 2010.[2] Its Annual Report has indicated the success of the emergency arbitration procedure with 152 applications being filed for emergency arbitration since 2010.[3] The Rules introduce the tool of PPOs to strengthen the emergency arbitration process and enable an applicant to obtain urgent interim reliefs without notifying the opposing party. PPOs represent an expedited component of emergency arbitration to protect the applicant from the actions of a recalcitrant opposing party. However, given that emergency arbitration itself is an expedited procedure intended to grant similar urgent reliefs, the necessity and utility of PPOs is contentious.

Another issue with PPOs pertains to their enforceability in jurisdictions other than the seat court. In India, despite the absence of statutory provisions, the courts have given effect to interim reliefs obtained through SIAC emergency arbitration. However, there is no clarity on whether courts will enforce PPOs with some authors expressing doubt over their enforceability owing to procedural limitations.[4]

In this article, the author addresses the enforceability of PPOs as well as their utility. The author argues that PPOs may be enforceable in India under the same framework and principles adopted for the enforcement of interim reliefs from emergency arbitration and the critiques levelled against the PPO process may be misplaced.

The article consists of two parts. First, the author describes the PPO mechanism, evaluating its procedures and timelines. A comparison between the processes for the grant of a PPO and an interim relief through emergency arbitration is undertaken to understand the differences between them. Second, the author examines the enforceability of PPOs in India. This involves assessing the existence of consent for the PPO mechanism as well as the fairness of the framework adopted by the Rules for granting the relief.

2. Rishabh Malaviya, 'SIAC Rules 2025: Breaking New Ground in Emergency Arbitration with Protective Preliminary Orders' *Kluwer Arbitration Blog* (6 January 2025) <https://arbitrationblog.kluwerarbitration.com/2025/01/06/siac-rules-2025-breaking-new-ground-in-emergency-arbitration-with-protective-preliminary-orders/> accessed 25 February 2025.
3. *SIAC Annual Report* 2023, p 18 <https://siac.org.sg/wp-content/uploads/2024/04/SIAC_AR2023.pdf> accessed 25 February 2025.
4. Gayatri Kondapalli and Aditi Kanoongo, 'Emergency Arbitration: Will the SIAC's New Rules Face Judicial Resistance in India?' *IndiaCorpLaw* (24 February 2025) <https://indiacorplaw.in/2025/02/emergency-arbitration-will-the-siacs-new-rules-face-judicial-resistance-in-india.html> accessed 25 February 2025.

2. THE PROCESS OF GRANTING A PPO

Schedule I governs the procedure for emergency arbitration. Paragraph 25 to Paragraph 34 of Schedule I of the Rules deal with the procedure for the grant of a PPO. PPOs are intended to be a component of emergency arbitration since the same emergency arbitrator grants them as part of the same proceedings initiated through the same application. They are provided to direct a party "not to frustrate the purpose" of the emergency arbitration.[5] What distinguishes the application for a PPO from an emergency arbitration is the absence of notice to the other parties.[6] Therefore, if a party makes an application solely for emergency arbitration, it will be compelled to issue notice to the other parties but if the party adds a request for a PPO to the application for emergency arbitration, it is exempted from the need to issue notices to the other parties.

If the application for PPO is accepted by the SIAC President, an emergency arbitrator is appointed as per the procedure laid out in Paragraph 7.[7] Once the emergency arbitrator is appointed, the request for PPO is to be determined within 24 hours.[8] If the emergency arbitrator grants the PPO, the order is delivered to the SIAC Secretariat and the applicant is required to provide a copy of all the case papers, the PPO and all other communications to the other parties within 12 hours.[9] The Rules impose a duty on the SIAC Secretariat as well as the applicant to communicate the PPO to the other party. If the applicant fails to communicate the relevant information to the other parties within 12 hours or take effective measures for the same, the PPO expires after 3 days.[10] The Rules also enable the other parties to raise objections to the PPO "at the earliest practicable time" and direct the emergency arbitrator to promptly decide on the objection.[11] The PPO expires 14 days after it is issued.[12] The PPO can be adopted or modified in the interim relief granted through the emergency arbitration process.[13]

5. sch I, para 25.
6. ibid.
7. sch I, para 26.
8. sch I, para 27.
9. sch I, paras 28 & 29.
10. sch I, para 30.
11. sch I, paras 31 & 32.
12. sch I, para 33.
13. ibid.

In a situation where the request for a PPO is rejected by the SIAC President, the applicant must send notice to the other parties. This application is then treated as a request for emergency arbitration.[14]

The PPO process has three key differences from the emergency arbitration process. The first difference pertains to the availability of avenues to challenge the emergency arbitrator's appointment. Once the SIAC accepts a request for emergency arbitration, the emergency arbitrator must be appointed within 24 hours.[15] While this timeline is identical for the grant of a PPO, the other party can challenge the appointment of the emergency arbitrator since they receive notice of the appointment.[16] When an application is filed for a PPO, the other party cannot challenge the appointment of the emergency arbitrator prior to the grant of relief. It is only possible for the other party to raise an objection after the PPO has been granted. This is supported by the fact that the procedure for appointment of an emergency arbitrator under Paragraph 7 alone is made applicable for the PPO process and not the challenge procedure under Paragraphs 9 to 11. Therefore, the PPO process results in the unilateral appointment of an emergency arbitrator that can be challenged only after the PPO has been granted.

The second difference pertains to the duration for which the reliefs operate. The PPO, subject to the applicant's compliance with the notice requirements under Paragraph 29, remains in effect for 14 days from the date of issue. Given that emergency arbitration is to be concluded within 14 days of the appointment of the emergency arbitrator and the grant of PPO is determined within 24 hours of the appointment, the PPO is intended to operate for the duration of the emergency arbitration. On the other hand, the emergency interim relief (granted through the emergency arbitration process) operates till the tribunal modifies or revokes it or passes an award. Therefore, while both the PPO and the emergency interim relief are aimed at preventing the other party from frustrating the purpose of arbitration, their scope of application is significantly different. The emergency interim relief is broader and operates till the tribunal conclusively determines the issue, while the PPO is extremely narrow and operates till the emergency arbitrator decides on the grant of emergency interim relief.

14. sch I, para 34.
15. sch I, para 7.
16. sch I, para 9.

The third difference relates to the manner in which the reliefs are granted. The PPO is granted by the emergency arbitrator without hearing the other party. This is based on the premise that if notice is given, the other party might frustrate the purpose of arbitration before the proceedings are completed. The sole objective is to ensure that the other party does not have an opportunity to take any adverse actions during the pendency of the emergency arbitration. Any opportunity to challenge the PPO is provided only after the relief has been granted. However, in emergency arbitration, both parties have an opportunity to present their case before the interim relief is decided.

Therefore, a PPO is decided by a unilaterally appointed emergency arbitrator whose appointment can be challenged only after the relief is granted. The PPO is granted before hearing the other parties and operates for an extremely narrow time period. The author will subsequently argue that though there are substantial procedural differences from the emergency arbitration procedure this might not render the PPO unenforceable in India.

3. THE ENFORCEABILITY OF PPOS IN INDIA

An interim relief is only useful to the extent that it can be enforced. Therefore, it becomes important to analyse the enforceability of PPOs prior to discussing their utility or limitations.[17] While the Indian courts have enforced interim reliefs obtained through emergency arbitration under SIAC Rules, there have been concerns over the enforceability of PPOs.

A large part of this critique has been centred on the consent for the PPO procedure and its procedural fairness.[18] Under the former, the argument has been that since the PPO procedure is a new addition to the Rules and many arbitration agreements may have been entered into when these Rules did not exist, it cannot be said that the parties consented to them. This may be referred to as the *consent critique*. Under the latter, it has been argued that the unilateral appointment process and the lack of hearing provided to the other party lead to violations of the principle of fairness. There is an apprehension that courts may not enforce such procedurally unfair reliefs and may be referred to as the *procedural fairness critique*.

17. Zachary Song, Alex Green and Laura Niday, 'SIAC Rules 2025: Innovation in International Arbitration – Ex Parte Applications' *Steptoe* (18 February 2025) <https://www.steptoe.com/en/news-publications/siac-rules-2025-innovation-in-international-arbitration-ex-parte-applications.html> accessed 25 February 2025.
18. Kondapalli and Kanoongo (n 4).

Indian courts have extensively dealt with the consent critique while enforcing emergency interim reliefs. The courts have adopted the approach that when commercial entities draft an arbitration agreement containing a reference to institutional rules (like the SIAC Rules), it is presumed that they have complete knowledge of the rules and acquiesce to them (unless specifically excluded).[19] The institutional rules are deemed to have been incorporated into the arbitration agreement and are binding on the Parties.[20] Therefore, if the arbitration agreement contains a reference to the SIAC Rules and the PPO process (or emergency arbitration) has not been specifically excluded by the Parties, PPOs remain a mechanism for seeking interim relief prior to the constitution of the tribunal. Moreover, the parties' consent can be gauged from the language of their arbitration agreement. The SIAC model arbitration clause refers to conducting the arbitration in accordance with "the SIAC Rules for the time being in force." This signifies the consent of the parties to arbitrate according to the SIAC Rules that are in operation when the dispute is referred to arbitration. If the parties intended to adhere to a specific edition of the SIAC Rules, it is always open to them to make a reference to that specific edition. Therefore, there is a presumption that parties have conveyed their consent to the PPO process unless specifically excluded and the mere fact that the PPO process is not found in earlier editions of the SIAC Rules does not preclude parties' consent to it.

The procedural fairness critique presents a more significant challenge to the enforcement of PPOs. The challenge is exacerbated by the fact that the courts have not hesitated to judge arbitral procedures on the threshold of constitutional principles like equality under Article 14.[21] An example of this can be seen in *Godrej Properties Ltd v Goldbricks Infrastructure (P) Ltd*[22] *["Godrej Properties"]* where the court struck down an *ex parte* interim order passed by a tribunal. The court held that *ex parte* orders did not form a part of the IAA and constituted a violation of fair procedure for failing to hear the other party. However, a situation akin to the one in *Godrej Properties* might not arise in the context of SIAC PPOs for both

19. *Future Retail Ltd v Amazon.com Investment Holdings* LLC 2020 SCC OnLine Del 1636 (paras 107 & 109).
20. *Amazon.com NV Investment Holdings LLC v Future Retail Ltd* (2022) 1 SCC 209 (paras 28 & 46); *Amazon.com NV Investment Holdings LLC v Future Coupons (P) Ltd* 2021 SCC OnLine Del 1279 (para 143).
21. *Central Organisation for Railway Electrification v ECI SPIC SMO MCML (JV) A Joint Venture Company* 2024 INSC 857 (para 163).
22. (2021) 2 HCC (Bom) 542 : 2021 SCC OnLine Bom 3448.

legal and factual reasons. *Godrej Properties* involved ad hoc arbitration where the procedural rules governing arbitration and the law of the seat [i.e. the IAA] did not provide for ex parte interim orders. Moreover, the court was of the opinion that there was no factual basis for an urgent relief in the form of an ex parte order. However, in the case of SIAC PPOs, the institutional arbitration rules, which the parties incorporate by reference into their arbitration agreement, specifically provide for such orders. The fact that the SIAC President assesses the need for a PPO and appoints an emergency arbitrator only if the request is legitimate ensures that no frivolous requests for PPOs are entertained by emergency arbitrators.

In addition to these case-specific differences, the procedural fairness critique is limited for at least three structural reasons. First, commercial parties, operating under the presumption of full knowledge, have conveyed their consent to the adoption of the Rules for their arbitral proceedings. Akin to the response to the consent critique, the fact that the parties have conveyed their consent to the Rules operates to blunt the procedural fairness critique. Commercial parties engage in concerted negotiations over contractual terms and have the option to specifically exclude the PPO procedure from their dispute resolution process.

However, even where the parties have conveyed their consent, the courts have held that an absence of procedural fairness (like unilateral appointments) can vitiate the arbitration.[23] This is where the balancing adopted in the PPO process between the need for preventing the purpose of arbitration from being frustrated and ensuring procedural fairness comes into effect. As noted above, the purpose of the PPO is to prevent the other party from frustrating the purpose of emergency arbitration and operates for an extremely narrow time period. Unlike the emergency arbitration where any relief that the emergency arbitrator "deems necessary" can be provided,[24] the PPO is tailored for the specific objective of conserving the purpose of the emergency arbitration. The emergency arbitrator is appointed by the SIAC President and not by or upon the suggestion of the applicant – ensuring that it does not fall victim to the issue of unilateral appointments.[25] Even in this case, the other parties have the option of raising objections after the PPO is granted and these must be decided expeditiously. Moreover, some authors have argued that the short period for which the PPO remains applicable makes it extremely difficult to enforce in

23. ibid.
24. sch I, para 17.
25. sch I, para 7.

courts.[26] The 14-day period (at the most) for which PPO remains in force is extremely short to seek and obtain enforcement in foreign courts Instead, the PPOs serve a signalling and deterrent purpose since they indicate the existence of an arbitrator's order prohibiting the other party from carrying out an action that defeats the purpose of the emergency arbitration. Any action contrary to PPO indicates non-compliance with binding reliefs granted through the arbitration process and may have implications for the other parties' case in the arbitration proceedings. Therefore, the balance between procedural fairness and maintaining the effectiveness of arbitral proceedings that is sought to be maintained in the PPO procedure limits the procedural fairness critique.

Third, the SIAC's PPO procedure is in line with the UNCITRAL Model Law ["Model Law"]. Articles 17B and 17C of the Model Law provide for the grant of preliminary orders, which are akin to PPOs, for preventing the purpose of the interim measure requested during arbitration from being frustrated. The preliminary orders are granted following a procedure akin to the one for PPOs and are valid for an extremely short duration (20 days). However, a key difference between the Model Law and the SIAC PPO process is that the former requires the tribunal to specifically assess whether the "prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure."[27] The Rules do not require the emergency arbitrator to undertake such an assessment prior to waiving the notice requirement to the other parties. The Rules mandate the applicant to communicate the PPO to the other parties and provide an opportunity to the latter to raise "any objections" which must be expeditiously addressed. However, a blanket exemption from notifying the other parties merely on requesting a PPO might be prima facie disproportionate. However, this criticism too can be addressed by the fact that the SIAC President scrutinises each request for a PPO and it is only upon their acceptance that the notice requirement is waived. This is further supported by the fact that if the President refuses the application for a PPO, the applicant is required to give notice to the other parties and the application is deemed to be a request solely for emergency arbitration.[28] Therefore, as long as the SIAC President effectively scrutinises the PPO application and there is no blanket waiver of the notice requirement, the PPO procedure is in line with the Model Law and effectively addresses the procedural fairness critique.

26. Malaviya (n 2).
27. Model Law, art 17B(2).
28. sch I, para 34.

4. CONCLUSION

The introduction of PPOs in the SIAC Rules 2025 represents an innovative addition to the emergency arbitration framework. While emergency arbitration has been a successful mechanism for obtaining interim reliefs in urgent situations, PPOs serve a distinct purpose by providing expedited relief without prior notice to the opposing party when there is a risk that the purpose of emergency arbitration might be frustrated.

Despite their procedural differences, this article argues that PPOs may be enforceable in Indian courts under the same principles that have been applied to emergency arbitration reliefs. The consent critique can be addressed through the established judicial principle that parties who refer to institutional rules in their arbitration agreements are presumed to have knowledge of those rules and consent to them unless specifically excluded. The procedural fairness critique, while more substantial, can be mitigated by three factors: the express consent of commercial parties to the Rules, the careful balancing between procedural fairness and preventing frustration of arbitral proceedings, and the alignment of the PPO procedure with the UNCITRAL Model Law provisions on preliminary orders.

The PPO mechanism, when properly scrutinised by the SIAC President to ensure that notice is not waived without justification, represents a proportionate response to the challenge of maintaining the effectiveness of emergency arbitration in the face of potentially recalcitrant parties. While the short duration of PPOs may limit their practical enforceability in foreign courts, they serve an important signalling and deterrent function that may encourage compliance without formal enforcement.

In conclusion, the SIAC's introduction of PPOs is a significant development in international arbitration that addresses a practical gap in the emergency arbitration framework. Although certain procedural concerns exist, the PPO mechanism appears to be carefully designed to balance competing interests and may find recognition in the Indian arbitration landscape as part of the broader judicial acceptance of emergency arbitration.

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STATEMENT ABOUT OWNERSHIP AND OTHER PARTICULARS

(See Rule 8)

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

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