1 Multi Party Disputes: The Joinder of Third Parties to International Arbitration Agreements
*Kavya Bhardwaj*

19 Imagining a New Age Investor State Dispute Resolution Mechanism – The Indian Story
*Chandni Ghatak*

55 India's Prospects on Third Party Funding in Arbitration: Cross Jurisdictional Approach and Recommended Policy Framework
*Aditya Sethi*

88 Concerns of Legitimacy in the Application of Soft Law in International Arbitration
*Prakhar Agarwal*

112 Enforcement of Set-aside Awards
*Bedanta Chakraborty*

144 "Effective Means of Enforcing Rights": An Additional Sword for Investors against Developing Nations?
*Kishan Kumar Gupta & Kashish Sinha*

175 Investor-State Disputes in India's Energy Sector: Balancing Foreign Investments with National Energy Security Concerns
*Abhishek Rana*

201 The Changing Stance of the Indian Judiciary towards Domestic Arbitrations with a Foreign Seat
*Ananya Verma*

229 A Take on the Growing Challenge of Repeat Appointments of Arbitrators
*Apoorba Biswas & Rishabh Mishra*

255 Judicial Approach in Applying the Arbitration and Conciliation Act, 1996 to Investment Disputes
*Harsh Singh & Shubhangi Agarwal*

269 *Jayesh H. Pandya* v. *Subtex India Ltd:* Supreme Court's Troubling Decision on Waiver of Right to Object
*Parimal Kashyap & Rahul Kanoujia*

**The National Law Institute University**

Kerwa Dam Road, Bhopal, India - 462044



INDIAN ARBITRATION LAW REVIEW

Vol II | 2020


IALR

# Indian Arbitration Law Review


VOLUME II FEBRUARY 2020

# Indian Arbitration Law Review

Volume II

February, 2020

National Law Institute University

Kerwa Dam Road, Bhopal, India-462 044

Vol. II Feb 2020

*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 and is supported by L&L Partners (formerly Luthra & Luthra Law Offices).

The Journal invites submissions of scholarly, original and unpublished written works from persons across the legal profession – students, academicians and practitioners.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 conform to *The Bluebook: A Uniform System of Citation (20th Ed.)*

All rights reserved. No article or part thereof published herein may be reproduced without the prior permission of NLIU. For all matters concerning rights and permissions, please contact at *ialr@nliu.ac.in.*

The views expressed in the articles published in this Volume of 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, L&L Partners or the National Law Institute University, Bhopal.

Recommended Form of Citation

**2 Ind. Arb. L. Rev. (2020)**

# NATIONAL LAW INSTITUTE UNIVERSITY

Ref. No. ...Q.../NLIUB

Prof. (Dr.) V. Vijayakumar
M.A., M.L., M.Phil., Ph.D.
Vice Chancellor

Date: 14/2/2020

## MESSAGE FROM THE VICE CHANCELLOR

I am delighted to present to the readers Volume II of the *Indian Arbitration Law Review*. After the successful launch of Volume I of IALR at the NLIU-Justice R.K. Tankha Memorial International Moot Court Competition 2019, the Editorial Board of the journal has this year as well compiled a collection of insightful pieces on arbitration law that will resonate with Indian and overseas readers. The IALR is a the fruition of the efforts by a group of students under the guidance of Dr. Sanjay Yadav with a view to encourage scholarship in the field of arbitration law with the support of an NLIU alumnus, Mr. Prashant Mishra, Partner, L&L Partners, New Delhi. Volume II perfectly exemplifies the goals and aims of the journal, as the articles reflect the understanding, critical thinking and research endeavours in arbitration of the students and practitioners contributing to it. I am certain that it will foster discussion among students, practitioners and academicians on contemporary legal issues surrounding arbitration law.

I would like to appreciate and congratulate the student body, whose efforts have brought this volume into existence. I wish them all the very best for the future and am hopeful that they can take the IALR to greater heights in the years to come.

14/02/2020
(Dr. V. Vijayakumar)

University established by Madhya Pradesh Act No. 41 of 1997

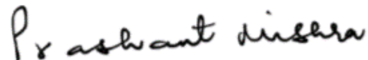
Kerwa Dam Road, Bhopal - 462 044, (M.P.) India
Tel : 0755 - 2696965, 2696970 (O) Ext.-109, Fax : 0755 - 2696724
E-mail : vc@nliu.ac.in, vijayakumar@nliu.ac.in, Visit us at : www.nliu.ac.in

Vol. II Feb 2020

## MESSAGE FROM THE PATRON

I am delighted to present the second Volume of the Indian Arbitration Law Review. After the successful publication of Volume 1 in 2019, this second volume continues in the same vein by presenting an array of insightful pieces on arbitration law.

I would like to extend my most sincere thanks to the students who have worked tirelessly to make this second edition of the publication a possibility, and heartiest congratulations to the authors whose exceptional works have been incorporated in this Volume. I also look forward to all future editions of IALR and am hopeful that they shall continue to promote scholarship in the field of arbitration in India.



Mr. Prashant Mishra,

Partner, L&L Partners, New Delhi

Vol. 11 Feb 2020

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

*Patron*

Mr. Prashant Mishra
Partner, L&L Partners, New Delhi

*Editor-in-Chief*

Mr. Prabal De

*Managing Editor*

Mr. Jasvinder Singh

*Content & Technical Supervisors*

Ms. Arpita Pande
Mr. Pranjal Agarwal

*Secretary*

Mr. Suyash Bhamore

*Peer Review Board*

Ms. Aishwarya Srivastava
Mr. Akash Gupta
Mr. Akhil Chowdary
Mr. Ansh Singh Luthra
Ms. Archi Agnihotri
Ms. Garima Tiwari
Ms. Meenakshi Kumar
Ms. Raghavi Vishwanath
Ms. Rajeswari Mukherjee
Mr. Ritvik Kulkarni
Mr. Shashank Chaddha
Mr. Shourya Bari
Mr. Udyan Arya

*Editorial Board*

Mr. Aditya Wadhwa
Ms. Aura Pandey
Ms. Anoushka Ishwar
Ms. Arundhati Diljit
Mr. Hrishikesh Bhise
Mr. Janak Pradhan
Ms. Navya Saxena
Ms. Payal Dubey
Ms. Rachita Shah
Ms. Rayana Mukherjee
Mr. Ritwik Srivastava
Ms. Shagun Singhal
Ms. Spandana Singh
Mr. Syamantak Sen
Mr. Tejas Hinder

Vol. II Feb 2020

# CONTENTS

**EDITORIAL ........................................................................... VII**

**Multi Party Disputes: The Joinder Of Third Parties To International Arbitration Agreements ........................................................................ 1**

*Kavya Bhardwaj ........................................................................................1*

**Imagining A New Age Investor-State Dispute Resolution Mechanism – The Indian Story ........................................................19**

*Chandni Ghatak ........................................................................................ 19*

**India's Prospects on Third Party Funding in Arbitration: Cross Jurisdictional Approach and Recommended Policy Framework.... 55**

*Aditya Sethi ............................................................................................. 55*

**Concerns Of Legitimacy In The Application Of Soft Law In International Arbitration ..................................................................... 88**

*Prakhar Agarwal ....................................................................................... 88*

**Enforcement Of Set Aside Awards ................................................ 112**

*Bedanta Chakraborty ............................................................................. 112*

**"Effective Means Of Enforcing Rights": An Additional Sword For Investors Against Developing Nations? ........................................144**

*Kishan Kumar Gupta & Kashish Sinha ...................................................... 144*

**Investor-State Disputes in India's Energy Sector: Balancing Foreign Investments with National Energy Security Concerns ..................175**

*Abhishek Rana* ........................................................................................ *175*

**The Changing Stance Of The Indian Judiciary Towards Domestic Arbitrations With A Foreign Seat ..................................................201**

*Ananya Verma* ........................................................................................ *201*

**A Take On The Growing Challenge Of Repeat Appointments Of Arbitrators ........................................................................................229**

*Apoorba Biswas & Rishabh Mishra* ............................................................ *229*

**Judicial Approach In Applying The Arbitration And Conciliation Act, 1996 To Investment Disputes ..................................................255**

*Harsh Singh & Shubhangi Agarwal* ............................................................ *255*

***Jayesh H. Pandya* v. *Subhtex India Ltd :* Supreme Court's Troubling Decision on Waiver of Right to Object ..........................................269**

*Parimal Kashyap & Rahul Kanoujia* ............................................................ *269*

Vol. II Feb 2020

## EDITORIAL

With an increasingly cross-jurisdictional approach to business in recent years, the significance of arbitration law has transgressed domestic borders. The meticulously picked articles for this journal indicate this wide paradigm and demonstrate its ever-evolving nature. We proudly present to you Volume II of the Indian Arbitration Law Review. Through this Volume, we aim at delivering articles that reflect expertise on contemporaneous subjects of domestic, international and investor-state arbitration.

This Volume begins with the article '*Multi Party Disputes: the joinder of third parties to international arbitration agreements*'. In acknowledging the consensual nature of arbitration, this article delves into the technicalities involved in third-party intervention in arbitration agreements. The article raises concerns in regards the individual's contractual rights, confidentiality of the agreement and enforceability of the award.

In '*Imagining a new age investor-state dispute resolution mechanism-the Indian story*', the author discusses the principle of exhaustion of local remedies, in light of the change occurring to dispute resolution around the world. The article analyses the approaches adopted by other jurisdictions such as China and the European Union to make the clause workable, and suggests an appropriate approach which is tailor made to suit the Indian context.

'*India's prospects on third party funding in arbitration: cross jurisdictional approach and recommended framework*', demonstrates the requirement of a regulatory framework for third-party funding in India. The author delves into the successful models of regulation for third party funding in Singapore and Hong Kong, and suggests a

concrete mechanism to govern such funding in India to make it a prominent seat and venue for international arbitration.

The *'Concerns of legitimacy in the application of soft law in international arbitration'* looks at the binding value of the IBA Guidelines on Conflict of Interest in International Arbitration, to resolve the issue of conflict of interest in appointment of arbitrators. The author questions the legitimacy of these guidelines by exploring the applicability of soft law in different areas of international arbitration. While answering the same, the article discusses the role played by the guidelines in maintaining the impartiality and independence of the arbitrator in international arbitration.

Next, is '*Enforcement of set aside awards*', which addresses the uncertainties in enforcement of awards which are set aside at the seat of the arbitration. While critiquing the existing position of law, the author discusses the viability of bringing about unification and harmonisation of the law for enforcing such awards. The article ambitiously demonstrates the practicality of a supra-national organisation to govern such enforcement.

The '*"Effective Means Of Enforcing Rights": An Additional Sword For Investors Against Developing Nations?'* is a take on the feasibility of applying the "effective means" clause to protection of investors in developing nations. The authors criticize the expansionist interpretation given to the said clause, while setting out the evolution of its jurisprudence and try to re-negotiate an appropriate standard, suitable for developing nations.

The *'Investor-State Disputes in India's Energy Sector: Balancing Foreign Investments with National Energy Security Concerns'* carries out a deep study of the past bilateral treaties of India in the energy sector to lay down the requirements of an appropriate energy policy to

increase foreign investment and balance socio-economic concerns. The author looks at the implications of the existing Indian model BIT in securing its long-term energy security plans.

*'The Changing Stance Of The Indian Judiciary Towards Domestic Arbitrations With A Foreign Seat'* throws light on the positive and negative implications of the changing stance of the Indian judiciary while allowing Indian parties to choose a foreign seat.

*'A Take On The Growing Challenge Of Repeat Appointments Of Arbitrators'* dwells into the crucial issue of ensuring the impartiality of arbitrators. The authors draw upon the practises prevalent in other jurisdictions and thereby inspect the effectiveness of the position in the Indian law, with a particular emphasis on the issue of reappointment of arbitrators.

The article *'Judicial Approach In Applying The Arbitration And Conciliation Act, 1996 To Investment Disputes'* brings to light the lacunae in arbitration law when it comes to investment disputes. The authors offer solutions for bridging the gap between the existing legal position in India and its commitments under investment treaties.

The final article *'Jayesh H. Pandya v. Subhtex India Ltd: Supreme Court's Troubling Decision On Waiver Of Right To Object'* is a case comment on the recent Supreme Court judgement which dealt with the termination of the arbitrator's term. The author critically analyses the judgement from the perspective of waiver of the right to object.

We hope that this Volume proves to be a piece of prolific scholarship and encourages students, practitioners and policy-makers in further developing this field.

Vol. 11 Feb 2020

# MULTI PARTY DISPUTES: THE JOINDER OF THIRD PARTIES TO INTERNATIONAL ARBITRATION AGREEMENTS

*Kavya Bhardwaj**

**Abstract**

*The issue of multi-party arbitration has become a part of the contemporary jurisprudence on international commercial arbitration. Scholarly conflict has often revolved around the need to balance the doctrine of privity of contract and terms of agreement with the "extension" of the arbitration agreement. This has given rise to the applicability of new principles in determining the scope of the arbitration agreement. The hurdles of a consensual agreement, confidentiality obligations, enforceability and form requirement are often termed as the 'stumbling blocks' to the joinder of third parties to an international arbitration agreement. In an era of complex business transactions, the need for efficiency in alternate dispute resolution has time and again encouraged the joining of third parties to the arbitration agreement. This paper is an attempt to bring forward the conceptual nature, purposive interpretation and technicalities involved in third party intervention, extension of the arbitration agreement and joinder of parties. It begins with the conceptual terminology and goes on to discuss at length the legal basis of binding non-signatories, theories of extension to the arbitration agreement under the backdrop of the consent to arbitration per se. The article primarily revolves around the recurrent debate of whether extending the scope of the arbitration agreement is an infringement of the individual contractual rights or an efficacious remedy. This paper encapsulates the jurisprudential principles, model law's approach, concept of implicit consent, arbitral awards and hindrances as to confidentiality and agreed upon terms by the parties, to explain the very 'joinder of third parties'.*

* The author is a student at the Rajiv Gandhi National University of Law, Patiala.

*"The reality of international commercial disputes has dramatically changed. Before, the great majority of disputes seemed to be bipolar disputes. Presently, an important number of disputes are multiparty and even multi-polar disputes.*" – Eduardo Silva Romero[1]

## I. Introduction

The advent of commercial interdependence, complex contractual relationships and global proliferation of cross border business has given rise to disputes involving more than two camps with more than two diverging interests, whereby third parties step in with separate claims and grounds. Although considerable jurisprudence has been developed for addressing third party claims yet there are still complex unresolved issues faced by the international arbitration community in the domain of joinder and non- joinder of parties to the arbitration agreement. 'Third party' refers to any party which intervenes in arbitration with a claim as a matter of right it asserts an interest in the subject matter of the dispute, or, the disposition of the arbitration may, as a practical matter, impair or impede the third party's ability to protect that interest or when the original parties will not be able to represent adequately the claims of the third parties.[2]

The complexity is further strengthened via the interplay between domestic arbitration laws, international principles of commercial arbitration, lex fori and the lex arbitri in the procedural applicability of the "extension" of arbitration agreement. Continental scholars refer to it as "extending" the arbitration clause[3] and Anglo Saxon lawyers ascribing the same as "joining

---

[1] Eduardo Silva Romero, *Brief Report on Counterclaims and Cross-claims: The ICC Perspective in Arbitral Procedure at the Dawn of the New Millennium*: *Reports of the International Colloquium of CEPANI*, Brulyant, 73 (2005).

[2] Jean L. Doyle, *Federal Rule 24: Defining Interest for Purposes of Intervention of Right by an Environmental Organization*, 22 VALPARAISO UNIVERSITY LAW REVIEW, 109, (1987).

[3] Pierre Mayer, *Extension of The Arbitration Clause to Non-Signatories under French Law*, 180, OXFORD UNIVERSITY PRESS, (2008).

non-signatories.[4]" Lord Collins aptly remarked, "The extent to which a non-signatory may be bound by an arbitration agreement is among the most complex and delicate issues in international commercial arbitration."[5]

The complex issue as to the identity of the parties is often referred as a question of subjective scope of arbitration agreement or jurisdiction *ratione personae*.[6] In other legal systems, such as the United Sates, the impetus lies upon the formulation of the arbitration agreement.

## II. Complexity due to the Consensual Nature of Arbitration

The consensual nature of arbitration is often referred as the 'heart and soul' of the alternate dispute resolution mechanism. Only the parties to an arbitration agreement are bound to or benefited from the same. Article 1(1) of the 2010 UNCITRAL Rules provides that the Rules apply "where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration."[7] Many commentators have remarked that since arbitration rests upon 'consent' only parties to an arbitration agreement are bound by it. Many arbitration legislations and conventions concur with this opinion. For instance, Article II (2) of the New York Convention illustrates, Contracting States "shall recognize an agreement in writing under which the parties undertake to submit their disputes to arbitration."[8] Article 7(1) of the UNCITRAL Model Law defines an arbitration agreement as "an agreement by

---

[4] John M. Townsend, *Non-Signatories in International Arbitration: An American Perspective*, KLUWER LAW INTERNATIONAL (2007).
[5] Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov't of Pakistan, UK SC 46 (2010).
[6] X v. Y & Z, DFT 4A,128 (2008).
[7] UNCITRAL Model Law Rules on International Commercial Arbitration, 2010, 24 ILM 1302.
[8] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10th June 1958 330 UNTS 38.

the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them."[9] The basic premise that evolves is that arbitration rests upon consent of the parties and only recognizes the parties to an arbitration agreement and not to other entities.

## III. Form Requirement for Binding Non-Signatories

Three possibilities usually exist when the question is related to the scope of arbitration agreement-: (1) a contract that expressly allows for joinder or intervention of third parties; (2) a contract that expressly prohibits joinder or intervention of third parties; and (3) a contract that is silent or vague regarding joinder or intervention of third parties.[10] 'Joinder' is a term which is used to refer to the circumstance when a third party is asked to join an already pending arbitration proceeding.[11]

The issue of non-signatories to an arbitration agreement is a matter of rampant debate and dilemma with many scholars remarking that 'signature' of a party to an agreement to arbitrate is a "customary mode of implementation of agreement to arbitrate."[12] In complex commercial transactions, like manufacturing contracts, construction assignments, it is most vividly seen that an agreement/contract is executed by agents, contractors and other "middle" executing parties. The law will usually, but not necessarily, provides that signatories are parties to the agreements that they execute. It has laid down that persons other than the formal signatories may be parties to the arbitration agreement by application of the theory of apparent mandate or

[9] UNCITRAL Model Law on International Commercial Arbitration, 21st June 1985, 24 ILM 1302.

[10] Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INTERNATIONAL LAW JOURNAL, 89 (1995).

[11] B. Hanotiau, *Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law*, A.J. VAN DEN BERG, 341 (2006).

[12] Republic Of Ecuador v. Chevron Texaco Corp, 376 F. Supp. 2d 334, 351, 3 56 S.D.N.Y (2005).

ostensible authority or because they are third-party beneficiaries or on other grounds.[13] There are many legal systems such as the United States and Switzerland, which do not require a 'form' requirement of an agreement to arbitrate and cover many unwritten contracts and unsigned agreements. New York Convention covers agreements to arbitrate concluded through unsigned exchanges of letters and telegrams.[14] Even amendment to Article 7 of UNCITRAL Model Law, 2006 bears testimony to the aforementioned stance. It refers to the factual reality that agreement to arbitrate requires some other condition/circumstance other than the formality of a signature. There is a degree of assent to arbitrate that is either express or implied that needs to be derived from "chain of transactions" and other documents. This doctrine as illustrated and developed by the French law, talks about connecting the substantive obligation with the procedural framework. This was first explained in a *Cour de cassation* case[15] which talked about the involvement of non-signatory in a series of contracts and therefore deduced its involvement in the subject matter of the dispute binding the non-signatory

In more modern arbitration legislations, for instance, Switzerland[16] other forms of communication which permit the consent to an arbitration agreement to be witnessed by a text have been put on the same footing as signing an agreement to arbitrate. In the light of these considerations, it is concluded that the form

[13] Hanotiau, *Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues – An Analysis*, 18 JOURNAL OF INTERNATIONAL ARBITRATION, 253, 256 (2001); Whitesell & Silva-Romero, *Multiparty and Multicontract Arbitration: Recent ICC Experience, in ICC, Complex Arbitrations* ICC Ct. Bull. Spec. Supp. (2003).

[14] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article II, 10th June 1958 330 UNTS 38; Sphere Drake Ins. PLC v. Marine Towing, Inc. 16 F.3d 666, 669 (1994).

[15] Société Alcatel Business Systems (ABS), Société Alcatel Micro Electronics (AME) et Société AGF v. Amkor Technology et al, Cass 1e civ., JCP [2007] I 168, No. 11(2007).

[16] Federal Code on Private International Law, 1987 Art.178, (1987).

requirement under the New York Convention as well as those under the national legislations are applicable only to the original arbitration agreement and not to the legal bases for extending the arbitration agreement to non-signatories. The status quo, therefore, provides little or no justification for extending the form requirement beyond the initial agreement.

## IV. Legal Basis for Binding Non-Signatories to an Arbitration Agreement

The issue that persons or parties that are not expressly named in the arbitration clause can take advantage of arbitration agreement needs to be scrutinized from case to case basis and thus, cannot be subjected to a straight-jacket formula. Rather what need to be ascertained are the circumstances under which non-signatories become involved in the performance, execution and negotiation of the subject matter of the agreement and in the dispute arising from it.[17] The issue of the extension of the arbitration agreement to non-signatories has engendered a wealth of comments and literature.[18] 'Extension' refers to a process whereby a party/ person maybe bound to an arbitration agreement even though there is no reference of the party in the agreement. It refers to a party which is covered within the personal scope of the arbitration agreement. [19] The real focus lies upon the intentions of the parties contracting to the agreement and the consent of the non-signatory party to be bound by the terms of subject matter per se.[20] However even the issue of consent has been contradicted by legal scholars and case law jurisprudence under the non-consensual theories of veil piercing (alter ego), estoppel, apparent

---

[17] Case No. 9517 of 1992, Y.B. Comm. Arb. 46 (lCC lnt'l Ct. Arb.).

[18] Anne Marie Whitesell, *Non-signatories in ICC Arbitration,* KLUWER LAW INTERNATIONAL (2006).

[19] B Hanotiau, *Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties* Issues – *An Analysis*, 18 JOURNAL OF INTERNATIONAL ARBITRATION, 253, 256 (2001).

[20] Sunkist Soft Drinks v. Sunkist Growers, 10 F.3d 753 (11th Cir. 1993); J.J. Ryan & Sons v. Rhône Poulenc Textile SA, 863 F.2d 315 (1988).

authority, or succession. Some authorities have characterized the issue of extension as one concerning the scope of the agreement to arbitrate (e.g., to what persons does the agreement extend to?).[21] Other legal scholars say that the question whether a non-signatory is bound by an arbitration agreement is determined through contract formation (e.g., has an arbitration agreement been formed between parties A and C?).[22]

## V. Legal Theories for Extension of Arbitration Agreement

### A. GROUP OF COMPANIES DOCTRINE

The doctrine emerged in the French law which binds together companies under the same ownership, control and management to any contractual relationship. The most explanatory of the same being the Dow Chemical Award whereby it was held that the arbitration clause being accepted by some companies in the group also binds other companies by virtue of their presence in the conclusion, performance, or termination of the contracts containing said clause.[23] The Swiss Federal Supreme Court's position with regard to group of companies has been approved by the prevailing legal doctrine in Switzerland.[24] In ICC case no. 6610,[25] the tribunal found no evidence of intent to add other parties to the contract under a 'group of companies' theory.

---

[21] W. CRAIG, W. PARK & J. PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION ¶11.05 (3d ed. 2000).
[22] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).
[23] Dow Chemical v. Isover Saint Gobain, Interim Award of 23 September 1982 in ICC Case No. 4131, Yearbook IX (1984).
[24] Marc Blessing, *Introduction to Arbitration – Swiss and International Perspectives*, INTERNATIONAL ARBITRATION IN SWITZERLAND, An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute, HELBING & LICHTENHAHN AND KLUWER (2000).
[25] Case No. 6610 of 1991, 19 Y.B. Comm. Arb.(lCC lnt'l Ct. Arb.).

### B. REPRESENTATION AND AGENCY

The law of agency is often invoked to bind the non-contracting principal to disclose the mandate of the principal to the given contractual relationship. The Swiss Federal Tribunal cancelled an award applying this theory to bind a sovereign state to an arbitration clause. The arbitral tribunal opined that four Middle Eastern states were bound by the arbitration clause, which had been entered into by an international organization that the four states had founded.[26] Some scholarly authorities have illustrated that even an agent may invoke an arbitration agreement contained in a contract which it executes on behalf of a principal, notwithstanding the fact that the agent would not be bound by the substantive terms of the underlying the contract.[27]

### C. APPARENT AUTHORITY

This is close knit to the theory of agency which rests upon the principles of contract law and good faith.[28] This is often remarked as the 'principle of appearance' or 'mandate apparent' in some jurisdictions.[29] The party is considered to be bound by another entity's acts purportedly entered into on its behalf even if those acts were unauthorized, if the putative principal created the impression of authorization or legitimization through either words or conduct, leading the opposite party to believe that authorization actually existed.[30] The apparent or ostensible authority (commonly termed) theory does not rests upon the consensual nature of the arbitration but upon the representation made by the principal to the third party which is intended to convey the real 'participation'. However, the theory raises

---

[26] Case No. 3879 of 1986, 9 Y.B.Comm. Arb. 148 (lCC lnt'l Ct. Arb.).
[27] Lerner v. Amalgamated Clothing & Textile Workers Union, 938 F.2d 2 (2d Cir. 1991).
[28] Case No. 1050 of 1992, 19 Y.B.Comm. Arb. 146 (lCC lnt'l Ct. Arb.).
[29] J. HERBOTS, INTERNATIONAL ENCYCLOPAEDIA OF LAW CONTRACTS, 477 (1999).
[30] BOWSTEAD & REYNOLD, AGENCY, 8-014 (19th ed.2010).

questions as to the choice of laws like for instance, law governing the arbitration agreement, the law of the state where the principal's or agent's conduct occurred, and the law of the state where the opposite party apprehends the putative principal's conduct. In order to resolve these hurdles, it is suggested that specialized rule of international law governing apparent authority should be applicable to international arbitration agreements. This would not raise issues like the choice of law given that apparent authority does not rely upon the principles of consent.

### D. ALTER EGO THEORY

Commonly referred as the theory of 'piercing of corporate veil,' the purpose of which is to extend the arbitration agreement to the actual controlling parent companies. German authors and courts have often relied on piercing the corporate veil (*Durchgriff*) in order to determine that a non-signatory was bound by an arbitration agreement.[31] In many legal systems, this theory is restricted to find out the situations of abuse of rights and fraud.[32] In ICC case no. 5730[33] and 5721[34], the theory was applied to find out the misrepresentation caused by the non-signatory parent company and thus, was brought under the contract. Such practice is often done when the company and its owners form a single economic entity and when the corporate structure has been established with the sole purpose of avoiding justified claims by creditors or of circumventing any kind of contractual obligation or duties. In ICC case no. 8385[35] it was decided to pierce the veil of the insolvent subsidiary due to 'illegitimate conduct' (fraud) by the subsidiary at the instigation of the parent company.

---

[31] KARL-HEINZ BOCKSTIEGEL, GERMANY AS A PLACE FOR INTERNATIONAL AND DOMESTIC ARBITRATIONS – GENERAL OVERVIEW, WOLTERS KLUWER, 29 (2007).
[32] Bernard Hanotiu, *Complex Arbitrations, Multiparty, Multicontract, Multi-issue and Class Actions*, KLUWER LAW INTERNATIONAL, 178 (2005).
[33] Case No. 5730 of 1990, 9 Y.B. Comm. Arb. lCC lnt'l Ct. Arb.).
[34] Case No. 5721 of 1990, 9 Y.B.Comm. Arb. (lCC lnt'l Ct. Arb.).
[35] Case No. 85355 of 1991, 9 Y.B. Comm. Arb. (lCC lnt'l Ct. Arb.).

### E. THIRD PARTY BENEFICIARIES

Non-signatories to an arbitration agreement often derive certain benefits from a contract and are therefore termed as third party beneficiaries. As explained in an arbitral award, "it is generally accepted that if a third party is bound by the same obligations stipulated by a party to the contract and this contract contains an arbitration clause or, in relation to it, an arbitration agreement exists, such a third party is also bound by the arbitration clause, or arbitration agreement, even if it did not sign it."[36] Many national courts as well as tribunals have held that the non-signatory third party claiming benefits within the contractual matter is bound by the terms of the agreement.[37]

Since this is an exceptional rule to the generally applicable principle, that the contract does not guarantee enforceable rights to non-parties, therefore it is the burden of the signatory to the agreements to clearly establish benefit derived by such a third party. In some cases, an arbitration clause on third party beneficiary may be invoked on the grounds akin to estoppel.[38] This issue as addressed by scholarly authorities should be decided by the laws applicable to the arbitration agreement and the contract since it involves issues of formation and interpretation of the agreement.

### F. STATE NON-SIGNATORIES

Many contractual relationships involve state entities which do not expressly participate in the arbitration proceedings but in reality, the contract is concluded for their ultimate benefit. One leading example is the *Pyramids case*[39] wherein an agreement to construct

---

[36] Case No. 9726 of 2004, 29 Y.B. Comm. Arb. (lCC lnt'l Ct. Arb.).
[37] Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc., 138 F.3d 160, 166 (5th Cir. 1998); Newby v. Enron Corp., 391 F.Supp.2d 541, 561 (S.D. Tex. 2005); Bevere v. Oppenheimer & Co., 862 F.Supp. 1243 (1994).
[38] Thomson-CSF, SA v. Am. Arbitration Ass'n, 64 F.3d 773, 779 (2d Cir.1995).
[39] Case No.3493 of 1980, 29 Y.B. Comm. Arb. (lCC lnt'l Ct. Arb.).

a complex tourist resort was entered into between foreign investors and an Egyptian state entity. In principle, the same rules should apply on state actors; however, many national legal systems are reluctant in enforcing awards binding such state actors. For example, U.K. Supreme Court refused to recognize an award, rendered in Paris by a distinguished arbitral tribunal against a Ministry of the Pakistan government.[40]

## VI. Issue of Consent: A Legal Basis for Binding Non-Signatories to an Agreement

Scholarly authorities have often cited consent, be it expressed or implied to be the cornerstone of an arbitration agreement. The premise rests upon the principles of good faith in commercial transactions. This implies that the real focus should lie upon the intentions, both actual and presumed, and conduct of the parties to an arbitration agreement to bind a third party to a contractual ensemble. One of the most frequent ways for binding a non-signatory party is the involvement of the third party in the underlying contractual relationship.[41] A signatory to an arbitration clause will be precluded from refusing to arbitrate with a non-signatory when the essence of the dispute is intertwined with, or derived from the subject matter of the dispute

Many national courts have defaulted by applying principles of equity and efficiency[42] rather than those of a contractual analysis while joining parties to an arbitration agreement such as the US courts in binding parties on the basis of 'congruent interests'[43]

---

[40] Dallah Estate & Tourism Holding Co. v. Ministry of Religious Affais, Gov't of Pakistan UK SC 46 (2010).

[41] Tobias Zuberbühler, *Non-Signatories and the Consensus to Arbitrate*, 26 ASA BULL,18 (2008).

[42] Blessing, *Extension of the Arbitration Clause to Non-Signatories, in The Arbitration Agreement: Its Multifold Critical Aspects,* ASA, 151, 162 (1994).

[43] Isidor Paiewonsky Assoc., Inc. v. Sharp Prop., US Court of Appeals Inc., 998 F.2d 145, 155 (3d Cir. 1993).

and 'nexus between relations'.[44] These remain insufficient grounds for the joinder of third parties since these theories overlook the criterion of 'consent' that forms the legal basis of joining third parties and since arbitration rests upon consent of parties, principles like equity need to be given up. It is only in the non-consensual theories of extension such as alter ego, estoppel that consent may be overlooked. The courts and tribunals need to reconsider that formalistic approaches to bind third parties, need to be undermined and the presumption of separability of arbitration agreement should be upheld which is the reason as to why the parties have resorted to international commercial arbitration rather than settlement via courts. It is appropriate to apply a liberal standard of proof of consent that takes into account the pro-arbitration policies of the New York Convention and national arbitration legislation.[45] The reason for the same could be attributed to the pro-arbitration tendencies that have formed a part of the present national legal policies of nations, the purpose of which is to reduce burden on courts, encourage efficient resolution of disputes and facilitate the ease of cross border business.

## A. SPECIFIC PROVISIONS AGREED UPON BY THE PARTIES

The consensual nature of arbitration is often termed as its Achilles heels.[46] This serves to be the foremost obstacle to multi-party proceedings. This implies that consent given at the beginning of the arbitration proceeding binds only those parties to the arbitration proceeding. The apt solution is that these parties and their lawyers to be aware of possible solutions of joinder

---

[44] Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 758 (11th Cir. 1993).

[45] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2818 (2 ed, Kluwer Law International 2014).

[46] Kristina M. Siig, *Multi-party Arbitration in International Trade: Problems and Solutions*, 1 INT'L J. LIABILITY AND SCIENTIFIC ENQUIRY, (2007).

facilitating efficiency and redressal against genuine parties. The arbitration institutions should provide assistance for this by drafting standard arbitration clauses for the joinder of third parties.[47] In ICC case 4504,[48] the tribunal refused to extend the arbitration agreement due to lack of reference of the non-signatory. In ICC case no. 10758;[49] the tribunal found no evidence of consent to arbitrate merely because the non-signatory participated in the contract negotiation and thus, joinder was refused. After the revision in the UNCITRAL Model Rules in 2010, the position of joinder under Article 17(5) has provided an impetus for extension of multi-party arbitration and much has changed on the forefront of institutional arbitration relating to joinder of third parties. Article 7 of SIAC Rules,[50] 2016 bear testimony to the same.

### B. IMPLIED CONSENT

An entity/party can become a party to an arbitration agreement, impliedly – typically, either by conduct or non-explicit declarations, as well as by express agreement or formal execution of an agreement. In ICC case no. 8910[51] and 11160[52], non-signatories played a critical role in the performance of the contract and therefore the agreement was extended to them. The intention of other parties to be bound by the agreement to arbitrate with the non-signatory is also necessary. There are five common scenarios to deduce implied consent (1) non-signatory participation in contract formation[53] often confused created by

---

[47] Andrea Meier, *Einbezug Dritter vor internationalen Schiedsgerichten,* SCHULTHESS, 322 (2007).
[48] Case No. 4504 of 1986, 9 Y.B. Comm. Arb. 46 (lCC lnt'l Ct. Arb.).
[49] Case No. 10758 of 2001, 9 Y.B. Comm. Arb. 46 (lCC lnt'l Ct. Arb.).
[50] Rule 7, Arbitration Rules of the Singapore International Arbitration Centre (6th Edn. 2016).
[51] Case No. 8910 of 2000, 9 Y.B. Comm. Arb. 146 (lCC lnt'l Ct. Arb.).
[52] Case No. 11160 of 2001, 19 Y.B. Comm . Arb. ( ICC Int'l Ct. Arb).
[53] Case No.5332 of 1990, 21 Y.B. Comm. Arb. ( ICC Int'l Ct. Arb).

mention of the non-signatory in contract documents[54]; (2) a single contract scheme constituted by multiple documents[55]; (3) acceptance of the contract or arbitration agreement by the non-signatory, whether in the particular arbitration itself or in another forum; (4) ab initio absence of corporate personality; and (5) fraud or fraud-like abuse of the corporate form.[56] There may be instances in which a party's conduct after a dispute arises evidencing its implied consent to an arbitration clause.

## VII. Types of Claims Arising in Multi-Party Disputes

In a multi-party arbitration, generally the following types of claims arise when joinder is sought-:

### A. PRELIMINARY REMARKS

This is generally a common situation where the claimant alleges that more than one party is jointly and severally liable.

### B. CLAIMS BY THE RESPONDENT AGAINST A NON-SIGNATORY

This situation has earlier been a matter of scholarly debate whereby the controversy is whether it is possible to extend the counterclaim to a third non-party. Under the German Civil Law, this situation has been referred as *Drittwiderklage*.[57]

### C. CLAIMS BY RESPONDENTS AGAINST OTHER RESPONDENTS (CROSS CLAIMS)

In this situation, there is no joining of a third party, only a claim is raised by the respondent against another respondent which is

[54] Case No. 7155 of 1999, 46 Y.B. Comm. Arb .( ICC Int'l Ct. Arb).
[55] Case No. 1434 of 2000, 19 Y.B. Comm. Arb .( ICC Int'l Ct. Arb).
[56] William W. Park, Non-Signatories and International Contracts: An Arbitrator's Dilemma, OXFORD PUBLISHING PRESS (2009).
[57] Jens Kleinschmidt, *Die Widerklage gegen einen Dritten im Schiedsverfahren*, 4 SCHIEDSVZ, 143(2006).

termed as cross claim.[58] A cross-claim generally is a claim in guarantee or in damages, for instance, a claim raised by one subcontractor against another where the main contractor has initiated arbitration proceedings against both of the parties.

### D. CLAIMS FOR RECOURSE AGAINST A THIRD PARTY

A claim for recourse is generally raised by the respondent against a third party to be joined as a party to the arbitration proceeding if it loses its cases against the original counterparty. In some situations, claims for recourse can be raised even by the claimants.[59]

### E. CLAIMS BY THIRD PARTIES

This is a situation where a third party wishes to join proceedings on its own motion, without being requested to do so by a claimant or a respondent. In France, the intervention of a party is possible with the *intervention volontaire principale*, which permits the adjudication of related third-party claims. If an intervention is permitted it generally does not make any difference whether it is raised against a claimant or the respondent.

## VIII. Obstacle of Confidentiality To Joinder Of Third Parties

The common view in English jurisprudence is that the parties' arbitration agreement gives rise to an implied duty of confidentiality. The purpose of ADR encapsulates within its ambit an inherent duty of confidentiality whereby the information exclusive between the parties and the arbitrator(s) cannot be disclosed. However, this duty is not absolute and there are limitations imposed on this duty, which are:

---

[58] Bernard Hanotiu, *Complex Arbitrations, Multiparty, Multicontract, Multi-issue and Class Actions*, KLUWER LAW INTERNATIONAL, 178 (2005).
[59] Andrea Meier, *Einbezug Dritter vor internationalen Schiedsgerichten,* SCHULTHESS, 23,68 (2007).

1. Disclosure by consent
2. Disclosure due to public interest and interests of justice
3. Disclosure due to statutory obligations and increased public transparency.[60]

Confidentiality of arbitral proceedings is considered to be an obstacle to the joinder of third parties. Third parties involved in arbitration proceedings would have no express obligation to prevent disclosure. This creates a hindrance that can endanger the confidentiality of the proceedings and weaken the protection granted to confidential information. Even the third-party funders, including litigation funders, are non-signatories the arbitration agreement and can hardly ever be joined in the arbitration as a party.[61] It was also elucidated in *Oxford Shipping Company*[62] that "strangers" would be excluded from the proceedings and despite any matter similarity between the cases; the court found that neither the parties nor the tribunal could join and hear disputes together. The Model Law's drafting history bears testimony that the parties' agreements with regard to the confidentiality of international arbitrations would be given effect.[63] A Party shall disclose to third parties the documents produced by the opposing Party and shall use them only for the purpose of participating in the arbitration except where these documents are already disclosed and out in the public domain or the opposing Party has expressed its consent to their disclosure.[64] Prof. Gary Born has also summarized that the disclosure of detailed information relating to the arbitration proceedings to non-parties carries with

---

[60] Denoix de Saint Marc, *Confidentiality of Arbitration and the Obligation to Disclose Information on Listed Companies or During Due Diligence Investigations*, 20 JOURNAL OF INTERNATIONAL ARBITRATION, 211 (2003).
[61] Milsom and others v. Ablyazov, 955 EWHC 36 (2011).
[62] Ali Shipping Corporation v Shipyard Trogir [CLC 566(1998) .
[63] Report of the Secretary-General on Possible Features of A Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/207, ¶17 (1981).
[64] Beccara and Others v. Argentina, ICSID Case No. ARB/07/5 (2016).

it the risk of "'trial by press release," distractions from the mutually-agreed, centralized dispute resolution mechanism, aggravation of the parties' dispute and the loss of important efficiency benefits.[65] However, it has been laid down that the interests of decreasing confidentiality and increasing transparency are more compelling with respect to arbitrations involving a third State party than with respect to arbitrations involving private commercial parties.[66]

## IX. Concerns Regarding the Enforceability of an Arbitral Award

The extension of an arbitration agreement to a third party also creates a hurdle in the enforceability of the arbitral award. The New York Convention presupposes an agreement in writing as elucidated in Article II r/w Article V (1) (a). Additionally, Article V(1)(c) of the New York Convention which deals with the issue of ultra petita, and Article. V(1)(d) of the New York Convention, which talks about the parties' agreement regarding the composition of the arbitral tribunal and the manner so laid, are further hindrances in the way of enforcing an arbitral award involving multiple parties. However, as illustrated in the case of *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GmbH*,[67] a party may be precluded from claiming that the absence signature hindered the recognition of an award if the party relied on the contract by requesting other provisions to be enforced to its benefit.

---

[65] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2818 (2 ed, Kluwer Law International 2014).

[66] Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT. ARB, 121, 134 (2003);Born & Shenkman, *Confidentiality and Transparency in Commercial and Investor-State International Arbitration* in C. ROGERS & R. ALFORD (eds.), THE FUTURE OF INVESTMENT ARBITRATION, OXFORD UNIVERSITY PRESS, (2009).

[67] Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GmbH 206 F.3d 411 (2000)

## X. Conclusion

Complex contractual relationships and the disputes arising therein are often resolved by permitting joinder of additional parties for preventing conflicting awards and loss of efficiency. The underlying purpose is augmenting the efficiency of the dispute resolution process. With contemporary debate revolving around the joinder of additional parties against the backdrop of privity of contract, much of the solution focuses upon addressing such possibilities during the drafting of the arbitration agreement. Arbitration institutions should draft standard arbitration clauses for multiparty contracts and pertinent provisions for joinder. A recent statistical analysis provided that mostly 40% of disputes involved more than two parties.[68] Thus, the issue of joinder of third parties serves to be a matter of modern jurisprudence in the field of international commercial arbitration which needs to be addressed during the very framing of the arbitration clause. With institutional rules providing for joinder and consolidation proceedings, the position of third parties to an agreement has drastically evolved.

[68] Felix Dasser, *International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis*, 25 ASA BULL., 444 (2003).

Vol. 11 Feb 2020

# IMAGINING A NEW AGE INVESTOR-STATE DISPUTE RESOLUTION MECHANISM – THE INDIAN STORY

*Chandni Ghatak**

**Abstract**

*In an increasingly inter-connected world, where trans-border deals are becoming the norm, dispute resolution is undergoing serious changes. Given the diverse interests at stake in investor-state disputes, the exhaustion of local remedies clause must also undergo changes to successfully adapt to the situation. Thus, it becomes especially crucial for a developing economy such as India to revamp its own outlook of investor-state dispute resolution. This paper shall analyse the current Indian situation vis- a-vis approaches adopted by other jurisdictions such as China and the European Union. Ultimately, the author aims to formulate suitable approaches, that are tailor made to suit the Indian context while also being able to deliver on the expectations of this increasingly inter-connected business ecosystem.*

## I. Introduction

The principle of exhaustion of local remedies is a widely accepted principle within customary international law. This principle has been the subject of vast discourse in contexts relating to injuries caused to diplomats of a State while serving in a foreign state, or cases that involve common citizens as well.[1] Consequent to such a notion finding support within the jurisprudence relating to alien tort protection, law on diplomats etc; one can also observe the acceptance and application of the principle even in context of contractual agreements, especially Bilateral Investment Treaties [

* The author is an advocate practicing at the Delhi High Court.

[1] A. A. Cancado Trindade, *Denial of Justice and Its Relationship to Exhaustion of Local Remedies in International Law*, 53 PHIL. L.J. 404 at 405 (1978).

"**BIT**"]. With the advent of globalization, there emerged compelling need for States to chalk out a cohesive mechanism for managing issues of trade. The BITs' therefore, acted as helpful tools for States to not only regulate trade but also formulate mechanisms which helped sustain such investment and maintain trading relations.[2] An important role of these treaties however, was the manner in which it significantly regulated and continues to regulate dispute redressal between the State Parties. The impact the clauses within these treaties wield play a significant role not only in solving the conflict at hand but also in building long-lasting trading relations.

Accordingly, it becomes increasingly important to clarify the ambiguous aspects of such dispute resolution clauses. One such pertinent yet ambiguous and unevenly applied clause having a decisive impact on the way dispute resolution pans out amongst State Parties is the exhaustion of local remedies ["**ELR**"] clause. The primary focus of the paper is on the issue of framing, interpreting and applying such a clause in the context of BITs.

The specific point of inquiry, however, is how such clause should be reworked in the indian context. In 2016, the Indian government published the Model Indian BIT, which came as a shock to several states. One of the surprises was the language of the ELR clause. The said clause heavily curtailed the investor's ability to resort to investor-state arbitration by mandating that available local remedies be pursued at first for a period of five years.[3] Other conditions were also placed which made it cumbersome to circumvent such an exhaustion clause as well as to avoid arbitral discretion in the matter, which in several other

---

[2] Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46.1 HARVARD INTL L. J 67 (Winter 2005).

[3] MODEL TEXT FOR THE INDIAN BILATERAL INVESTMENT TREATY 2016, http://mof.gov.in/reports/ModelTextIndia BIT.pdf [hereinafter, '*2016 Indian Model BIT'*].

treaties is usually the norm.[4] This has caused a deadlock of sorts, as far as further negotiations with states are concerned to revise erstwhile BITs.

In light of the aforesaid anomalous situation, this paper seeks to study and attempt to devise a beneficial approach toward reworking the said clause. In this pursuit, this study shall involve the scrutiny of practices adopted by States, which arguably profess a more sophisticated investment treaty regime, in order to build an appropriate solution for the Indian context.

In Chapter II, the author has briefly outlined the concept of the exhaustion of local remedies [ELR] capturing its evolution from first being an actively used rule in cases of public international law. In Chapter III, taking ahead the discussion from the previous chapter, the author moves onto highlight the Indian story in relation to its controversial ELR clause. Further, the author shall highlight the main concerns of India which illustrate to the reader the possible reasons behind the incorporation of such a rigid ELR clause. For doing so, the author shall highlight the inconsistencies pertaining to the Investor-state dispute settlement ["**ISDS**"] regime, in particular the International Centre for Settlement of Investment Disputes ["**ICSID**"] system, which is most popular for the resolution of investor-state disputes.

Chapter IV shall focus on the ambitious goal of the European Union to establish a multilateral investment court system. The author shall provide a summary of the key reasons why the region was inclined toward such reformation of the investor-state dispute system. The author shall therein, also provide a summary of points which discuss why such system may not be suited to India's needs.

---

[4] Prabhash Ranjan & Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, 38 NW. J. INT'L L. & BUS. 1 (2017).

Chapter V shall ultimately highlight the key takeaways of the whole discourse in order to devise a remedy which answers the research questions set forth in this paper, studying mainly the approach of Brazil and China, which may be streamlined to specific Indian needs.

Chapter VI shall provide a conclusion on the basis the foregoing chapters. The author provides an outline of certain suggestions which in the opinion of this author may be relevant towards formulating a more accessible and credible investor-state dispute resolution system.

## II. Examining the Principle of Exhaustion of Local Remedies

This principle has been the subject of vast discourse in contexts relating to injuries caused to diplomats of a State while serving in a foreign state, or cases that involve common citizens. The notion that *whoever ill-treats a citizen indirectly injures the State* has found life through the widespread application of this principle as far as treaties are concerned.[5] The rule remains an important principle of customary international law and is applicable in diplomatic protection cases and in international human rights law.[6]

The popular justifications for such an idea naturally emanates from the emphasis on concepts such as sovereignty,[7] however, it is also believed that the motivations for imposing such rule is different. Scholars believe that in private matters, the entire procedure becomes a lot more efficient if carried out by those closer to the event.[8] This brings in the notion that local

[5] Theodor Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, 35 BRIT. Y. B. INT'L L. 85 at 101 (1959).

[6] Matthew C. Porterfield, *Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Ha8s Come?* 15 YALE INT'L L.J 3 (Fall, 2015) [hereinafter '*Porterfield*'].

[7] David Mummery, *Content of Duty to Exhaust Local Remedies*, 2 A.J.I.L 390 (1964) [hereinafter *'David Mummery'*].

[8] *Id* at p. 391.

enforcement authorities, given their proximity to the dispute are better equipped to deal with resolution, from the early stages of fact finding, collection of evidence etc. In the Indian sense of things, we could possibly correlate this idea to how under the Code of Civil Procedure,1908,[9] the understanding of where the cause of action arises grants automatically to the authorities therein the requisite jurisdiction to deal with the matter.[10]

Another interesting aspect related to the history of the ELR rule is its sociological purpose. Sociologists suggest that associations and communities formulate internal uniformities and behavioural patterns which are termed as acceptable forms of conduct.[11] This is done not only for the purpose of setting a moral code within the community but also for it to act as a defence mechanism against the outside world.[12] Scholars have also argued that the basis for this rule also stems from the idea of natural justice principles. This rule permits the respondent ( i.e. the state) to first be heard by its own courts, before it is arraigned into the relevant international forums.[13]

The ELR rule however, in the context of investment treaty arbitration, is certainly controversial. While there are the obvious benefits which come with it including protection of policy space of the host state, there is the other obvious fear – how effective are local remedies? Concerns about transparency, accountability, and recourses for affected communities will only be improved if the domestic law of host countries provides an adequate framework to protect such interests and the means for implementing them.[14] India has for the longest time faced

[9] Code of Civil Procedure, 1908 [India]. [hereinafter *'CPC'*].
[10] § 20, CPC.
[11] David Mummery, *supra* note 7 at 392.
[12] David Mummery, *supra* note 7 at 393.
[13] David Mummery, *supra* note 7 at 394-96.
[14] Sonia E. Rolland, *The Return of State Remedies in Investor-State Dispute Settlement: Trends in Developing Countries*, 49, LOYOLA UNIVERSITY COLLEGE CHICAGO L. J. 403 (2017) [hereinafter *'Rolland'*].

criticism for its courts being burdened by a serious backlog of cases and this problem has for many years been the top focus of every reigning Chief Justice.[15] Even in other more sophisticated jurisdictions such as the EU we see a tussle over the incorporation of this rule. Take for instance the negotiations between the EU and the United States' over Transatlantic Trade and Investment Partnership ["**TTIP**"]- the two parties have never been able to meet eye to eye on the issue of inclusion of the said rule simply because the US is adamant over the view that investors would not obtain the requisite form of effective dispute resolution.[16]

This shows a general scenario of clash amongst parties over inclusion of this rule. In the forthcoming chapter, the author deals more closely with the Indian situation and the Indian approach.

## III. Chapter II: The Indian Model BIT - The Local Remedies Trap

In 2011, India experienced the biggest and most compelling instance of its turbulent relationship with ISDS mechanisms through the White Industries[17] case. The reason why White Industries obtained relief on account of being denied an effective means of remedy was not due to the wording of the India-Australia BIT but instead the Most Favoured Nation ["**MFN**"] clause within the India-Kuwait BIT which ensured that an effective means of remedy would be granted to the investors of

---

[15] Soibam Rocky Singh, *Backlog of Cases due to Lack of Judicial Infrastructure*, THE HINDU (Apr.11, 2019) https://www.thehindu.com/news/cities/Delhi/backlog-of-cases-due-to-lack-of-judicial-infrastructure/article24515317.ece.

[16] Porterfield, *supra* note 6; Catharine Titi, *Transatlantic Trade and Investment Partnership [TTIP] and a Paradigm Shift from Arbitration to Investment Law Trial?*, KLUWER ARBITRATION LAW BLOG (Apr.10, 2019) http://arbitrationblog.kluwerarbitration.com/2016/01/19/transatlantic-trade-and-investment-partnership-ttip-and-a-paradigm-shift-from-arbitration-to-investment-law-trial/.

[17] White Industries Australia Limited v. Republic of India, Final Award UNCITRAL (30 November 2011) (India).

Kuwait.[18] Since the aforementioned case, the Ministry of Commerce (India) has actively pursued a study of revising BITs to ensure a balance between regulatory control and investor protection was maintained.[19] Recently in 2018, the Indian Government had established a think tank dedicated to studying the impact of investment treaties on the Indian economy along with a focus on protecting India from investment arbitration claims in future.[20]

In addition to revamping the language of India's Model BIT, as seen through the phrasing of the local remedies' clause, it has also been seen that there is an increasing recalcitrant approach undertaken by Indian domestic courts as far as injunctions in investment arbitration cases are concerned. The most recent example being the case of *Union of India* v. *Vodafone Group PLC United Kingdom & Anr,* [21]wherein the Delhi High Court granted an anti-arbitration injunction against arbitral proceedings initiated by Vodafone Group against Union of India in relation to the provisions contained in the India-UK Bilateral Investment Promotion & Protection Agreement ["**BIPPA**"].[22] Despite

[18] Rosmy Joan, *Renegotiation of Indian Bilateral Investment Treaties: An Analysis from a Development Perspective*, 4, UNCITRAL CONGRESS, http://www.uncitral.org/pdf/english/congress/Papers_for_Programme/99-JOAN-Renegotiation_of_Indian_Bilateral_Investment_Treaties.pdf.

[19] DEPARTMENT OF ECONOMIC AFFAIRS, MINISTRY OF FINANCE, GOVERNMENT OF INDIA, *Transforming the International Investment Agreement Regime: The Indian Experience,* http://unctadworldinvestmentforum. org/wp-content/uploads/201 5/03/Indiaside-event- Wednesday Model-agreements.pdf.

[20] Nicholas Peacock, *Indian Government Launches International Research Project On The Impact Of Bilateral Investment Treaties On Investment Flows From/To The Country,* MONDAQ (Apr.13, 2019), http://www.mondaq.com/india/x/743572/tax+treaties/Indian+Government+launches+international+research+project+on+the+impact+of+Bilateral+Investment+Treaties+on+investment+flows+fromto+the+country.

[21] Union of India v. Vodafone Group PLC United Kingdom & Anr., 2017 S.C.C Online Del 9930 (India).

[22] Chandni Ghatak, *The Power of National Courts to Injunct Investment Arbitration Proceedings*, CBCL, NLIU (Apr.13, 2019) http://cbcl.nliu.ac.in/arbitration-law/1856/.

landmark ICSID decisions such as *Maffezini* v. *Spain*,[23] which clearly states that the international character of the obligations in these treaties called for the Tribunal to retain the ultimate right to ascertain the scope and meaning of these obligations, Indian Courts are pursuing a rigid approach.

An additional factor within this restrictive local remedies clause is the fact that submitting to arbitral tribunals, namely ICSID, is possible only when both parties agree to the same. This is problematic because India is not party to the ICSID convention which means that submission of a dispute to this type of mechanism becomes practically impossible.[24]

The pertinent question therefore, in light of the aforementioned circumstances is why is India revamping its approach aggressively towards its own investment regime? This underlying answer shall be delved upon in this chapter by the author by first perusing the criticism meted out against India and its infamous local remedies trap followed by an analysis enumerating the possible reasons why India may have been compelled to take such a stance.

Once India announced its Model Bilateral Investment Treaty in 2016,[25] there was a widespread sense of shock over the exhaustion of local remedies clause.[26] The Model BIT mandates exhaustion of local remedies as well as negotiations and consultations before an investor is entitled to initiate arbitrations against the host State.[27] The limitation for initiating a case in the

---

[23] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7 (2000).

[24] Rolland, *supra* note 14 at 392.

[25] 2016 Model Indian BIT, *supra* note 3.

[26] Jesse Coleman, *India's Revised Model BIT: Two Steps Forward, One Step Back?* INVESTMENT CLAIMS (Apr.13, 2019) http://oxia.ouplaw.com/page/India-BIT.

[27] Ashutosh Ray, Unveiled: Indian Model BIT, KLUWER ARBITRATION BLOG, (Jan 18, 2016) http://arbitrationblog.kluwerarbitration.com/2016/01/18/unveiled-indian-model-bit/.

court of law is one year from the date on which the investor first acquires knowledge of the measure in question and knowledge that the investment has incurred a loss as a result. However, a non-applicability situation has been created, namely that if the investor can demonstrate that there are no available domestic legal remedies capable of reasonably providing any relief in respect of the same measure or similar factual matters for which a breach of treaty is claimed by the investor.[28] It is pertinent to note that despite the 260th Law Commission[29] suggesting an amendment of such local remedies clause, the Indian Government did not do so. If it had, the investor would be granted a six months period after which in case the negotiations also have not resulted in any amicable solution there would be the liberty to resort to arbitration.[30] As a result of this inclusion, India has not witnessed a renegotiation of any of its standing BITs' aside from Cambodia since 2016.[31]

Developing countries for very long have viewed BITs to play an active role in attracting foreign direct investment. India also has been part of the same bandwagon since the ushering in of its significant economic reforms in 1991.[32] However, as noted earlier, the fact that India has been subject to various instances of investment claims, the cautious approach has since then been aggressively adopted. Therefore, at this juncture it is crucial to outline India's aversion towards submitting to ICSID jurisdiction. Aside from the obvious factor of India not being a signatory to

---

[28] 2016 Model Indian BIT, *supra* note 3.

[29] LAW COMMISSION OF INDIA, *Analysis of the 2015 Draft Model Bilateral Investment Treaty*, 260th Report, http://lawcommissionofindia.nic.in/reports/Report260.pdf.

[30] *Id* at 44-45.

[31] Kshama Loya Modani, *Why India's Model Bilateral Investment Treaty needs a Thorough Relook?,* BUSINESS STANDARD (Apr.13, 2019) https://www.business-standard.com/article/economy-policy/why-india-s-model-bilateral-investment-treaty-needs-a-thorough-relook-118123100150_1.html [hereinafter '*Kshama*'].

[32] Prabhash Ranjan, *India and Bilateral Investment Treaties – A Changing Landscape*, 29 ICDIS REVIEW-FOREIGN INVESTMENT LAW JOURNAL 419 AT 429 (2014) [hereinafter *'India and BITs'*].

ICSID,[33] the author attempts to highlight certain other factors which possibly illustrate this Indian aversion towards ICSID jurisdiction. The first and foremost factor is that of the inherent inconsistencies in the ICSID jurisdiction.

Why has ICSID jurisprudence been consistently accused of inconsistency? The amendment to its rules in 2006,[34] which had ushered in greater post-award transparency, had also brought to light several inconsistencies.[35] The reason why the UNCITRAL arbitration regime has been cushioned from such criticism is perhaps due to the less volume of cases it handles as well as the heightened emphasis on confidentiality it imposes, unlike the ICSID regime.[36] In her seminal work,[37] Katherina Diel Glighor outlines crucial aspects which impede the consistency goal in international investment arbitration currently. These are namely- lack of a universal legal system, over complexity of international investment arbitration and the ambiguity regarding duty of an arbitrator.[38]

F. LACK OF A UNIVERSAL LEGAL SYSTEM:

Fuller's most basic contention is that law's essential function, the one that a norms system must fulfil in order to deserve the label of law, is to subject people's conduct to the guidance of general rules by which they may themselves orient their behaviour.[39] Matthew Kramer also in his theory mentions situation-specific

---

[33] INDIA AND WORLD BANK GROUP, DEPARTMENT OF ECONOMIC AFFAIRS, https://dea.gov.in/sites/default/files/India_WB_0.pdf.

[34] Tilbe Berengel, *Amendment of ICSID Rules and Regulations*, MONDAQ (Apr.13, 2019), http://www.mondaq.com/turkey/x/703380/Arbitration+Dispute+Resolution/Amendment+of+ICSID+Rules+and+Regulations.

[35] *Id*.

[36] Katherine Diel, TOWARDS CONSISTENCY IN INTERNATIONAL INVESTMENT JURISPRUDENCE: A PRELIMINARY RULING SYSTEM FOR ICSID ARBITRATION, 7 BRILL NIJHOFF 113 (2017) [hereinafter '*Katharina*'].

[37] *Id* at 142.

[38] Katharina, *supra* note 36 at 142-149.

[39] L FULLER, THE MORALITY OF LAW, 33 at 41 (Yale University Press: 1969).

directives must not be a principal means of regulating people's conduct.[40]

The rationale behind this requirement is that the generality of application and address of a system's rules is necessary for the subjects to 'gain a reliable sense of what other people are required and permitted and empowered to do.'[41]

However, we must look at investment treaties as diverse at their core. The fact that countries such as India have over the years released model BITs' indicate that a lot of socio-economic, political motivations unique to each country guide the motivations of a state while formulating such treaties. To then subject the adjudication process involving the interpretation of such diverse treaties is a fool's errand. To corroborate this view one can place reliance on the observation made by the ICSID Tribunal's ruling in *AAPL* v. *Sri Lanka*.[42]

´A BIT is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated(..), whether of international law character or of domestic law nature.'[43] This further indicates that a subjective interpretation becomes inevitable.

G. OVER-COMPLEXITY OF INTERNATIONAL ARBITRATION:

One cannot ignore the fact that the myriad of intricacies of this subject has hindered the setup of a global order in this respect. An intriguing aspect which exacerbates this factor is the

[40] Thomas Schultz, *The Concept of Law in Transnational Arbitral Legal Orders and some of its Consequences*, 2.1 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 59 at 62 (2011).
[41] *Id.*
[42] Asian Agricultural Products Ltd v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award (27 June 1990).
[43] *Id*.

differences within the individual provisions of investment treaties. From varied definitions of investment (which in fact was a highly contentious issue in the controversial White industries case)[44] to the diverse meaning of expropriation across BITs;[45] interpretation has to be extremely case specific. Additionally, the vast number of cases and the widespread nature of the impact such decisions generally have deterred consistency. Although scholars do argue that it is a flimsy excuse given the fact that more complex legal systems such as the EU have been able to achieve a considerable extent of harmonious interpretations; in the opinion of this author, to compare the remainder of the world with EU is unrealistic. EU as a region acts as one cohesive unit, with largely aligned economic and political aims. To contend that there is no dearth of such cohesion amongst the western and the eastern world is utopian.

A perfect example for this lies in the deadlock experienced with the proposed BIT between India and USA. Both countries have different positions regarding the MFN clause's inclusion and this difference has only weakened the possibility of reaching a conclusive treaty.[46] However, despite these diverse variations, it may also be argued that all BITs' at their core discuss and relate to the same fundamental concepts such as fair and equitable treatment.[47] Therefore, consistency in that regard could be urged for. As far as interpretation of a local remedies clause is concerned, given the fact that there is no mandatory requirement for the insertion of such clause in a BIT, the consistent

[44] White Industries Australia Limited v. Republic of India, Final Award UNCITRAL (30 November 2011).
[45] Ritesh Kumar Singh, *Investment Treaties are a Knotty Affair*, THE HINDU (Apr.10, 2019) https://www.thehindubusinessline.com/opinion/investment-treaties-are-a-knotty-affair/article7054030.ece.
[46] Prabhash Ranjan, *Bit of a Bumpy Ride*, THE HINDU (Apr.13, 2019) https://www.thehindu.com/opinion/op-ed/Bit-of-a-bumpy-ride/article14378406.ece.
[47] Katharina, *supra* note 36 at 148.

interpretation of the same becomes challenging. Undoubtedly, if there was a court which ruled clearly on this subject, paving way for the conception of jurisprudence on the subject, or if states were to consistently draft such clauses in a pre-devised manner for it to emulate consistent state practice in order to transform into opinio juris, the situation may have been less chaotic.

## H. THE UNKNOWN TERRAIN OF AN ARBITRATOR – PURELY FUNCTIONAL OR FUNCTIONAL YET PRUDENT?

In her seminal work, Ms. Katharina refers to the ambiguous role of arbitrators or rather the limits of the same to be a hindrance to the trustworthiness of the ICSID system as a whole.[48] A crucial point while considering most of the scholarly discourse surrounding the pitfalls of the ICSID system, concerns itself with the role of the arbitrator. – does the arbitral tribunal act only to resolve the dispute at hand or does it resolve disputes with the objective of setting precedents in a capacity of a law maker?[49]

If we analyse specifically the issue of interpretation of the ELR clause alone, one can see that the arbitrators under an ICSID purview have provided it with little or no significance. Although we can gather that an ELR clause is designated with the importance of being a jurisdictional requirement i.e. its non-satisfaction can result in an ICSID tribunal losing out on jurisdiction on a particular dispute arising out of a BIT, we see an increasing number of cases wherein this importance has been undermined. The former position however has been reflected in decisions such as *Kiliç* v. *Turkmenistan*[50] wherein the Tribunal while interpreting an ELR requirement in the Turkey–Turkmenistan BIT ruled the following:

---

[48] Katharina, *supra* note 36.
[49] Katharina, *supra* note 36.
[50] Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award, (July 2, 2013).

"When such conditions [precedent] are set out in the [dispute resolution provisions] of a BIT (as conditions of the Contracting Parties' offer to arbitrate), which are the very source of an ICSID tribunal's jurisdiction, compliance with them constitutes a jurisdictional requirement, in the sense that a failure to meet the conditions has the consequence that there exists no jurisdiction to be exercised.." [51]

Despite the theoretical understanding as portrayed by the Tribunal in the aforesaid decision, the more popular approach has been to bypass this requirement.

The most landmark decision can be traced to *Abaclat* v. *Argentina*,[52] wherein although the main issue dealt with while assessing the jurisdiction of the ICSID tribunals over mass claims, a considerable portion of the majority's decision would help one examine the arbitrator's mindset when it comes to assessing the importance of an ELR requirement.[53] In the said decision, the Tribunal held that the consequences of non-compliance with a time-limited local litigation requirement would be lopsided ( i.e. in favour of an investor) in keeping with the principles of fairness and justice.[54] Further, the Tribunal supported such reasoning with the stance that insisting on the litigation requirement would unfairly deprive the right of the investor to resort to arbitration. Accordingly, upon a scrutiny of the quality of the local remedies available, it was found that none of those available would have been able to effectively resolve the dispute in 18 months, thus

[51] *Id* at ¶ 6.2.9.
[52] Abaclat v. Argentina, ICSID Case No. ARB/07/05 (Formerly Giovanna A Beccara and Others v. The Argentine Republic).
[53] Abaclat and Others v The Argentine Republic (Formerly Giovanna A Beccara and Others v. The Argentine Republic), ALLEN & OVERY, http://www.allenovery.com/publications/en-gb/Pages/Abaclat-and-Others-v-The-Argentine-Republic-(Formerly-Giovanna-A-Beccara-and-Others-v-The-Argentine-Republic).aspx (2011).
[54] *Id*.

causing an unnecessary burden on the investors.[55] Accordingly, it held that Abaclat's non-compliance with the requirement did not preclude resorting to arbitration.[56]

This shows that arbitrators may tend to completely forego the importance of such clauses in order to keep with other larger requirements of ensuring that the dispute meets speedy resolution. Trends such as this highlight the limited extent to which arbitrators are expected to act as policy makers. Unlike judges of a court, arbitrators adjudicate with the mentality of solely resolving the dispute arisen. Although legal theorists advice that for a sentiment of rule of law to prevail in any legal regime, laws are to be applied consistently[57] which naturally gives rise to the presumption that when the law is less developed, consistent rulings become more necessary.[58] However, to contend that investment arbitration must undergo the same transformation is difficult, given the fact that ad hoc tribunals decide cases and each investment treaty is conceptualised as a result of different factors being at play. This creates a further problem for a country like India, given its own history with the regime.

Another crucial factor is the factor of biasness. Aside from the usual arguments which indicate biasness amongst all international adjudicators which range from policy biases,[59] bias towards the cause of developing or developed countries[60] as the case may be, investment arbitration brings forth another peculiar phenomenon.

---

[55] *Supra* note 53.
[56] *Supra* note 53.
[57] L. Fuller, *supra* note 39.
[58] Gabrielle Kaufmann-Kohler, *Is Consistency a Myth? Precedent in International Arbitration*, ICCA, https://www.arbitration-icca.org/media/4/92392722703895/media012319141360720009500062.pdf.
[59] Paulsson, *Moral Hazard in International Dispute Resolution,* 25 ICSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL, 339 (Jan: 2010).
[60] *Id* at 343.

Unlike even the International Court of Justice ["**ICJ**"] wherein judges hail from diverse regions and countries, the ICSID in particular experiences a different form of bias. This is in some circles known as the '*revolving door bias*.'[61] The jobs of an ICSID arbitrator are not full-time, leaving them to serve either as counsel in other investment arbitrations to either host states or investor companies. Given this factor the likelihood of bias increases.[62]

In addition to the three factors which constitute major concerns for a country like India, to generally be wary of the ICSID regime, there is another separate and important consideration which deserves attention i.e. the 'Third World Approach to International Law'[63] ["**TWAIL**"] toward the ICSID regime.

## I. TWAIL & INVESTMENT ARBITRATION – DOES INDIA PARTAKE IN THE SAME VIEW?

TWAIL, as a school of thought perceives international law as a legal regime which is motivated and dominated largely by the interests of the developed world. Scholars such as Matua have noted that TWAIL as a concept emerges from the view that all of the developed world presumes third world actors to be 'backward' and thus in immense need of intervention from the developed world.[64] This attitude as per TWAIL scholars finds replication even in the investment arbitration regime, wherein it is largely held that the public interest considerations such as the vulnerabilities of a developing economy are largely ignored.

[61] Michael Waibel, Yanhui Wu, *Are Arbitrators Political? Evidence from International Arbitration*, Working Paper, http://www-bcf.usc.edu/~yanhuiwu/arbitrator.pdf (2017).
[62] *Id* at 9.
[63] Makau Matua, Antony Anghie, *What Is TWAIL?*, 94 SOC'Y INT'L L. PROC. 31 (2000).
[64] *Id* at 33.

India specifically, in the opinion of the author has gravitated toward this school of thought since the Dabhol Arbitration.[65] The said arbitration arose as a result of claims being brought against the Government of India in lieu of the India-Mauritius Investment Treaty, by companies including Enron, General Electric amongst others.[66] The interesting part however is that the reason why the International Chamber of Commerce [**ICC]** exercised jurisdiction in this matter was not due to the provisions of the power-purchase agreement but due to the provisions of the shareholder agreement subsisting between the Maharashtra Government and the other companies so involved. Scholars such as Prof. Gus Van Harten have argued that aspects of this arbitration all indicate a certain element of third world bias. This is evidenced by the fact that therein the ICC using a backdoor mechanism has not merely adjudicated the dispute but also gone ahead and commented on the policy decisions being taken by the concerned Maharashtra authorities.[67] Instances such as these go onto show that '*regime bias*' is in fact real and can possibly make institutions such as ICSID itself more prone to it.

Perhaps that is why; we observe a shift in India's approach since the Dabhol arbitration. For example, soon after the Dabhol arbitration, India signed a Free Trade Agreement ["**FTA**"] with Singapore.[68] This particular FTA did not contain clauses related to MFN, fair and equitable treatment etc; thereby exhibiting the paranoia that India began to undergo as far as investment related disputes were concerned.[69]

---

[65] Anupama Katakam, Praveen Swami, *Dabhol and Political Sparks*, THE FRONTLINE: THE HINDU (Apr.8, 2019) https://frontline.thehindu.com/static/html/fl1822/18220400.htm.
[66] John J Kerr, Janet Whittaker, *Dabhol Dispute*, 1 CONST. L. INT'L 17 at 23 (2006).
[67] Gus Van Harten, *TWAIL and the Dabhol Arbitration*, 3 Trade L. & Dev. 131 (2011) [hereinafter *'Gus Van Harten'*].
[68] *Id.*
[69] India and BITs', *supra* note 32 at 427.

The ICSID has particularly shown this type of behaviour to the Latin American region.[70] In the case of *Tecnicas Medioambientales [Tecmed], S.A* v. *United Mexican States*,[71] the ICSID tribunal held that Mexico indirectly violated provisions of the Spain-Mexico BIT by indirectly expropriating the company's interest on account of its refusal to issue the permit to operate a hazardous landfill, without which there is no value associated with the investment made by the concerned company in related properties.[72] Situations such as these have most likely fuelled India's fear of being engulfed by the ICSID trap which has inevitably led to the water tight local remedies provision. In the forthcoming chapter, the author shall now explore the landmark yet elusive model of the EU's ambitious Multilateral investment Court.

## IV. Chapter III: The EU v. ISDS – Make way for a 'Glocal' Court

This chapter shall embark on the study of analysing the monumental decision of the European Union ["**EU**"] to establish a unique system for settlement of investor-state disputes. For doing so, the author shall reflect briefly on the motivations which fuelled EU's need for making such a radical announcement and then move onto discussing the features of such reform.

The EU has been a highly unique region in terms of its diversity and success in managing that diversity. It has for years proven to be a reference model for economic cohesion which acts as a roadmap for emerging as an economic superpower.

---

[70] Antonious R.Hippotyle, *Aspiring for a Constructive TWAIL Approach towards the International Investment Regime*, 207, in INTERNATIONAL INVESTMENT LAW AND DEVELOPMENT – BRIDGING THE GAP, Stephan W. Schill, Christian J. Tams et al, FRANKFURT INVESTMENT LAW SERIES ( 2015).

[71] *Tecnicas Medioambientales [Tecmed], S.A* v. *United Mexican States,* ICSID Case No. ARB/(AF)/002 [hereinafter '*Tecinas'*].

[72] *Id.*

One of the many factors contributing to its rise as an economic super power is the manner in which it has functioned as a single European market.[73] With its common currency, its high level of harmonization in terms of regulations and policies, it has over the years been perceived as this singular unit. Therefore, it comes as no real surprise that a singular unit such as the EU has announced its plan of establishing a multilateral investment court.[74]

In her announcement, Commissioner Malstrom has reiterated that EU has persistently been advocating for reform in ISDS.[75] She states that the motivations behind such move includes the need for ISDS to be of a more permanent nature, wherein adjudication is conducted by the requisite experts within feasible costs.[76] As per the EU, the current ISDS regime has been largely ineffective due to its unpredictable nature, lack of expertise and lack of diverse representation.[77] In a way, we may infer that a suggested body such as this Court could address most of the concerns India has over the current ICSID regime, as highlighted in the previous chapter of this paper.

For the purposes of the present chapter, the author shall undertake her inquiry in a two stage manner. First, the discourse shall be led by understanding the EU's agitation with the ICSID mechanism as a whole. This investigation shall help the reader understand the rationale behind EU's decision to establish an alternate dispute resolution scheme as far as resolution of disputes emerging from BITs' are concerned. Second, the author

---

[73] Bogumila Mucha Lezko, *The European Union as a Global Economic Power*, 19.9 COMPARATIVE ECONOMIC RESEARCH, 30 (2016).

[74] *A Multilateral Investment Court: A contribution to the Conversation about reform of Investment Dispute Settlement*, SPEECH BY EUROPEAN COMMISSIONER FOR TRADE CECILIA MALSTROM, (22 Nov, 2018) http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157512.pdf [hereinafter '*Cecilia Malstrom'*]

[75] *Id.*

[76] Cecilia Malstrom s*upra* note 74.

[77] Cecilia Malstrom s*upra* note 74 at 2.

elaborately studies the framework of this proposed multilateral investment court. In this section, the reader shall obtain a glimpse not only into the proposed working of the new system but also include coverage on the loopholes of this system as well as on its benefits. In keeping with the larger research question to be tackled within the instant research paper, the issue of local remedies and how such Court shall either harmonize or destruct the application of such clause will be discussed.

## A. THE LONG-STANDING CONFLICT OF EU & ICSID:

Countries in Europe (inclusive of Non-EU members) have acted as active pools of investment since the first ever BIT was conceived, namely in form of the BIT between West Germany and Pakistan.[78] This is demonstrative of the significant stake Europe as a region has to play in the heavily interdependent economic world of today. The EU has been a consistent critic of the ISDS system and its attack on the right of states to regulate investor-state disputes In several occasions, the EU has been an advocate of the idea that majority of the arbitral tribunals constituted under BITs' happen to favour the interests of the investors.[79] Additionally, the problem is furthered when such tribunals provide beneficial interpretations of MFN clauses in other BITs' in order to provide leverage to the investor. The fact that the EU has been heavily against decisions such as Maffezini[80] is evidenced even through provisions of its recently enforced BIT

---

[78] THE ENTRY INTO FORCE OF BILATERAL INVESTMENT TREATIES, UNCTAD, https://unctad.org/en/Docs/webiteiia20069_en.pdf.
[79] EU COMMISSION ISSUES CONCEPT PAPER ON ISDS IN TTIP AND BEYOND: PROPOSALS FOR 'PROFOUND REFORM', HERBERT SMITH FREEHILLS, https://hsfnotes.com/publicinternationallaw/2015/05/19/eu-commission-issues-concept-paper-on-isds-in-the-ttip-and-beyond-proposals-for-profound-reform/.
[80] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7 (2000).

with Canada,[81] which has been dealt with greater emphasis in the forthcoming section. Aside from that, one can also trace the roots of such dissatisfaction with ICSID decisions from the instance of the *Micula* v. *Romania*[82] case. In this particular instance, Romania was found to have violated certain provisions of the Sweden-Romania BIT by denying certain tax incentives. While the said BIT was negotiated in 2002, Romania having been inducted into the EU in 2005 was required to amend its state aid rules, which resulted in change of policy.[83] The ICSID tribunal denied interpretation of the treaty in light of EU law by stating that the position prior to induction within the EU was the appropriate position to interpret the treaty by.[84] This has perhaps fuelled the long-standing conflict between EU and ICSID in terms of exercising ultimate supervisory control.

Perhaps in lieu of the above, the EU Commission in early 2015, soon after making the announcement of kick starting its ambitious project of establishing a multilateral investment court ["**MIC**"], released a concept paper[85] discussing its stance on improving dispute resolution mechanisms in future BITs. Therein, concerns such as lack of trust toward the current ISDS schemes of resorting to arbitration via modes such as ICSID have

---

[81] EUROPEAN UNION–CANADA COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (final draft of 29 February 2016), http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ [hereinafter *'CETA'*].

[82] Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20.

[83] THE EUROPEAN COMMISSION PROHIBITS ROMANIA FROM COMPLIANCE WITH AN ICSID AWARD: IMPLICATIONS FOR THE ENFORCEMENT OF INTRA-EU INVESTMENT TREATY AWARDS? HERBERT SMITH FREEHILLS, https://hsfnotes.com/publicinternationallaw/2015/04/16/the-european-commission-prohibits-romania-from-compliance-with-an-icsid-award-implications-for-the-enforcement-of-intra-eu-investment-treaty-awards/.

[84] *Id*.

[85] INVESTMENT IN TTIP AND BEYOND – THE PATH FOR REFORM: ENHANCING THE RIGHT TO REGULATE AND MOVING FROM CURRENT AD HOC ARBITRATION TOWARDS AN INVESTMENT COURT, CONCEPT PAPER, EUROPEAN TRADE COMMISSION, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

been expressed. These concerns include lack of impartiality of arbitrators, the "revolving door" phenomenon therein etc.[86] Interestingly, as the author has highlighted in this paper, these concerns are similar to the concerns raised by India when it comes to resorting to investor-state arbitration.

B. THE PROPOSED MULTILATERAL INVESTMENT COURT:

First and foremost, it is important to note that the EU, although a unified unit, originally provided its members the liberty to negotiate policy matters such as BITs with other nations independently.[87] This autonomous exercise by members underwent a change post the enforcement of the Lisbon Treaty.[88] The said treaty sought to provide a common constitution for the whole of EU, establish an EU Parliament etc; along with empowering the EU as a unit to negotiate BITs as a singular unit.[89] This meant that the EU not only took decisions as a unit on other aspects of investment which are typically covered under a BIT but also took over the dispute resolution clauses incorporated there under.

The first BIT which was conceived after such shift in decision making was the EU- Canada Comprehensive Economic Trade Agreement ["**CETA**"].[90] CETA acted as the first document which presented to the world how EU intended to include investor-state arbitration mechanisms within such treaties. Within CETA, while it acknowledged the usage of investor-state

---

[86] *Id* at 5-7.
[87] Jonas Parello-Plesner, Elena Ortiz de Solarzano, *A Comprehensive Approach to Investment Protection*, 2, EUROPEAN COUNCIL ON FOREIGN RELATIONS, https://www.ecfr.eu/page/-/ECFR82_INVESTMENT_BRIEF_AW.pdf.
[88] THE TREATY OF LISBON, FACT SHEETS ON THE EUROPEAN UNION: EUROPEAN PARLIAMENT, http://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon
[89] *Id*.
[90] CETA *supra* note 81.

arbitration by inserting detailed provisions related to establishment of such MIC,[91] it also inserted specific provisions related to clauses such as MFN which clearly exclude the Maffezini circumvention.[92]

The EU has been consistently working towards providing suggestions for establishing such MIC. It has also lobbied its way through the UNCITRAL Working Group (III) wherein this proposal is currently being discussed.[93] The important features of such MIC[94] have been illustrated in the table below alongside the differences with an ICSID based arbitral tribunal:

| **Multilateral Investment Court** | **ICSID Regulated Tribunal** |
|---|---|
| Permanent bench | Formed on an Ad Hoc Basis |
| Consist of an Appeal Mechanism | Lack an Appeal Mechanism, hence every award is final upon being rendered |
| Constituted by a permanent set of arbitrators, (thereby avoiding the revolving door phenomenon) | Constituted by panel of arbitrators chosen by the investor & host state. These arbitrators are engaged on a part-time basis and for the remaining time otherwise |

[91] CETA, *supra* note 81 at Art 8.29.
[92] CETA *supra* note 81 at Art 8.7.
[93] Martin Dietrich Brauch, *Multilateral ISDS Reform is Desirable: What Happened at the UNCITRAL meeting in Vienna and how to prepare for April 2019 in New York*, INVESTMENT TREATY NEWS, IISD (Mar.16, 2019) https://www.iisd.org/itn/2018/12/21/multilateral-isds-reform-is-desirable-what-happened-at-the-uncitral-meeting-in-vienna-and-how-to-prepare-for-april-2019-in-new-york-martin-dietrich-brauch/.
[94] THE MULTILATERAL INVESTMENT COURT PROJECT, EUROPEAN COMMISSION, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608.

| | |
|---|---|
| | function as counsels, academics etc; thus heightening the biasness fear. |

Although the MIC has been proposed vociferously by the EU, ironically certain inconsistencies between this proposal and internal EU law have come to light.[95] In the much awaited decision in *Achmea*,[96] the Court of Justice European Union ["**CJEU**"] has raised some interesting points regarding the co-existence of EU law and that of the law declared by any other international court.[97] Although the inference to be drawn from the judgment is one which permits the submission of disputes to other international tribunals ( in this case the MIC), it comes with a caveat- such permission shall prevail so long as the autonomy of the EU legal order is respected.[98]

The crucial question to ask at this stage is what would this decision mean for those BITs which exist between EU members and third countries? From an analysis of the Achmea decision it can be inferred that the CJEU found no incompatibility with EU law primarily because it said that EU case law has limited role in commercial arbitration because in BITs parties divest their own courts of jurisdiction over certain range of disputes.[99] Herein

[95] Szilard Gaspar Szilgayi, *It is not just about Investor-State Arbitration: A Look at Case C-284/16, Achmea BV*, EUROPEAN PAPERS, http://www.europeanpapers.eu/en/europeanforum/it-is-not-just-about-investor-state-arbitration-achmea-case [hereinafter '*Szilard*'].
[96] *Id*.
[97] Guillaume Croisant, *CJEU Opinion 1/17- AG Bot Concludes that CETA's Investment Court System is Compatible with EU Law*, KLUWER ARBITRATION BLOG (Mar.21, 2019) http://arbitrationblog.kluwerarbitration.com/2019/01/29/cjeu-opinion-117-ag-bot-concludes-that-cetas-investment-court-system-is-compatible-with-eu-law/.
[98] *Id*.
[99] Szilard *supra* note 95.

arises an anomaly- given that the *Achmea*[100] decision requires that the legal autonomy of the EU order to be respected for no chance of incompatibility to arise, BITs cannot then simply divest EU countries or the investors the choice of submitting disputes to their own domestic courts.[101] An ELR clause then becomes the only way possible to circumvent this possibility of incompatibility. This aspect requires attention in the EU's working plan for the MIC which currently finds no mention.

Undoubtedly, the MIC project initiated by the EU is an ambitious proposal. However, there is no guarantee that it quells all the doubts experienced by countries such as India over ICSD. Additionally, the current framework of this ambitious project also showcases the long road ahead in terms of renegotiating treaties with third countries specifically. Plus, at best the current proposal of adjudicating investor disputes by an MIC acts as a fork in the road clause at best, with no reference to the exhaustion of local remedies. While ICSID makes it clear that the insertion of such clause is not mandatory,[102] the EU proposal does not replicate nor suggest an alternative to such approach.

Perhaps, a useful feature to make such a proposed court more efficient and less subject to frivolous claims being submitted would be to adopt the CJEU's jurisdiction over hearing and passing preliminary rulings.[103] This shall not only mean that disputes could receive a preliminary hearing to ascertain if the dispute is of real merit and/or poses substantive questions of law but may also increase the possibility of creating solid and consistent jurisprudence, in its advisory jurisdiction capacity.

---

[100] Szilard, *supra* note 95.
[101] Szilard, *supra* note 95.
[102] Szilard, *supra* note 95.
[103] Art. 177, EEC TREATY, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E234:EN:HTML.

This hesitation toward adopting the approach as seen under CETA has been widely expressed by the Indian Ministry of Commerce in 2017 itself, when it summarily rejected such idea.[104]

## V. Chapter IV: Exploring Options to Rectify the Indian Situation

The Indian scheme as far as BITs are concerned has traditionally been centred around the idea that investments made in India must be protected to the maximum level, as can be seen with the many provisions relating to assurances provided in its earlier version of the Model BIT released in 2003[105] (which includes provisions related to MFN[106], imposing no ELR[107] etc). This shows that from 2003-2015, India perceived itself to be a rule-taker in international investment.[108] Therefore, it becomes noteworthy to see the shift that India has undergone with its approach to BITs generally. India has off late emerged as a rising economic super power with its growth trajectory on the consistent rise,[109] thus giving it the luxury of now becoming a rule-maker instead. This transition is visible in its revised Model BIT which has been discussed in the earlier parts of this paper. Perhaps India's increasing significance in the world economy is providing it with

---

[104] INDIA REJECTS ATTEMPTS BY EU, CANADA FOR GLOBAL INVESTMENT AGREEMENT, THE HINDU (Mar.28, 2019), https://www.thehindu.com/business/India-rejects-attempts-by-EU-Canada-for-global-investment-agreement/article17083034.ece. [hereinafter '*India rejects*'].
[105] Indian Model Text of Bilateral Investment Promotion and Protection Agreement (2003) https://www.italaw.com/sites/default/files/archive/ita1026.pdf.
[106] *Id* at Art 4.
[107] Szilard *supra* note 95.
[108] Prabhash Ranjan, *India's Bilateral Invesmtent Treaty Program – Past, Present and Future*, in KAVALJIT SINGH & BURGHADARD IGLE, RETHINKING BILATERAL INVESTMENT TREATIES-CRITICAL ISSUES AND POLICY CHOICES, 106 (2016).
[109] *Id*.

the leverage to stress on reforms within the ISDS mechanisms, including the emphasis on the ELR rule.[110]

An analysis of India's Model BIT 2015 shall indicate that India has been treading a contradictory path; on one hand its BIT has restrictive dispute resolution clauses whereas its new arbitration regime strives to make India a desirable location for international commercial arbitration.[111] In this chapter, the author shall embark on a concluding discourse which attempts to explore the possible options at hand for India when it comes to revamping its dispute settlement clause within BITs. As illustrated in the earlier chapters, India has burnt its fingers with the usual Investor-State arbitration mechanism, which explains the heavy emphasis on the ELR rule. For the purposes of the discourse at this particular juncture, the author shall delve into the alternatives India may pursue as against the current restrictive provision on ELR.

## A. LESSONS FROM THE INDIA-BRAZIL BIT:

In early 2016, reports of India and Brazil having concluded negotiating a BIT were floated.[112] The highlights of the said BIT were that it did away with the traditional ISDS mechanisms incorporated within the majority of BITs. Instead, the states followed the approach undertaken by Brazil in its Model BIT. Therein, it proposed formally for a state-state arbitration which would first be preceded by a Joint Committee Report ( acting as an ombudsman) that would take into account the dispute, the nature and standing of the affected party ( i.e. either the

[110] India rejects, s*upra* note 104.

[111] Jonathan Stoel, Michael Jacabson, *India's New BIT and Arbitration Law Send Mixed Signals to Foreign Investors*, HOGAN LOVELLS (Mar.25, 2019) https://www.hlregulation.com/2016/01/19/indias-new-bit-and-arbitration-law-send-mixed-signals-to-foreign-investors/.

[112] INDIA REVAMPS ITS BILATERAL INVESTMENT TREATY REGIME, INTERNATIONAL ARBITRATION LAW, http://internationalarbitrationlaw.com/blog/india-revamps-its-bilateral-investment-treaty-regime/.

Contracting State or an affected investor, as the case may be).[113] If the Joint Committee Report does not lead to an amenable and mutually agreeable solution, either contracting party may submit to an arbitral institution for pursuing arbitration.[114] Although this means that the ELR clause as envisaged within India's Model BIT finds no mention in this reported negotiation, it means that India is more amenable on having a framework which allows it to have some type of preliminary ruling.

The Joint Committee ["**Committee**"] as envisaged under the Brazilian model[115] calls for such committee to be constituted by members from the Governments of both contracting parties. These members shall not only determine the scheme of any dispute but also engage in discussion over other aspects including opportunities for mutual investment etc. If we look also at some of the BITs Brazil shares with countries such as Ethiopia,[116] the said provision related to the mandate of such committee also provides for engagement with stakeholders of civil society of both contracting parties. This ensures that inclusion of public interest considerations, a crucial factor currently missing under the present day ISDS regime, is being included in the process of investment related dispute settlement. For a developing economic nation such as India, these types of consideration are of relevance.

This goes onto show that similar to the way in the World Trade Organizations ["**WTO**"] Doha talks of 2001, wherein concerns of developing countries especially those related to public interest

---

[113] See Art.23 of Bilateral Investment Treaty between Brazil and Ethiopia, https://investmentpolicyhub.unctad.org/Download/TreatyFile/5717 [hereinafter *'Article 23']*

[114] *Id* at Art. 24; *See* also INDIA AND BRAZIL CONCLUDE NEGOTIATIONS OF BILATERAL INVESTMENT TREATY, HERBERT SMITH FREEHILLS, https://hsfnotes.com/publicinternationallaw/2016/12/05/india-and-brazil-conclude-negotiations-of-bilateral-investment-treaty/#more-6033.

[115] Article 23 *supra* note 113.

[116] Article 23 *supra* note 113 at ¶ d.

were largely considered,[117] the present day ISDS regime perhaps through the UNCITRAL working groups needs to take the same direction in its discourse.

The takeaway from this type of a negotiated BIT goes onto show a preferable solution to India which can allow it to tone down its ELR requirement. This has found support even in the recent high profile Sri Krishna Committee report which taking on the example of the Brazil scenario itself has suggested that India stick to this mechanism so as to avoid submission to current day ISDS mechanisms as a whole.[118]

### B. PURSUING A MULTILATERAL INVESTMENT COURT MECHANISM – IS IT INDIA'S YELLOW BRICK ROAD?

As discussed in the previous chapter of this paper, the question of following EU's path of establishing a MIC type of forum has been looming over India for long. The purpose of every investment treaty varies, depending on the contracting parties. India and EU for long have been attempting to emerge as significant partners for one another and with the recent turn of events revolving around BREXIT, it might just be a possibility.[119] However, developing an entirely new regime is a different ball game altogether. It is important to realise that for the establishment of such court, not only bilateral negotiations have to separately take place but also negotiations at world forums such as UNCITRAL etc; are required. As is already taking place, ISDS

---

[117] C. Rammanohar Reddy, *What the Doha Development Agenda is all About?* THE HINDU (Apr.2, 2019), https://www.thehindu.com/2001/11/16/stories/0616000c.htm.

[118] REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA, 108, http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

[119] Daniel Boffey, *Brexit could help EU strike free trade deal with India, MEPs believe*, THE GUARDIAN (Feb.27, 2019) https://www.theguardian.com/politics/2017/feb/23/brexit-could-help-eu-strike-free-trade-deal-india-meps.

mechanisms are being discussed in the UNCITRAL's current working group (III),[120] however for it to materialise is going to take a considerable amount of time. ISDS reform of any kind is a mammoth task. Not only has the complexity of treaty negotiations increased manifold simply because of the number of parties generally involved but also due to the sensitivities, political & otherwise of the issues at stake.[121] Further, experience has made States more mindful of the implications of international agreements and more cautious to the consequences of their application.[122]

Perhaps the consequence of such caution is the inevitable success of regimes such as ICSID wherein States are provided at least procedural certainty.[123] Aside from the hassle of creating a viable framework which is consistent with the needs of the global economic order as such, convincing states to submit to the jurisdiction of such a court is another difficulty.

At the global level, the two main bodies arbitrating disputes involving states are Permanent Court of Arbitration ["**PCA**"] & ICSID. Participation in these two bodies is not complete.[124] Neither ICSID nor PCA enjoy *ipso facto jurisdiction*. Compulsory jurisdiction for both these bodies would depend upon the language of the investment treaty concerned.[125]

---

[120] UNCITRAL, WORKING GROUP III: 2017 TO PRESENT: INVESTOR STATE DISPUTE REFORM, http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html.
[121] EDUARDO ZULETA, CREATING A STANDING INTERNATIONAL INVESTMENT COURT IN JEAN E. & ANNA JOUBIN, RESHAPING THE INVESTOR STATE DISPUTE SETTLEMENT SYSTEM- JOURNEYS FOR THE 21ST CENTURY, 4 NIJHOFF INTERNATIONAL INVESTMENT SERIES, 403 at 404 (2015) [hereinafter '*Eduardo*'].
[122] *Id*.
[123] Eduardo, s*upra* note 121 at 410.
[124] Cesare PR Romano, *The Shadow Zones of International Judicialization* in CESARE ROMANO, KAREN J, YUVAL SHANY, THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION, 95 (2015) [hereinafter *'Cesare'*].
[125] Cesare, s*upra* note 124 at 95.

Although ICSID and WTO as bodies represents the confluence of trade and investment being dealt as issues, the discrepancies in their memberships is noteworthy. Notable ICSID absences are: Canada, EU (Poland), several economic super powers to be (including India) –Brazil, Mexico, South Africa & Russia; a populist trio of Latin American nations such as Venezuela, Bolivia and Ecuador etc.[126] Trends such as these indicate that generally the developing countries have always abstained from completely submitting to institutions which they believe represent some type of cultural elitism or disregard for the needs of the third world. As discussed earlier in Chapter 3 under the TWAIL approach, we sense this fear amongst the developing world and such purposeful absences indicate that such fear is a persisting one. Therefore, if India went about lobbying in favour of the MIC it would not only be contradictory but also counter-productive. There is no real guarantee that the MIC shall not turn out to be as criticised a mechanism as the usual ICSID measure. Take for instance, the issue of selecting arbitrators. The MIC provisions as incorporated under CETA indicate that selection of such permanent bench shall be undertaken by a 'Trade Committee.'[127] That being said, there is no elaboration on how this committee shall base its decision, thereby bringing forth once again the age-old concern of biasness.

Further, as far as tackling the issue of inconsistency is concerned, there is no specific guarantee that under such system as well this challenge can be completely overcome. Overcoming this would mean creating a centralised forum wherein all investment

[126] *Id,* at 96.

[127] *Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal,* AMERICAN BAR ASSOCIATION (Mar.18, 2019) https://shop.americanbar.org/PersonifyImages/ProductFiles/262739281/6-Proposed%20EU%20Investment%20Court.pdf. [hereinafter '*ITWG*'].

arbitration cases have to be heard,[128] akin to say what the International Court of Justice does for matters of public international law. Doing so would mean going back to the first hindrance highlighted earlier, i.e of getting nations to submit to such a framework. Additionally, even if such permanent structure is miraculously set up without any obstacles, having only one panel to judge all investment cases is impossible.[129] Additionally, for there to be consistency, investment treaties would all have to be read in a streamlined and uniform manner, which as is known is a futile exercise as each BIT is unique in terms of its context and drafting language.[130] Plus, the direct submission of every dispute to such a setup would not differ at its core from the ICSID mechanism, against which India has incorporated a rigid ELR requirement in the first place. Thus, pursuing such an option becomes more or less futile.

### C. LESSONS FROM CHINA – A POSSIBLE ROADMAP FOR INDIA AS WELL

China has been consciously chosen as a comparable jurisdiction for the purposes of the larger research question of this paper. Given its own remarkable emergence as a decisive player in the world economic order today, its involvement in the investment world is certainly not going to diminish in the near future. Traditionally as well, the boom in China's economy can be largely attributable to its open door policy[131] and other initiatives taken to attract foreign direct investment.[132] Aside from this similarity with India, the Chinese approach to arbitration has also been somewhat similar. China has been working greatly on

---

[128] Stephan Wilske, Raaesa Rawal, Geetanjali Sharma, *The Emperor's New Clothes: Should India Marvel at the EU'S New Proposed Investment Court System*, 6 I.J.A.L. 93 (2018) [hereinafter *'Wilske'*].
[129] *Id* at 94.
[130] Wilske *supra* note 128 at 94.
[131] Hongling Ning, Tong Qi, *Multilateral Investment Court: The Gap Between EU and China*, 156 CHINESE JOURNAL OF GLOBAL GOVERNANCE, 57 (2018).
[132] *Id*.

strengthening its image as an international arbitration hub,[133] similar to how India has been working toward that goal.[134] In wake of ISDS reform taking the world investment arena by storm, China has been working enthusiastically toward strengthening its own reputation as a suitable jurisdiction for resolving investor state disputes. In 2016, the Schenzen Court of International Arbitration ["**SCIA**"] revised its arbitral rules to include under its purview even foreign claims[135] and has to that effected entered into a cooperation treaty with ICSID in 2018.[136] India too recently has introduced the Mumbai Centre for International Arbitration ["**MCIA**"][137] as well as the New Delhi International Arbitration Centre Bill.[138] Although the MCIA Rules 2016[139] do not have a provision specifically allowing submission of foreign claims etc; if the recent trends of India to attempt to emerge as a budding hub for international commercial arbitration are anything to go by, this could be a plausible approach to slowly follow. Undoubtedly, the infrastructural and logistical capacities for India to take up such disputes are not as sophisticated yet. However, through a gradual attempt and foresightedness the same is not impossible. Another remarkable aspect about the Chinese plan is its initiative to

[133] Maarten Roos, Yang Limeng, *New Developments to Impact International Arbitration in China*, MONDAQ (Apr.11, 2019), http://www.mondaq.com/china/x/686054/International+Courts+Tribunals/New+developments+to+impact+international+arbitration+in+China.

[134] Huiping Chen, *China's Innovative ISDS Mechanisms and its Implications*, 112, A.J.I.L UNBOUND 209 (2018).

[135] Shenzhen Court of Int'l Arbitration, 2016 Arbitration Rules art. 2(2) (effective Dec. 1, 2016) [hereinafter '*Shenzhen'*]

[136] China Int'l Commercial Court, Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions (June 27, 2018).

[137] MCIA Rules, 2019 (India), http://mcia.org.in/wp-content/uploads/2016/05/MCIA-Rules_2017.pdf.

[138] Binny Susan, Neha Sharma, *New Delhi International Arbitration Centre: Building India into a Global Arbitration Hub*, KLUWER ARBITRATION BLOG (Mar.1, 2019) http://arbitrationblog.kluwerarbitration.com/2018/05/04/new-delhi-international-arbitration-centre-building-india-global-arbitration-hub/.

[139] MCIA Rules, 2019 (India), http://mcia.org.in/wp-content/uploads/2016/05/MCIA-Rules_2017.pdf.

establish joint arbitration centres with partners it already shares BITs with. For instance, the China-Africa Joint Arbitration Center ["**CAJAC**"] which was set up in 2015; the Chinese government and fifty African countries established this venture at the Johannesburg Summit and the Sixth Ministerial Conference of the Forum on China-Africa Cooperation.[140] CAJAC has set up five centers: three in China (Shanghai, Beijing, and Shenzhen) and two in Africa (Johannesburg and Nairobi). In these locations, CAJAC will provide arbitration, mediation, and conciliation services that bypass the jurisdiction of local courts, local arbitration institutions, and other international arbitration institutions.[141]

The aforesaid directly represents an alternative to inserting a restrictive ELR clause. Given that the impact of investment treaties is far-reaching by building partnerships such as the one illustrated the conflicting issues of ELR and obtaining a fair and mutually agreeable solution may be solved more easily.

## VI. Concluding Remarks

The exhaustion of local remedies is a difficult point, which often leads to unnecessary and otherwise easily avoidable clashes between contracting parties. Although matters of sovereignty and protecting national interests are crucial, their insertion can run a risk of deterring investment to a large extent. The standstill Indian BIT negotiations have reached[142] since the adoption of the Model BIT in 2016 containing a difficult ELR requirement amongst other problematic clauses indicates the need for reform.

As assessed in the course of this paper, the factors which cause India and other similarly placed economies to shy away from completely submitting to ICSID or other similar forums are fairly

[140] Shenzhen *supra* note 135.
[141] Shenzhen supra note 135.
[142] Kshama *supra* note 31.

same to a large extent. In keeping with this commonality, India could perhaps lead the way in forming strategic partnerships with similarly placed nations. Two plausible options were presented in the previous section of the paper, namely: the India-Brazil BIT approach and the Chinese mantra. The author would recommend the blending of both these approaches. While the latter is certainly far sighted in the sense that it not only aims to internally strengthen arbitration mechanisms and domestic institutions but also foster long standing partnerships, the Brazil example also indicates a more immediate solution. The Brazil model allows India to not only foster relationships by creating the Joint Committee for purpose of acting as an ombudsmen or providing preliminary rulings to ascertain and possibly resolve disputes amongst contracting parties, it also allows India to depend on the logistical framework readily available via the secretariat of the ICSID. The Chinese mantra calls for detailed and long-term planning, and although highly desirable, it will not be able to deal with immediate needs.

As far as the appeal mechanism is concerned, although the MIC framework provides for a permanent appellate body to be instituted, the dubious standards by which such permanent bench shall be chosen casts too many doubts for it to be the ideal way to go about meeting this requirement.[143]

Additionally, it is important for the Indian Government to realise that inclusion of such a strict ELR provision causes a detrimental effect, specifically in instances wherein urgent relief may be required by small and medium size investors who have already suffered (potentially significant) losses on their investment.[144] Further, local remedies also create a greater liability on the concerned host state, given that in any case if the matter were to be ultimately heard by an arbitral tribunal, the remedies so

---

[143] ITWG *supra* note 127.
[144] Wilske *supra* note 128 at 97.

exercised will be under the scrutiny of the 'fair and equitable' treatment test. By simply doing away with the MFN clause etc; as India has in its Model BIT,[145] we cannot guarantee that a tribunal may still not find a ruling that goes against it. This kind of circumvention therefore, is not fool proof.

The ultimate solution therefore lies in dedicating more policy attention toward creating innovative mechanisms to reform ISDS generally. Although the Srikrishna Committee Report[146] has highlighted India's favorable attitude towards suggestions such as sticking solely to a state-state arbitration model or a MIC model,[147] this author humbly submits that the need of the hour is to currently find ways of flexing the current ISDS framework itself. Starting an entirely new system from scratch is an extremely slow and arduous task. If pursued, it can be certainly done alongside finding and executing effective solutions which work sustainably within the existing framework itself.

---

[145] 2016 Model Indian BIT, *supra* note 3.

[146] REPORT OF HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA, LEGAL AFFAIRS OF INDIA (30 July 2017), http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

[147] Rohit Bhat, *Will India Do away with Investor-State Arbitration?* KLUWER ARBITRATION BLOG (Mar.2, 2019) http://arbitrationblog.kluwerarbitration.com/2017/08/23/will-india-away-investor-state-arbitration/.

Vol. 11 Feb 2020

# INDIA'S PROSPECTS ON THIRD PARTY FUNDING IN ARBITRATION: CROSS JURISDICTIONAL APPROACH AND RECOMMENDED POLICY FRAMEWORK

*Aditya Sethi*[*]

**Abstract**

*Third-party funding, as a concept, affords a win-win situation, principally for the disputants on one hand, especially favouring the under-privileged party from the perspective of access to justice and providing an opportunity for effective representation against a well-funded party; and on the other hand, for the investors, by offering relatively safer and favourable returns for their regulated funding of the arbitration process.*

*The exponential rise in the litigation and arbitration claims being financed by third-party financiers has brought about perhaps the most influential trend in the civil justice system. The successful models in Singapore and Hong Kong are an inspiration for instituting regulatory measures in the Indian context. Consequently, a need is felt to institute a strong regulatory framework to safeguard the infallible image and reputation of the Indian judicial system against the potential abuse by the unscrupulous third-party financiers who fund a dispute purely with financial profit in mind. In effect, the regulatory mechanism on the subject calls for concrete rules on third-party funding from outside the country, the reinforcement of public policy objectives, and the integrity of the judicial system.*

*While forging conducive conditions in the Indian context, the regulatory framework must be initially customized to the Indian environment to stabilize the system. Later, with evolution of the system with time, there is a definite requirement to adapt to global benchmarks to unequivocally pave way for third-party funding mechanism as an effective method to benefit the Indian citizens and also India's global*

[*] The author is a student at School of Law, Christ University, Bangalore.

*reputation as a prominent seat and venue for international arbitration. In this significant backdrop, this paper seeks to analyze the regulatory regime adopted by established jurisdictions, the prevailing challenges, and recommend a plausible policy framework on India's position on third-party funding in arbitration.*

'*Third Party should be encouraged as it empowers parties who can't afford the procedures but have a right to justice*' – Mark Bravin

## I. Introduction

Third party funding as a phenomenon is becoming mainstream in both international arbitration and litigation communities. It is a method of financing a particular dispute in which an entity is not a party to a particular dispute, however, funds another party's legal fees or pays an order, award or judgment rendered against that party. The discourse around third party funding across jurisdictions worldwide is largely focused around domestic litigation but in the context of international arbitration, it is usually classified as a subset of litigation funding. There are nuanced contours of third-party funding that advance on a different paradigm and therefore, merit a different kind of analysis.

The exponential rise in the litigation and arbitration claims being financed by third-party financiers has brought about perhaps the most influential trend in the civil justice system as highlighted by the ICCA-Queen Mary Task Force in its findings on policy issues with respect to third-party funding. A favorable response to third-party funding in the Justice Srikrishna Committee Report on Institutionalization of Arbitration in India has certainly given impetus to the prospect of a probable transition towards formally permitting third-party funding in international commercial arbitration in India. At the same time, a need is felt to institute a strong regulatory framework to safeguard the infallible image and reputation of the Indian judicial system against the potential abuse

by the unscrupulous third-party financiers who fund a dispute purely with financial profit in mind. In effect the regulatory mechanism on the subject calls for concrete rules on third-party funding from outside the country, the reinforcement of public policy objectives and the integrity of the judicial system.

In the Indian context, the regulatory mechanism on third-party funding is still very nascent. The models in Singapore, Hong Kong, and United Kingdom have a fairly evolved regulatory mechanism in place which is under constant review. The need of the hour is to embrace the best practices world over in third-party funding for a satisfactory and responsive justice system at the grassroots level, espousing to make India a preferred seat of international commercial arbitration propelled by the third-party funding regime.

This paper intends to explain the framework of third-party funding and contemplate funding arrangements in international arbitrations in light of their unique attributes by examining the key provisions across established jurisdictions.

To arrive at a logical conclusion, the approach to the study is aimed to be dealt cogently by a pragmatic assessment of crucial sub-sets and fundamentals on the subject as follows:

- Assessment of the cross jurisdictional approach to the subject from the perspective of best practices and trends evolved globally.
- Overview of the current dynamics of third-party funding in arbitration in India.
- Appreciation of issues and challenges for adopting a viable regulatory mechanism for India.
- Recommendations on enunciating a viable policy framework for third-party funding in arbitration in India.

## II. Cross Jurisdictional Approach

The legality of third-party funding in international arbitration is often contested owing to a lack of judicial consensus on the propriety of such agreements. If third-party funding is regarded as illegal at the seat of arbitration, the funded party seeking interim measures from the courts of the seat may be sued by the respondent for the torts of champerty and maintenance. Also, on the prospect of challenging the award, the respondent may contend the involvement of a third-party to be a ground for setting aside the award under the public policy exception. With momentous developments in technology and markets witnessing significant investments, the inevitable benefits of third-party funding cannot be denied.[1] It is important that this mechanism is promptly regulated to ensure that stakeholders are adequately protected and the legitimacy of arbitration as a mechanism for dispute resolution is maintained.[2] Toward this end, an analysis of the best practices and trends evolved in prominent seats of arbitration globally, offers valuable inputs.

### A. UNITED KINGDOM

The doctrines of maintenance and champerty originated in the ancient Greek and Roman legal systems, evolved in the common law system of England, and spread across other jurisdictions largely though the far reaching British empire.[3] Champerty can be defined as the act of providing financial assistance with the expectation of receiving money recovered if the party wins.

---

[1] Varun Mansinghka, '*Third Party Funding in International Commercial Arbitration and its Impact on Independence of Arbitrators: An Indian Perspective*', in Michael Pryles and Philip Chan (eds), Asian International Arbitration Journal, Volume 13, Issue 1 (Kluwer Law International), pp. 97-112.

[2] Khushboo Hashu Shahdadpuri,'*Third Party Funding in International Arbitration: Regulating the Treacherous Trajectory*', in Michael Pryles and Philip Chan (eds), Asian International Arbitration Journal (Kluwer Law International 2016), Volume 12 Issue 2, pp. 77-106.

[3] Douglas R. Richmond, '*Other People's Money: The Ethics of Litigation Funding*', 56 Mercer L. Rev., 652-655 (2005).

Maintenance is an umbrella term encompassing champerty in which the funder seeks profit from the client's successful claim.[4] Different nations have adopted varied approaches in dealing with these doctrines. Some of the nations have deemed them to be obsolete while others have revived them in recent years to evaluate the desirability and legality of third-party funding arrangements.[5]

The courts in the United Kingdom have been preclusive in permitting third-party funding on the grounds of raising unethical and unmeritorious claims. Though third-party funding agreements are *per se* not opposed to public policy, prohibition on contingency fees is extended to arbitration proceedings.[6] The House of Lords in *Giles v. Thompson*[7] observed that it would be inappropriate to extend the doctrine of champerty to international arbitration as it would mean extending a public justice system doctrine to a private judicial system. In 1998, the doctrines of champerty and maintenance were categorically extended to arbitration. In *Bevan Ashford,*[8] the Vice Chancellor Sir Richard Scott stated that the prohibition on contingency fees does not extend to arbitration.

The modern sense of third-party funding in international arbitration gained significant momentum with legislative changes such as the Legal Services Act ["**LSA**"] in 2007. The LSA opened doors to studying and improving litigation funding. The Legal Services Board[9] constituted the first tier of the new regulatory scheme addressing the issue of liability of costs orders and

---

[4] Ari Dobner, '*Litigation for Sale*', 144 U. Pa. L. Rev., 1543-1546 (April 1996).
[5] Richard Lloyd, '*The New, New Thing, The Am, The Law*', (Supplement), 22-26 (Jun. 1, 2010).
[6] Kshama Loya Modani and Vyapak Desai, "*Asia No Longer 'Third' To Third Party Funding – Meets The Financing World of Arbitration*", Digital Newsletter, 2017, Kuala Lumpur Regional Arbitration Centre, December 2017.
[7] Giles v. Thompson, [1994] 1 AC 142.
[8] Bevan Ashford v. Geoff Yandle, [1998] 3 WLR 172.
[9] Legal Services Act 2007, Section 3.

assigning causes of action with specific detail.[10] In *Assar Oilfield*,[11] the court recognized the discretion of the arbitral tribunal and held that costs of funding a legal proceeding may be recovered on the terms agreed with the funder in addition to the award rendered by the tribunal. The extent to which a third-party funder would be liable for the costs of the other party would depend upon the degree of financial interests and the control exerted by the funder in the legal proceeding.[12] However, in an arrangement where the funder is not expected to receive any return, the funder will generally not be held liable for the costs of the funded party in the event that the claims are unsuccessful.[13]

While considering the limits on the extent of a funder's adverse cost liability, the courts have relied on *Arkin*,[14] in which the claimant pursued his claim to judgment because of being supported by a litigation funder. The defendants upon successfully defending the claim sought an order directing the funder to pay the entire costs. Lord Phillips MR observed that commercial funders should only pay costs to the opposing parties to the extent of funding provided by them (Arkin cap).[15] However, this cap would apply only when the funder finances a part of the costs of litigation.

---

[10] Sir David Clementi, Review of the Regulatory Framework for the Legal Services in England and Wales, Final Report, December 2004, (last accessed on 15 October 2019), available at: http://www.avocatsparis.org/Presence_Internationale/Droit_homme/PDF/Rapport_Clementi.pdf

[11] Assar Oilfields Services Ltd v. Norscot Rig Management Pvt. Ltd., (2016) EWHC (Comm) 2361.

[12] Mary Jordan et al, '*Why Third Party Funding is on the Rise in England and Wales*', Global Arbitration News, 27 February 2018, (last accessed on 10 September available at :https://globalarbitrationnews.com/why-third-party-funding-is-on-the-rise-in-england-wales/#_ftn2.

[13] Hamilton v. Al Fayed, [2002] EWCA Civ. 665.

[14] Arkin v Borchard Lines Ltd. and Others, [2005] EWCA Civ 655.

[15] *At What Costs*? A Lovells Multi-Jurisdictional Guide to Litigation Costs, 74, (last accessed on 07 August 2019), available at: http://www.chrysostomides.com/assets/modules/chr/publications/16/docs/LitigationCostsReport.pdf

*The Court of Appeal* in *Excalibur Ventures LLC,*[16] ordered the third-party funder to pay costs of the other side on an indemnity basis on the premise that '*he has funded proceedings substantially for his own financial benefit and has thereby become a real party to the litigation*' and so '*it is ordinarily just that he should be liable for costs if the claim fails.*' Lord Justice Tomlinson expressed the principle that '*justice will usually require that, if the funded proceedings fail, the funder must pay the successful party's costs.*' The Court of Appeal further ruled on two important propositions. *Firstly*, a commercial funder would be required to contribute to the defendants' costs on the same basis as the funded claimant and; *secondly*, an order for adverse costs would be made not only against the funder mentioned in the litigation funding agreement but also in favour of a third-party who contributed funds and benefitted from the success of the proceedings.[17]

The prospects of third-party funding gained prosperous momentum post the decision in *Arkin v. Borchard*.[18] The Legal Services Act, 2007 and the efforts of Lord Justice Jackson opened the way to study this question in greater depth.[19] In 2009, Lord Justice Jackson considered the question of whether common law doctrines of champerty and maintenance should continue. The results of the *Final Report* suggested that eliminating these doctrines would cause inadvertent consequences to the interested parties. Lord Jackson, however, recommended that the laws must be modified to reflect if the funder allows any form of regulation

---

[16] Excalibur Ventures LLC v. Texas Keystone Inc. & Ors., [2016] EWCA Civ 1144.

[17] LESLIE PERRIN, THE THIRD PARTY FUNDING LITIGATION LAW REVIEW, (2ND ED., LAW BUSINESS RESEARCH LTD., LONDON 2018).

[18] Melanie Willems, Third Party Funding: A Paper for the Society of Construction Arbitrators (London: Howrey LLP, 2009).

[19] LISA BENCH NIEUWVELD AND VICTORIA SHANNON SAHANI, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION, (2ND ED. KLUWER ARBITRATION, 2017).

that may be agreed upon, and then its agreement will not be overturned on grounds of maintenance and champerty.[20]

Third-party funding in the United Kingdom is self-regulated by the Association of Litigation Funders ["**ALF**"] which covers capital adequacy requirements for funders and rights regarding termination and control proceedings in any given investment situation.[21] The Code of Conduct for Litigation Funders ["**Code**"] provides provisions restricting the ability of the funder to withdraw from a continuing arbitration[22] subject to certain conditions. The Code mandates that reasonable steps must be taken to ensure that the funded party receives independent advice on the terms of the Litigation Funded Agreements ["**LFAs**"],[23] to ensure that no steps are taken which influence the funded party's lawyer to act in breach of their professional duties,[24] to ensure that the funder does not influence the funded party's lawyer to cede control over the proceedings of the dispute[25] and maintain adequate financial resources to meet their funding obligations.[26]

There remain unaddressed questions as to whether a voluntary code regulating third-party funders would be sufficient to regulate the market if more third-party funders enter the market. A sub-

---

[20] Review of Civil Litigation Costs: Final Report 124.

[21] MARY JORDAN ET AL, '*WHY THIRD PARTY FUNDING IS ON THE RISE IN ENGLAND & WALES*', GLOBAL ARBITRATION NEWS, 27 FEBRUARY, 2018, (LAST ACCESSED ON 10 SEPTEMBER 2019, AVAILABLE AT: https://globalarbitrationnews.com/why-third-party-funding-is-on-the-rise-in-england-wales/.

[22] LORD JUSTICE JACKSON, THIRD PARTY FUNDING OR LITIGATION FUNDING, SPEECH DELIVERED AT THE SIXTH LECTURE IN THE CIVIL LITIGATION COSTS REVIEW IMPLEMENTATION PROGRAMME, THE ROYAL COURTS OF JUSTICE, P. 3 (23 November 2011), available at: http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Sixth-Lecture-by-Lord-Justice-Jackson-in-the-Civil-Litigation-Costs-Review-.pdf

[23] THE CODE OF CONDUCT FOR LITIGATION FUNDERS, PARAGRAPH 9(B) (1).

[24] *Id* at Paragraph 9(b) (2).

[25] The Code of Conduct for Litigation Funders, Paragraph 9(b) (3).

[26] *Id* at Paragraph 9(b) (4).

market of UK brokers has been growing significantly who are using their expertise to match claims with funders, insurers and others.[27]

B. SINGAPORE

Third-party funding has conventionally been prohibited under the laws of Singapore on grounds of maintenance and champerty.[28] In *Otech Pakistan*[29], the Court of Appeal held that the doctrine of champerty applied to both court litigation and arbitration. The court observed that it would be unworthy to differentiate between forms of dispute resolution on the basis of the different forums in which they are conducted. In *Lim Lie Hoa,*[30] a third-party funding arrangement was upheld in the context of a pre-existing genuine commercial or personal interest in enforcing the proceedings.

The scenario changed with the realization of Singapore's prominence as an important and reputed seat for international commercial arbitration. With the intent to legitimize third-party funding in international arbitration, the Law Ministry of the Government of Singapore enforced the Civil Law (Amendment) Act 2017[31] ["**Act**"] along with the Civil Law (Third-Party Funding) Regulations 2017[32] ["**Regulations**"] and related

[27] Third Party Litigation Funding and Claim Transfer: Trends and Implications for the Civil Justice System: An Overview.
[28] Sapna Jhangiani and Rupert Coldwell, '*Third Party Funding for International Arbitration in Singapore and Hong Kong- A Race to the Top*', Kluwer Arbitration Blog, 30 November 2016, (last accessed on 15 July 2019), available at: http://arbitrationblog.kluwerarbitration.com/2016/11/30/third-party-funding-for-international-arbitration-in-singapore-and-hong-kong-a-race-to-the-top/.
[29] Otech Pakistan v. Clough Engineering, [2007] 1 SLR (R) 989.
[30]Lim Lie Hoa v. Ong Jane Rebecca, [2005] 3 SLR(R) 116.
[31] Civil Law (Amendment) Act 2017, available at: https://sso.agc.gov.sg/Acts-supp/2-2017/.
[32] Civil Law (Third Party Funding) Regulations 2017, available at: https://sso.agc.gov.sg/SL-Supp/S68-2017/Published/20170224?DocDate=20170224

amendments to the Legal Professional Act (Chap. 161)[33] and the professional conduct rules[34] for lawyers in Singapore. The Act has abolished common law torts of champerty and maintenance in third-party funding and the same are not contrary to public policy where it is provided by eligible parties in the prescribed proceedings.[35] The Act defines a third-party funder as a person who carries on the business of funding all or part of the costs of dispute resolution proceedings to which the person is not a party;[36] and the Regulations provide for eligibility requirements of the funders[37] to include the '*entire process of resolving or attempting to resolve a dispute*' including '*any civil, mediation, conciliation, arbitration or insolvency proceedings.*'[38]

Rule 49 A of the Professional Conduct Rules, 2015 imposes an obligation on practitioners to disclose to the court, and the other party, the engagement of their client in third-party funding along with the identity and address of the funder.[39] Section 107 of the Legal Profession Act (Cap. 161) categorically prohibits solicitors from holding any interest in the suit which contemplates payment only upon its success.[40]

The Singapore Institute of Arbitrators ["**SIArb**"] has published guidelines to encourage best practices for funders in arbitrations seated at Singapore.[41] These guidelines have reflected on significant matters relating to conflict of interest,[42] control of

[33] Legal Professional Act (Chap. 161), available at: https://sso.agc.gov.sg/Act/LPA1966
[34] Legal Profession (Professional Conduct) Rules, 2015, https://sso.agc.gov.sg/SL/LPA1966-S706-2015
[35] Civil Law (Amendment) Act, 2017, Section 5A(1).
[36] Civil Law (Amendment) Act, 2017, Section 5B (10).
[37] Civil Law (Third Party Funding) Regulations 2017, Regulation 4(1) (a).
[38] Civil Law (Amendment) Act, 2017, Section 5B (10).
[39] Legal Profession (Professional Conduct) Rules, 2015, Rule 49 A.
[40] Legal Professional Act (Chap. 161), Section 107.
[41] SIArb Guidelines for Third Party Funders (18 May 2017), available at: https://siarb.org.sg/images/SIArb-TPF-%20Guidelines-2017_final18-May-2017.pdf.
[42] *Id* at Paragraphs 6.1, 6.2, 2.1.3 and 3.1.5.

proceedings,[43] confidentiality and privilege.[44] The Singapore International Arbitration Centre ["**SIAC**"] has released a Practice Note on Arbitrator Conduct in matters involving external funding[45] and has addressed issues of disclosure and costs.[46] Additionally, the SIAC has also published the Investment Arbitration Rules, 2017 dealing with provisions related to third-party funding.[47]

### C. HONG KONG

Hong Kong remained a British colony until 1997 and derived its laws on maintenance and champerty from the English legal tradition. The Courts in Hong Kong have ruled on in the affirmative to uphold prohibitions on maintenance and champerty buy those do not apply to third-party funding in arbitration whether international or domestic.[48] The Courts are entrusted with the discretion to order costs, including attorney fees under the traditional loser pays rule and the 'costs' are classified as taxation.[49]

In *Winnie Lo v. HKSAR,*[50] the Court of Final Appeal permitted third-party funding subject to certain exceptions. The Court in *Cannonway Consultants v. Kenworth Engineering,*[51] it was held that

[43] *Id* at Paragraphs 7.1.1, 3.1.7 and 6.2.3.
[44] *Id* at Paragraph 2.2.
[45] SIAC Practice Note PN – 01/17 on Arbitrator Conduct in Cases Involving External Funding (31 March 2017), available at: http://www.siac.org.sg/images/stories/articles/Rules/Third%20Party%20Funding%20Practice%20Note%2031%20March%202017.pdf.
[46] *Id.*
[47] SIAC Investment Arbitration Rules (1st Edition, 1 January 2017), available at: http://www.siac.org.sg/images/stories/articles/Rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf, %20Articles%2024(1),%2033.1%20and%2035.
[48] Jern-Fei Ng, '*The Role of the Doctrines of Champerty and Maintenance in Arbitration*', 76(2) Arb. 2010, 208-209, 211 (2010).
[49] Justin D'Agostino, '*New Hong Kong Arbitration Ordinance Comes into Effect*,' (Kluwer Arbitration Blog, 2011) (last accessed on 24 August 2019).
[50] Winnie Lo v. HKSAR, (2012) 15 HKCFAR.
[51] Cannonway Consultants v. Kenworth Engineering, [1995] 1 HKC 179.

doctrines of champerty and maintenance were not applicable to international arbitration as it would negatively impact Hong Kong as a preferred venue for arbitration. In *Unruh v. Seeberger*,[52] the Court of Final Appeal held that concerns of maintenance and champerty must be balanced against other public policy concerns. The Court further observed that it would undertake a case-by-case analysis of the facts of each case in light of the various public policy considerations that apply. The Court in *Chinachem Charitable Foundation Ltd.*[53] held that a party could not recover costs incurred with respect to an agreement that violates public policy including maintenance and champerty concerns.

In a watershed development, the Hong Kong Legislative Council passed the Arbitration and Mediation Legislation (Third-party Funding) Amendment Ordinance, 2017[54] pursuant to which the Hong Kong Code of Practice for Third-party Funding in Arbitration was published. This Code has similarities with the Code of Conduct for Litigation Funders in England and Wales and sets out rules, standards and permissible practices in third-party funding in Hong Kong.[55]

The Code is applicable and binding on all the parties and applies to any funding agreement.[56] Any non-compliance with the provisions of the Code does not subject any party to judicial proceedings but only operates as evidence in subsequent court or

---

[52] Unruh v. Seeberger, (2007) 10 HKCFAR 31.

[53] Chinachem Charitable Foundation Ltd. v. Chan Chun Chuen and Another, [2011] HKCFI 422.

[54] Hong Kong Legislative Council passed the Arbitration and Mediation Legislation (Third Party Funding) Amendment Ordinance, 2017, available at: https://www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf.

[55] Peter Hirst and Mun Yeow, '*Comparing Hong Kong Code of Practice for Third Party Funding Arbitration with the Code of Conduct in England and Wales*, Clyde & Co., Kluwer Arbitration Blog, 04 February 2019.

[56] Hong Kong Code of Practice for Third Party Funding in Arbitration, Paragraph 1.2.

tribunal proceedings.[57] The Code provides for explicit representation that the funder will not influence any control on the funded party or its legal representative.[58] The Code requires the funder to ensure that effective procedures are intact to manage conflicting interests[59] and warrant that the funded party discloses the existence of a funding agreement and the name of the third-party in writing both to the opposite party and the arbitration body.[60] The enactment of the Code is seen as a positive step in promoting Hong Kong's prowess as an important centre for international arbitration.

### D. FRANCE

The rules regulating the conduct of legal practitioners do not prohibit attorneys from accepting funds from the agents of their clients. The need for third-party funding in practice is not encouraged because of an effective mechanism of legal aid as also the low costs of legal actions[61] and prohibition of contingency fee arrangements.[62]

In 2006, the Versailles Court of Appeal[63] had to consider the validity of third-party funding in international arbitration. An Australian company had initiated proceedings against another company to enforce a funding agreement on the failure of a construction project. Upon the rejection of its claim by the arbitral tribunal, the Australian company sought to secure the financing of litigation costs from the third-party funder Foris AG

---

[57] Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, Section 98 S (2) (a).
[58] Hong Kong Code of Practice for Third Party Funding in Arbitration, Paragraph 2.9.
[59] Hong Kong Code of Practice for Third Party Funding in Arbitration, Paragraph 2.6.
[60] Section 98 (U), Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017.
[61] LISA BENCH NIEUWVELD AND VICTORIA SHANNON SAHANI, *supra* note 12.
[62] French Civil Code, Art. 1342-1.
[63] CA Versailles, 01 June 2006, No 05/01038.

which ultimately refused to honor the agreement. Though the Court of Appeal denied jurisdiction of French courts over the matter, it did acknowledge that the financing contract in dispute was *sui generis* and unknown in European Union countries other than those of Germanic cultures. The court could not determine the nature of the contract but did not render it void.[64]

Under the French National Bar Association Rules, a lawyer is entitled to receive payment only from his client or client's agent. In a third-party funding scenario, funders may provide clients with funds who may then pay the fees to the lawyers.[65] Also, in cases of privileged information provided by the funders to determine the chances of success, it would violate the lawyer's duty of professional secrecy. Therefore, in such an arrangement, it would only be the client who could provide privileged information to the third-party funder.[66] It is important to consider that compliance with such ethical rules is only restricted to French lawyers and foreign lawyers representing clients in international arbitration proceedings in France would not be subjected to such regulations.[67]

### E. IRELAND

The Irish legal framework prohibits maintenance and champerty under the Statute of Conspiracy (Maintenance and Champerty). In *Persona Digital,*[68] the plaintiff sought a declaration from the High Court that third-party funding did not constitute abuse of process or contravene the rules of maintenance and champerty. The High Court held that to permit funding in litigation by a party having no legitimate interest in the proceeding would entail

---

[64] CA Versailles, 01 June 2006, No 05/01038.

[65] French National Bar Association Rules, Article 11.3.

[66] French National Bar Association Rules, Article 2.

[67] Antoine Adeline and Laure Perrin, *Third Party Funding of Arbitration in France*, Squire Sanders.

[68] Persona Digital Telephone Ltd. And Sigma Wireless Networks Ltd. v. The Minister of Public Enterprise & Ors., [2017] IESC 27.

bringing a policy change which was beyond the competence of the courts. The Supreme Court reiterated the view of the High Court and held that *'a person who assists another's proceedings without a bona fide independent interest acts unlawfully.'* On the question of legality of assignment of cause of action, the court in *SPV OSUS Limited* v. *HSBC Institutional Trust Services (Ireland) Limited & Ors.,*[69] observed that it was incumbent on part of the legislature to carry out wide-ranging analysis and balance important policy considerations, which would be required in order to ensure that the necessary change to the law can effectively vindicate the right of access to the courts.

### F. AUSTRALIA

The common law doctrines of maintenance and champerty are not considered as torts and the proposition of third-party funding is assessed from the standpoint public policy.[70] With legal finance growing as an essential business tool, third-party funding plays a significant role in ensuring greater access to courts and bringing equality of representation against well-resourced respondents.[71] The legal regime in Australia prevents parties from entering into an arrangement based on contingency fees calculated based on the percentage of amount recovered[72] but permits conditional billing arrangements where ordinary fees is payable on the successful outcome in a matter. However, the Victorian Law Reform Commission ["**VLRC**"] in its Report on Litigation Funding and Group Proceedings suggested that prohibition based on contingency fees does not prevent lawyers from receiving a contingency fee through a common fund court order

[69] SPV OSUS Limited v. HSBC Institutional Trust Services (Ireland) Limited & Ors., 2018 [IESC] 44.
[70] Campbells Cash and Carry Pty Ltd. v. Fostif Pty. Limited, [2006] HCA 41.
[71] JASON GEISKER AND JENNY TALLIS, THIRD PARTY LITIGATION FUNDING LAW REVIEW (2ND ED., LAW BUSINESS RESEARCH LTD. 2018).
[72] *Id*.

approving a litigation service fee with respect to class actions brought before the Supreme Court of Victoria.[73]

In June 2018, a discussion paper[74] was released by the Australian Law Reform Commission which proposed that contingency fee arrangements must be permitted for solicitors in class action proceedings but with certain limitations. This proposition was suggested with the intent to ensure that solicitors, subject to a court approval would receive a percentage of the sum due at settlement to ensure that such arrangements are reasonable and comparative.[75]

### G. NEW ZEALAND

The courts in New Zealand have adopted a cautious approach in permitting third-party funding in the absence of a legislation regulating the same.[76] Torts of champerty and maintenance have not been abrogated completely but their application to funded agreements has been relaxed.[77] However, funding may be disallowed if the process of the court is being abused for ulterior motives and the claim is vexatious and oppressive.[78]

The Supreme Court has categorically observed that courts are not bound to give approval to funding arrangements which are outside their supervisory role in representative proceedings under Rule 4.24 of the High Court Rules.[79] The role of courts is rather

---

[73] Victorian Law Reform Commission, '*Access to Justice: Litigation Funding and Group Proceedings*' Report, p. 63, para. 3.96.
[74] Australian Law Reform Commission, '*Inquiry into Class Action Proceedings and Third Party Litigation Funders*' Discussion Paper 85, pp. 4–5, and p. 17, para. 1.17.
[75] JASON GEISKER AND JENNY TALLIS, *supra* note 71.
[76] ADINA THORN AND ROHAN HAVELOCK, THE THIRD PARTY FUNDING LITIGATION LAW REVIEW, (2ND ED., LAW BUSINESS RESEARCH LTD., LONDON 2018).
[77] PriceWaterhouseCoopers v. Walker, [2017] NZSC 151.
[78] Saunders v. Houghton, [2010] 3 NZLR 331.
[79] HIGH COURT RULES 2016, RULE 4.2.4, available At: http://www.legislation.govt.nz/regulation/public/2016/0225/latest/dlm6959801.html

restricted to adjudication of applications in which the existence and terms of a litigation funding arrangement may be relevant.[80] Litigation funders being providers of financial services are subject to the provisions of the Fair Trading Act, 1986 which regulates consumer protections against deceptive conduct and misleading representations.[81] It is also imperative for a litigant to disclose matters including the identity of the funder, the amenability of the funder to the jurisdiction of courts in New Zealand and the terms of withdrawal of funding, if those terms in some way give legal control over the proceedings to the funder.[82] The important principle of confidentiality is regulated by both common law and the Evidence Act, 2006.[83] Legal privilege extends to communication with legal advisers[84], preparatory materials for proceedings[85] and further for settlement of negotiations or mediations.[86] The assessment of costs is generally based on a notional recovery rate which is in consideration of a reasonable time for every step required in relation to an interlocutory application.[87] However, litigation funding costs do not constitute as 'disbursements' within the meaning of the costs regime and it is only in exceptional circumstances that the High Court may order the unsuccessful party to pay such costs pursuant to its inherent jurisdiction.[88] With a stark increase in the prospects of litigating funding, the Law Commission in 2018 acted upon the concern of judges and respected commentators of the need to

---

[80] Waterhouse v. Contractors Bonding Ltd., [2013] NZSC 89.
[81] Fair Trading Act, 1986 and Consumer Guarantees Act, 1993 (imposes certain statutory guarantees in relation to goods and services with a more limited set of remedies available).
[82] Waterhouse v. Contractors Bonding Ltd, *supra* note 66 at 67-69, 72.
[83] The Evidence Act, 2006, Section 68–70.
[84] The Evidence Act, 2006, Section 54.
[85] The Evidence Act, 2006, Section 56.
[86] The Evidence Act, 2006, Section 57.
[87] The Arbitration Act, 1996, Schedule 2, Rule 14.2(c) and (d).
[88] ADINA THORN AND ROHAN HAVELOCK, *supra* note 76.

formulate a regulatory regime to remove uncertainties and inefficiencies in the court system.[89]

The Law Commission decided to assess the potential benefits of class actions and litigation funding *vis-a-vis* any costs and disadvantages that it may entail.[90] The draft terms for reference include the extent to which the courts should have a role in managing class actions and third-party funding arrangements, whether any regulatory requirements should be imposed on third-party funders and issues concerning costs and settlement in class actions and other third-party funded proceedings.[91]

## III. OVERVIEW OF THE CURRENT DYNAMICS OF THIRD-PARTY FUNDING IN ARBITRATION IN INDIA

The judiciary in India has adopted a pro-arbitration approach[92] in acknowledgement of the inefficiency created by severe judicial backlog. This has indeed created pathway for an effective means for settlement of disputes from a credible forum.[93] In India, resolution of disputes through arbitration is a costly proposition involving multifarious costs of the various stakeholders involved in the process.[94] The prospect of third-party funding entails multiple advantages. It provides for a viable opportunity of having a dispute financed without undertaking the immediate risk of expending financial resources.[95] It would ensure that a

---

[89] *Id*.
[90] Law Commission Act 1985 Sections 4 and 5(3).
[91] Law Commission Act 1985 Sections 4 and 5(3) at 14.
[92] NTT Docomo Inc. v. Tata Sons Limited, O.M.P. (EFA) (COMM.) 7/2016 & IAs 14897/2016, 2585/2017.
[93] PP Rao, '*Access to Justice and delay in disposal of cases*', 30 Indian Bar Review 208 (2003).
[94] Thibault De Boulle, 'Third *Party Funding in International Commercial Arbitration*', Faculty of Law, Ghent University, 27 (2014).
[95] Susanna Khouri, Kate Hurford and Clive Bowman, '*Third Party Funding in International Commercial and Treaty Arbitration-A Panacea or a Plague*?' , A discussion of the risks and benefits of third party funding', Article for TDM Special Issue.

financially weaker party would not have to settle for a less than reasonable offer irrespective of the merits of the claim.[96] Third-party funding would certainly rationalize the bargaining power[97] of the parties thereby giving a major boost to the promotion of arbitration as a preferred mechanism of dispute resolution.

Third-party Funding in arbitration would certainly augment the public policy objective of greater 'access to justice'[98] providing a cogent alternative to heavy costs[99] incurred on cases languishing in courts without resolution. In *Anita Kushwaha*,[100] the Supreme Court held that access to justice is a fundamental right guaranteed to every citizen under Articles 14 and 21 of the Constitution.[101] The Court observed that '*access to justice will be no more than an illusion if the adjudicatory mechanism provided is so expensive as to deter a disputant from taking resort to the same*.'[102] The State under Article 39A is obliged to promote a laudable objective of providing legal aid to needy litigants and to make access to justice affordable for the less fortunate sections of the society.[103] Indian companies account for a seemingly high number of cases at some of the well-established centres across the world.[104] This has further resonated the thoughts of the industry experts of establishing a comprehensible

---

[96] C Bogart, '*Third party funding in international arbitration*', The Arbitration Review of the Americas (2017), available at: https://globalarbitrationreview.com/edition/1000396/the-arbitration-review-of-the-americas-2017.

[97] Rodak, '*It's about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*', University of Pennsylvania Law Review, 503, 522 (2006).

[98] Boulle, *supra* note 94.

[99] '*Access to Justice Survey*', 2015-16, DAKSH, May 2016, (last accessed on 25 August 2019), available at: http://dakshindia.org/access-to-justice-survey/.

[100] Anita Kushwaha v. Pushap Sadan, (2016) 8 SCC 509.

[101] *Id* at Para 31.

[102] *Id* at Para 38.

[103] *Id.*

[104] '*After Mumbai, India's second business Arbitration Centre in Gurgaon*', Times of India, 20 January 2017, (last accessed on 16 September 2019), available at: https://timesofindia.indiatimes.com/city/gurgaon/after-mumbai-indias-second-business-arbitration-centre-in-gurgaon/articleshow/56675579.cms

framework to permit third-party funding in arbitration and exploit the massive potential that the Indian market possesses.[105] The establishment of the Mumbai Centre for International Arbitration,[106] the passing of the New Delhi International Arbitration Centre Act, 2019[107] and also the Arbitration and Conciliation Act, 2019[108] are indicators of steps being taken in the right direction towards realizing the dream of making India a desired jurisdiction for institutional arbitration.

India inherited the laws of maintenance and champerty as a colony of the United Kingdom. The prospects of third-party funding in India are neither specifically recognized nor expressly prohibited. The loser pays rule is followed in India. The claimant may be ordered to provide security for costs, and the cost awards may be adjusted in reference to the conduct of the parties litigating the case.[109] It is important to take into account that third-party funding agreements in India would have to be tested on considerations of equity and reasonableness. The terms of the contract must not be reprehensible to public policy grounds mentioned under Section 23 of the Indian Contract Act, 1872.[110]

The question regarding the applicability of champerty in India was first decided by the Privy Council in *Ram Coomar Coondoo,*[111]

---

[105] Varun Marwah, '*Third Party Funding Series (Part II): In conversation with Selvyn Siedel, Fullbrook Capital Management Bar*' (last accessed on 30 August 2019), (Bar and Bench, 28 November 2016), available at: https://www.barandbench.com/interviews/third-party-funding-series-part-ii-conversation-selvyn-seidel-fulbrook-capital-management.

[106] '*After Mumbai, India's second business Arbitration Centre in Gurgaon*', *supra* note 104.

[107] The New Delhi International Arbitration Centre Act, 2018 (Act No.17 of 2019), available at: http://legalaffairs.gov.in/sites/default/files/The%20New%20Delhi%20International%20Arbitration%20Centre%20Act%2C%202019.pdf.

[108] Arbitration and Conciliation Act, 2019 (Act No. 33 of 2019), available at: http://egazette.nic.in/WriteReadData/2019/210414.pdf.

[109] Phoenix Legal India, in Hogan Lovells LLP (ed.), '*At What Cost?*' 103.

[110] Pannalal Gendalal & Anr. v Thansingh Appaji & Anr AIR 1952 Nag 195.

[111] Ram Coomar Coondoo v. Chunder Canto Mookerjee, 1876 SCC OnLine PC 19.

holding that common law statutes of maintenance and champerty were enacted specifically for England to prevent vexatious suits and perverse practices of purchasing rights in litigation. The Privy Council held that champertous agreements were void as they were contrary to public policy. It categorically held that these statues were of a special character and were not applicable to India *in toto* but would apply to transactions which were *'inequitable, extortionate and unconscionable and not made with the bona fide objects of assisting a claim'*

The Privy Council in *Kunwar Ram Lal* v. *Nil Kanth,*[112] held that *'agreements to share the subject of litigation, if recovered in consideration of supplying funds to carry it on, are not in themselves opposed to public policy'.* In *Lala Ram Swarup* v. *Court of Ward,*[113] the Privy Council observed that a financier must be allowed the opportunity of exceptional advantage given the uncertainties of litigation.

The Courts have also considered the position of advocates engaging in third-party litigation funding in India. In *Moung Htoon Oung,*[114] the Calcutta High Court reprimanded an advocate for having entered into an agreement to receive professional fees in the form of a fixed share in the subject matter of the suit, as being contrary to public policy. Similarly, in *K.L Gauba,*[115] the Bombay High Court held that '*an agreement which makes the lawyer's fees conditional upon the success of the suit which gives the lawyer an interest in the subject- matter of the suit itself would necessarily tend to undermine the status of a lawyer as a lawyer. It would not be difficult to imagine at all how in such a case a conflict between self-interest and duty would immediately arise.'*

In *'G', A Senior Advocate*[116], a five-judge bench of the Hon'ble Supreme Court held that the rigid English rules of champerty and

[112] Kunwar Ram Lal v. Nil Kanth, *1893 SCC OnLine PC 7*.
[113] Lala Ram Swarup v. Court of Ward, AIR 1940 PC 19.
[114] In the Matter of Moung Htoon Oung, *21 WR 297 (Cal)*.
[115] K.L Gauba, In re, 1954 Cri LJ 1954.
[116] 'G', A Senior Advocate, (1955) 1 SCR 490.

maintenance do not apply in India and third-party arrangements are legally enforceable in India. The Court further observed that there is nothing morally wrong, nothing to shock the conscience, nothing against public policy and public morals in such a transaction per se.

There is statutory evidence to suggest that there is approval for litigation funding in India. Order XXV of the Code of Civil Procedure, 1908 ["**CPC**"] empowers the Indian courts to order security for costs. Rule 3 of Order XXV of CPC has been amended by various states like Maharashtra, Gujarat and Madhya Pradesh and inserted as '*Power to implead and demand security from third-person financing litigation*.'

The Supreme Court in *Bar Council of India* v. *AK Balaji and Ors,*[117] categorically held that third-party funding arrangements in arbitration are not prohibited, however, lawyers in India are specifically precluded from entering into contingency arrangements with their clients. The Bar Council of India Rules, 1975, under Part IV, Chapter II, Standards of Professional Conduct and Etiquette encompass provisions which do not allow lawyers to indulge in any form of litigation funding.[118] The Supreme Court in *B Sunitha*[119] dismissed a case involving cheque

[117] Bar Council of India v. AK Balaji and Ors., 2018 5 SCC 379.
[118] Bar Council of India Rules, 1975, Part IV, Chapter II, Standards of Professional Conduct and Etiquette:

> *Rule 9 : An advocate should not act or plead in any matter in which he is himself pecuniarily interested*
> *Rule 18 : An advocate should not, at any time, be a party to fomenting of litigation*
> *Rule 19 : An advocate shall not act on the instructions of any person other than his client or his authorized agent*
> *Rule 20 : An advocate shall not stipulate for a fee contingent on the results of the litigation or agree to share the proceeds thereof*
> *Rule 21 : An advocate shall not buy or traffic in or stipulate for or agree to receive any share in any actionable claim*
> *Rule 32 : An advocate shall not lend money to his client for the purpose of any action or any share of interest in any actionable claim*

[119] B. Sunitha v. The State of Telangana and Anr., (2018) 1 SCC 638.

bounce as the advocate sought to enforce a damages-based agreement for the recovery of 16% of the decretal amount in a motor accident claims case.

In *Jayaswal Ashoka Infrastructures Pvt. Ltd.,*[120] a partner of a law firm not registered as an advocate under the Advocates Act, 1961 entered into a damage based agreement with the client for consultancy in an arbitration proceeding. The client was successful in the claim but denied to pay fees to the counsel which was expressed in terms of percentage of the proceeds. The lower court ruled in favour of the law firm partner for the recovery of fees. On appeal before the Bombay High Court, the client argued that damage-based agreements were void under the Contract Act and also the Bar Council Rules. The partner of the law firm contended that he was not registered as an advocate, hence was not barred from entering into a damage based agreement under the Bar Council Rules. He argued that champertous agreements were not void as they were not in conflict with Section 23 of the Contract Act, 1872. The Court while relying on the obiter dicta of *'G', A Senior Advocate,*[121] held that there was nothing wrong in a champertous transaction not involving a legal practitioner. The court further observed that the agreement could not be rendered void only on the grounds that the respondent was a partner of a law firm.

## IV. Appreciation of Issues and Challenges for Adopting a Viable Regulatory Mechanism for India

The interplay between third-party funding and arbitration is often met with various challenges where different rules of procedures,

---

[120] Jayaswal Ashoka Infrastructures Pvt. Ltd. v. Pansare Lawad Sallagar, F.A. No. 106 of 2015 decided on 07 March 2019.

[121] 'G', A Senior Advocate, (1955) 1 SCR 490.

discovery and other practices are involved.[122] The proposition of third-party funding is often viewed from the spectrum of a possible conflict between a market oriented approach of the investors *vis-à-vis* interference in a legal suit[123] which may significantly compromise the position of the parties involved in an arbitration proceeding. Some of the challenges have been enumerated below:

### A. EROSION OF PARTY AUTONOMY.

It is argued that the prospect of party autonomy is compromised by the influence that is exerted by a third-party not just at the outset but throughout the arbitration proceedings.[124] The funder is in a commanding position to make selective choices with the objective of enhancing profitability, thereby compelling the choice of the funded party in selecting their legal counsels, nominating arbitrators and adopting decisive strategies for the arbitration proceedings.[125] A similar effect is prevalent in investor-state arbitrations, wherein any control influenced by the investor in adopting a dispute strategy may well be opposed to a State's public policy.[126] This concern can certainly be used to the advantage of the funded party with appropriate regulation. With their specialist skills and experience,[127] funders can enable the

[122] Selvyn Seidel, '*Third Party Funding in international Arbitration Claims-To invest or not to invest? A daunting question.*' ICC Publication Dossier X: Third Party Funding in International Arbitration in ICC, October 2013.
[123] Langtry v. Dumoulin, (1885) 7 QR 644 (Div Ct), p. 661.
[124] Jonas Von Goeler, '*Third Party Funding in International Arbitration and its Impact on Procedure*', International Arbitration Law Library, Chapter 2: The Various Forms of Third-Party Funding in International Arbitration, Volume 35 (Kluwer Law International, 2016), p. 41.
[125] *Id* at 47.
[126] Munir Maniruzzaman, '*Third Party Funding in International Arbitration-A Menace or Panacea*?' Kluwer Arbitration Blog, 29 December 2012 (last accessed on 10 August 2019).
[127] Alison Ross, '*The Dynamics of Third Party Funding*', Global Arbitration Review, 07 March 2012.

funded party to take important and tactical decisions after conducting extensive due diligence exercises.[128]

### B. CONFLICTING INTERESTS.

It is often a scenario where both the legal counsel and arbitrator are selected and nominated from the same pool of experts practicing in different subject matters. Therefore, an arbitrator in one proceeding may well be representing the same party as legal counsel in another proceeding.[129] The risk is augmented when both proceedings involve the same funder[130] and if this situation goes unnoticed by the tribunal, it may become a ground for challenging an arbitral award.[131] Even in cases where there is no direct conflict, prevalence of such a situation may raise claims of appearance of bias, which in the legal framework of most jurisdictions is a ground for disqualification of an arbitrator. These concerns can be circumvented with mandatory disclosure by the funders.

### C. FRIVOLOUS ARBITRATIONS AND CLAIMS.

Though third-party funding increases overall financing, it augments the possibility of frivolous claims, since the probability of any loss of investment is spread throughout the funding leaving little scope for the funder to investigate individual claims.[132] This

---

[128] Susanna Khouri, Kate Hurford and Clive Bowman, *supra* note 95.

[129] Charles Kaplan, '*Third Party Funding in International Arbitration Issues for Counsel*', in Bernardo M Cremades Roman and Antonias Dimolitsa (eds), Third Party Funding in International Arbitration (ICC Dossier), Dossiers of the ICC Institute of World Business Law, Volume 10 (Kluwer Law International).

[130] Jennifer A Trusz, '*Full Disclosure? Conflict of Interest Arising from Third-Party Funding in International Commercial Arbitration*', GEORGETOWN LAW JOURNAL, 1649, p. 1665.

[131] Dr. Markus Altekirch and Brigitta John, '*Should a party be obliged to disclose details about receiving third party funding in international arbitration*?' Global Arbitration News (February 2016) (last accessed on 18 July 2019) .

[132] Bruno Deffains and Claudine Desrieux, '*Litigation Financing: A Comparative Analysis*', at 11, (last accessed on 20 August 2019), available at: https://pdfs.semanticscholar.org/c997/06839b13a87975eb0baf809cb6aae72e720b.pdf.

concern may be overstated to some extent as funders would not like to invest in meritless claims which have a high probability of yielding a negative net value.[133]

### D. ACCESS TO JUSTICE VERSUS PROFITABILITY BARRIER.

A strong argument that merits third-party funding in arbitration is the proposition of providing access to justice to those having meritorious claims but are averse to the portals of justice due to their financial condition.[134] Third-party funding also enables parties who are financially capable to engage in arbitration but are opposed to risk in terms of benefits being outweighed by the cost of bringing a claim.[135] This method of funding shifts the burden on the funder who may apportion a part of the award but the funded party will stand to benefit of having realized something rather than not bringing the claim in the first place.[136] One of the significant limitations of this proposition is the bias of the funder towards investing in the claims of the claimants, as there is higher probability of gaining significant monetary outcome of the transaction. But it may also be argued that the respondents have valuable assets to defend from which the funders may derive significant returns.[137]

## V. Recommended Policy Framework: Indian Perspective

---

[133] Anthony Lin, '*The Smart Money: Australia's Litigation Funding Giant Looks Abroad*', The American Lawyer, I July 2011.
[134] REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT, LORD JUSTICE JACKSON, Chapter 11, paragraph 2.12 (December 2009).
[135] David S Abrams and Daniel L Chen, '*A Market for Justice: A First Empirical Look at Third Party Litigation Funding*', 15 Penn J Bus L (2013) 1075, at 1-77.
[136] REVIEW OF CIVIL LITIGATION COSTS, *supra* note 136.
[137] Julie Triedman, '*Arms Race: Law Firms and the Litigation Funding Boom*', American Lawyer (30 December 2015), (last accessed on 18 August 2019), available at: https://www.law.com/americanlawyer/almID/1202745121381/Arms-Race-Law-Firms-and-the-Litigation-Funding-Boom/.

### A. EXPLICIT PROVISION IN THE ARBITRATION AND CONCILIATION ACT, 1996.

The proposition of third-party funding though held valid by courts in India, can be challenged on grounds of being opposed to public policy. Owing to the tendency of courts to expand the scope of public policy exception, a specific provision[138] must be provided in the Act to reinforce the confidence of the stakeholders involved in the arbitration.[139]

### B. CENTRALIZED DATABASE FOR FUNDERS.

Experts have argued for the creation of a centralized data bank facilitating both the funders and the parties in making a comparative choice based on competitive pricing.[140] This data bank would include information based on various parameters including details related to sector-wise experience of the funders, total business expenses, amount of money advances, percentage of profits that have been yielded by funded arbitrations etc.[141]

### C. CONSULTATION PROCESS BY THE LAW COMMISSION OF INDIA.

It is believed that the contours of third-party funding are restricted to deliberations by the academia. Therefore, it is incumbent on the Law Commission of India to initiate a transparent consultation process to assess the requirements, need, best global practices, legal implications and objections to ascertain India's firm position on third-party funding in arbitration. This would contribute in developing a holistic and comprehensive

---

[138] Varun Mansinghka, *supra* note 1.

[139] Renusagar Power Co. Ltd. v. General Electric Co., (1994) Supp 1 SCC 644; Shri Mahal v. Progetto Grano Spa, (2014) 2 SCC 433.

[140] Martin Estevao, '*The Litigation Financing Industry: Regulation to Protect and Inform Consumers*', (2013) University of Colorado Law Review 84, p. 467.

[141] Anish Wadia and Shivani Rawat, '*Third-Party Funding in Arbitration-India's Readiness in a Global Context*', TDM 2 (2018).

regulatory regime encompassing representations made by the various stakeholders to be involved in the process.[142]

### D. ABOLITION OF CIVIL AND CRIMINAL LIABILITY FOR CHAMPERTY.

To effectuate the desire of making India a reputed seat of arbitration, it is imperative that efforts are made to make significant amendments to Indian laws to permit third-party funding in international and domestic seated arbitrations in India and abolish any civil and criminal liability for maintenance or champerty.[143]

### E. DISCLOSURE REQUIREMENTS.

Mandatory disclosure of third-party funding agreements is important to ensure the independence and impartiality of the arbitral tribunal along with concerns relating to confidentiality, ethical standards, conflicting interests of counsels, and allocation of costs. Principle 6 of the *IBA Guidelines* mandates '*disclosure by third-party funders and insurers in relation to the dispute may have a direct economic interest in the award.*[144] The *ICC Guidance Note*[145] requires arbitrators to disclose their '*relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award'* Such conditions for disclosure apply only on account of the arbitrator being aware of the presence of the third-party funder in the first place. Section 12 of the Arbitration and Conciliation Act, 1996 provides for mandatory disclosure on behalf of the arbitrators,[146] however, it does not incorporate

---

[142] *Id*.
[143] Varun Mansinghka, *supra* note 1.
[144] International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration, Explanation to General Standard 6 (October 2014).
[145] International Court of Arbitration of the International Chamber of Commerce, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (13 July 2016).
[146] The Arbitration and Conciliation Act, 1996, Section 12 (Also refer to Explanation 1 and Fifth Schedule).

obligations enumerated under the Red List and Orange List of the IBA Guidelines. Therefore, it is imperative that necessary provisions are included under the Act to strictly enforce disclosure requirements by arbitrators in the event of a third-party funding.[147]

### F. UNIFORM DEFINITION OF THIRD-PARTY FUNDING IN THE ACT.

There are two alternatives that can be adopted in this regard. Either a specific definition as provided under the United States Transatlantic Trade and Investment Partnership negotiations[148] or one in concurrence with Principle 6 of the IBA Guidelines may be incorporated under the Act or every arbitral institution must be given discretion to have their own definition.[149] In case of ad-hoc arbitrations, the arbitral tribunal may extend their services for the appointment of an arbitrator upon a requisite fee.[150] Rule 7.8 of the Mumbai Centre for International Arbitration ["**MCIA**"] Rules prescribe that parties can designate MCIA as the appointing authority without subjecting the arbitration to the provisions of such Rules.

### G. BALANCED APPROACH FOR SECURITY AND ADVERSE COST AWARDS.

Experts have argued that third-party funding should not be a parameter in assessing security for costs as it determines the claimants' incapacity to satisfy an adverse cost award. It furthers the risk of the financially stronger party exerting influence on the

---

[147] Varun Mansinghka, *supra* note 1.
[148] The European Union's Proposal for Investment Protection and Investment Dispute Resolution for the Transatlantic Trade and Investment Partnership, Section 3, Article 1.
[149] Laurent Levy and Regis Bonnan, '*Third Party Funding Disclosure, Joinder and Impact on Arbitral Proceedings in Third Funding in International Arbitration*', in Dossiers of the ICC Institute of World Business Law, 78, M Cremades Roman and Antonias Dimolitsa (eds) (2013).
[150] Varun Mansinghka, *supra* note 1.

financially weaker party.[151] If third-party funding was to be considered as a factor in determining security for costs of application, then this approach would come up every time a party would utilize third-party funding. This proposition has been reiterated in a number of judicial decisions highlighting the fact that sanctions arising out of the default in complying with the decision of security for costs 'does not depend on the question of the parties' source of funding[152] and application of such costs can only be ordered in cases of exceptional circumstances.[153] Alternatively, while formulating a legal framework, the Indian legislature must also look beyond the view propagated by the English courts of limiting the extent of funding provided and enforce complete liability on the funder for the defendants' costs. Section 31A amended by the 2015 Act read with Sections 9 and 17 permits the arbitral tribunal to order a party to furnish security for costs. With the involvement of a third-party funder, the states of Maharashtra, Gujarat and Madhya Pradesh have made amendments to Order XXV of the Code of Civil Procedure, 1908 to ascertain if such funder could be ordered to furnish security on behalf of the party which he is funding and the extent to which such funding can be made.[154]

### H. CONFIDENTIALITY AND ETHICAL STANDARDS.

This requirement entails regulation to cater the interests and relationship between the attorney and client and also the funder and the funded party.[155] From an ethical standpoint, the involvement of a third-party may dilute the lawyer's duty of

---

[151] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION (KLUWER LAW INTERNATIONAL 2009).
[152] RSM Production Corporation v. St. Lucia, ICSID Case No ARB/12/10.
[153] South American Silver Limited v. Bolivia, UNCITRAL, PCA Case No 2013-15, Procedural Order No. 10, January 11, 2016.
[154] ARBITRATION IN INDIA: CURATED VIEWS, ECONOMIC LAWS PRACTICE, MAY 2019.
[155] Khushboo Hashu Shahdadpuri, *supra* note 2.

exercising independent professional judgment.[156] The extent to which a funder must be allowed to have access to necessary materials for its due diligence must be strictly regulated significantly so in an adversarial form of arbitration. Therefore, ethical standards must be established to ensure that third-parties do not prevent lawyers from performing their duties with utmost sense of confidentiality and loyalty[157] towards their clients in compliance with the rules enacted in the jurisdiction of their practice.

### I. RESTRICTION ON WITHDRAWAL OF FINANCIAL SUPPORT BY THE FUNDER IN A CONTINUING ARBITRATION.

It is necessary to ensure an effective regulation to prevent the funder from abruptly withdrawing financial support in an ongoing arbitration. This however, should be a balanced approach to ensure that such a regulation does not reduce the incentives of a funder to invest in future arbitration claims. To incorporate provisions under Indian laws, reliance must be placed on the Association of Litigation Funders and Wales [“**ALF**”] Code of Conduct which restricts funders to unilaterally terminate the agreement barring certain exceptions.[158] To reduce probability of disputes related to such termination, explicit standards must be laid down in the agreement which would regulate the circumstances of termination by funders.[159] Such a solution would be a viable proposition, if the funders are effectively bound by them.

## VI. Conclusion

[156] American Bar Association, Commission on Ethics 20/20, International Report to the House of Delegates, p. 4.
[157] Valentia Frignati, ‘*Ethical Implications of third-party funding in International Arbitration, Arbitration International*’, 2016, 1-18, p.7.
[158] LORD JUSTICE JACKSON, THIRD PARTY FUNDING OR LITIGATION ON FUNDING, *supra* note 22. at 3.
[159] Harcus Sinclaim v. Buttonwood Legal Capital Ltd., [2013] EWHC 1193.

Third-party funding in India holds greater promises in achieving public policy objectives by increasing access to justice, facilitating effective representation as also speedy and better management of cases.

At the London Court for International Arbitration and SIAC, Indian companies account for as much as 30% of all cases referred for resolution. Besides the limitation of a favorable arbitration culture, the lack of concrete regulatory framework on third-party funding has precluded financiers in India despite a very large potential of opportunities.

The institutional arbitration centres in Singapore and Hong Kong are amongst the fastest growing globally. The experiences of these two countries offer inspirational model for India to emulate. While forging conducive conditions in the Indian context, the regulatory framework must be initially customized to the Indian environment to stabilize the system on matters of procedures & ethical standards, benchmark for disclosure of funding agreement, confidentiality, control over proceedings, caps on returns, mandatory legal advice for the litigant prior to entering funding agreement, termination of funding etc. Later, with evolution of the system with the experiences gained over passage of time, it should adapt to global benchmarks to unequivocally pave way for third-party funding mechanism as an effective method to benefit the Indian citizens and also India's global reputation as a prominent seat and venue for international arbitration.

India must also encapsulate provisions relating to third-party funding in investment disputes. With substantial increase in high value claims, the relevance of third-party funding is even more profound for investors who otherwise have to sustain the burden of the economic might of the State. While venturing into establishing a regulating regime, impetus must be placed on

addressing questions related to disclosure of funder's identity and independence of arbitrators.

Given the immense commercial viability of third-party funding, it is most appropriate at this juncture for India to establish a cohesive regulatory regime necessary for the development of an efficient justice delivery system. This when done will not only ensure benefits to its citizens but also accord India a position of great significance in the arbitration community.

Vol. 11 Feb 2020

# CONCERNS OF LEGITIMACY IN THE APPLICATION OF SOFT LAW IN INTERNATIONAL ARBITRATION

*Prakhar Agarwal**

## Abstract

*The impartiality and independence of an arbitrator are of paramount significance in international arbitration. This hypothesis is reflected in almost all the arbitration laws. However, the procedure to be followed while dealing with this issue of conflict of interest has not been elaborated in any arbitration law. Hence, the arbitrators, parties, Courts and arbitral institutions often stuck in dilemma as to what information is required to be disclosed and what are the standards to be followed while doing so. In the wake of this, the IBA Guidelines on Conflict of Interest in International Arbitration serve the requirements. However, these IBA Guidelines are in nature of soft law and hence are non-binding in nature. Consequently, the issue of their legitimacy arises. In light of this, after giving the general introduction to soft laws and their importance in arbitration, the essay will maintain that IBA Guidelines on Conflict of Interest in International Arbitration has been instrumental in regulating issues concerning conflict of interest. It has increased transparency, leveled the playing field and protected the integrity of arbitral award against challenges. Further, these Guidelines have been widely accepted by Courts, arbitral institutions and among the rest of the arbitration community while dealing with the issues of impartiality and independence of the arbitrator. Lastly, the essay will establish that there is complete legitimacy in the codification and application of these Guidelines, in so far as they facilitate flexibility to complement predictability, enhances the efficiency of the arbitral proceeding, ensures fairness and hence aids in delivering justice to the parties.*

* The author is a student at Maharashtra National Law University, Nagpur.

## I. Introduction

In the modern era of globalization, arbitration has become a preferred tool for resolving international disputes. This is primarily due to four established principles that govern the arbitration proceeding: *first*, the neutrality of arbitrator(s) with respect to the parties,[1] *second*, the flexibility of procedure with respect to the applicable laws,[2] *third,* party autonomy,[3] and *fourth,* international mobility of the arbitral award i.e., almost universal recognition and enforcement of the arbitral award under New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[4] However, often during the arbitration process, the parties, their counsels, and the arbitrator(s) are stuck with a question as to what rules should guide them through the arbitration process. The question is reasonable because the 'methods' of using the applicable procedural law are not set out in any code, law or guidance note.[5] The UNCITRAL Model Law on international arbitration,[6] which has been adopted by 80 countries,[7] directs the parties only to the basic doctrines of

---

[1] A REDFERN & J.M HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 31 (N. Blackaby & C. Partasides eds., 5 ed., Kluwer Law International 2009).

[2] J. LEW, L. MISTELIS & S. KRÖLL, COMPARATIVE COMMERCIAL ARBITRATION 5 (Kluwer Law International 2003).

[3] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 84 (2 ed. Kluwer Law International 2014).

[4] C. Liebscher, *Preliminary Remarks*, *in* C.H. BECK et al., NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS-COMMENTARY 1, 3 (R. Wolff ed., Hart Publishing 2009).

[5] Paula Hodges, *The Arbitrator and the Arbitration Procedure, The Proliferation of "Soft Laws" in International Arbitration: Time to Draw the Line? in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 205, 205, (CHRISTIAN KLAUSEGGER, PETER KLEIN, et al., eds., Beck C. H. 2015).

[6] United Nations Commission on International Trade Law 1985, with amendments adopted in 2006.

[7] UNCITRAL, *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, UNCITRAL, (Oct. 1, 2019, 11: 09 A.M).
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

international arbitration and to its intended objectives. Nonetheless, the procedures adopted vary depending upon the applicable law of procedure, institutional rules, the appointed arbitrator(s), counsels, parties, and the nature of the dispute.[8] The absence of a 'unified universal code of procedure' facilitates flexibility, enabling the arbitrator(s) to exercise their wide discretion in carrying out the arbitration proceedings with due respect to the nature of the dispute and the interests of the parties.[9] However, this flexibility sometimes also give rise to 'uncertainty', as the arbitrators and counsels in the arbitration proceedings may hail from different jurisdictions and may have different expectations as to what the proceedings will necessitate. This may ultimately lead to procedural inequality and consequently to substantive bias.[10]

To rule out this procedural incongruity and to achieve a uniform standard of procedure in arbitration proceedings, soft law plays a substantial role. Soft laws are "quasi-legal" norms, which do not have any legal enforceability, or whose enforceability is somewhat "weaker" than the enforceability of traditional law which is in contrast often known as hard law.[11] These norms may emerge either from state actors- legislators, governments or international organizations, or they may emerge from non-state actors- private

---

[8] Paula Hodges, *The Arbitrator and the Arbitration Procedure, The Proliferation of "Soft Laws" in International Arbitration: Time to Draw the Line? in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 205, 205, (CHRISTIAN KLAUSEGGER, PETER KLEIN, et al., eds., Beck C. H. 2015).

[9] For example, ICC Arbitration Rules art 20 allows the arbitrator to ascertain the facts by "all appropriate means"; LCIA Arbitration rules art 14.2 permits arbitrator to discharge their duties in "widest discretion"; UNCITRAL Model Law art 18, UNCITRAL Arbitration Rules art 17(1), American Arbitration Association (AAA) Rules of Arbitration art 16(1) and Australian Centre for International Commercial (ACICA) Rules of Arbitration art 17(1) in general allows the tribunal to carry out the arbitration proceedings in "whatever manner [they] considers appropriate."

[10] English Arbitration Act 1996, § 68, according to which, the procedural inequality may result in substantive unfairness and an unjust outcome.

[11] Felix Lüth & Philipp K. Wagner, *Soft Law in International Arbitration - Some Thoughts on Legitimacy*, 9(3) STUDZR 409, 411 (2012).

institutions, professionals or trade unions; regardless, they do not have binding authority by the state.[12]

This brings out the issue of the legitimacy of soft laws. To think about the issue of the legitimacy of soft laws is natural. The complexity involved in explaining compliance of hard laws that have the binding authority of state intensifies the requirement of discussion on a number of discourses to establish the legitimacy of soft laws.

In the field of international arbitration particularly, these discourses can run into a number of discussions, such as: *first,* the mode of codification of these soft laws, which basically deliberates upon three interrogatories: who formulated these soft laws? How do they formulate it? Why it has been formulated?[13] *Second,* the loss of flexibility, which as discussed above, is the debate between 'arbitrator's wide discretion and party autonomy in arbitration' v/s predictability;[14] *third*, the over "judicialisation" of arbitration, which implies the close similarity of arbitration proceedings with that of court proceedings, in which the arbitrators generally face a "delicate counterpoise" between efficiency and fairness;[15] and *lastly*, given that soft laws include charters, declarations, recommendations, gentlemen's agreement,[16] rules, codes, notes,[17] model laws, guidelines and best

[12] Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, 1(2) J. INT'L. DISP. SETTLEMENT 283, 284 (2010).
[13] *Id*.
[14] *Id*.
[15] William W. Park, *The Procedural Soft Law of International Arbitration: Non-Governmental Instruments*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 141, 143-46 (LOUKAS A. MISTELIS & JULIAN D. M. LEW eds., Kluwer Law International 2006).
[16] Alexandre Flückiger, *Why Do We Obey Soft Law? in* REDISCOVERING PUBLIC LAW AND PUBLIC ADMINISTRATION IN COMPARATIVE POLICY ANALYSIS: A TRIBUTE TO PETER KNOEPFEL 45, 45 (STÉPHANE NAHRATH & FRÉDÉRIC VARONE eds., Presses polytechniques et universitaires romandes 2009).
[17] Alexis Mourre, *Soft law as a condition for the development of trust in international arbitration*, 13 REVISTA BRASILEIRA DE ARBITRAGEM 82, 83 (2016).

practices,[18] the dispute is, whether the arbitral tribunal is violating the best standard principles of procedures of the international arbitration community, if it is not abiding by the soft law norms, and instead making the individualistic analysis and hence the arbitral award?[19]

## II. Importance of Soft Law in International Arbitration

The use of soft law instruments in international arbitration has increased significantly.[20] These instruments build the framework for the fundamental best practices in the realm of international arbitration.[21] There are two forms of soft law viz., substantive soft law and procedural soft law. Substantive soft laws are applied to the substance of the dispute. For example, the New Zealand Court of Appeal in *Hideo Yoshimoto* v. *Canterbury Gold International Ltd,*[22] when faced with a difficulty in interpreting the terms of the contract, referred to the UNIDROIT Principles on International Commercial Contracts.[23] Other examples of substantive soft law include the Principles on European Contract Law ["**PECL**"][24]

---

[18] Lüth/Wagner, *supra* note 11, at 410.
[19] *Id,* at 411.
[20] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1852 (2 ed., Kluwer Law International 2014).
[21] JAN PAULSSON, THE IDEA OF ARBITRATION 284 (Oxford University Press 2013).
[22] [2000] NZCA 350.
[23] Eckart Brödermann, *The Growing Importance of the UNIDROIT Principles in Europe – A Review in Light of Market Needs, the Role of Law and the 2005 Rome I Proposal*, 11(4) UNIFORM L. REV. 749, 759 (2006), commented that these soft law principles are used in international businesses, mainly because they are neutral, economically efficient and are ready-to-use instruments.
[24] Hugh Beale, *The Development of European Private Law and the European Commission's Action Plan on Contract Law*, 10 JURIDICA INTERNATIONAL 4, 5 (2005), elucidates that PECL is a model law created by Lando Commission in an endeavor to explain the fundamental concepts of Contract law and obligations that are common to the legal system of all the member states of EU, with an objective to address the requisites of inter-European Trade.

and Incoterms Rules.[25] Yet, even though, these substantive soft laws are mostly applied to the substance of the dispute, their application is not limited to arbitration and they are tailored to be applied to international commercial transactions in general.[26]

Procedural soft laws, on the other hand, are peculiar to international arbitration,[27] and hence are able to unveil the characteristics of the application of soft laws in international arbitration. Quintessential examples of procedural soft law in the context of international arbitration include UNCITRAL Model Law,[28] the UNCITRAL Arbitration Rules,[29] the International Chamber of Commerce ["**ICC**"] Arbitration Rules[30] and the three International Bar Association ["**IBA**"] instruments viz., Guidelines on Conflict of Interest in International Arbitration,[31] Guidelines on Party Representation[32] and Rules on Taking of

[25] Enacted by ICC, these rules provide internationally recognized definitions and rules of interpretation for most common commercial terms used in contracts for the sale of goods, See, International Chamber of Commerce, *Incoterms® Rules*, ICC, (Dec. 1, 2018, 11:15 P.M), https://iccwbo.org/resources-for-business/incoterms-rules/.

[26] Lüth/Wagner, *supra* note 11, at 412.

[27] Kaufmann-Kohler, *supra* note 12, at 284.

[28] United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006, G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 4, 2006).

[29] UNCITRAL Arbitration Rules, 1976 (with new article 1, paragraph 4, as adopted in 2013), UNCITRAL, (Oct. 01, 2019, 07:12 P.M), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf.

[30] The ICC Arbitration Rules, 2012, as amended in 2017, ICC, (Sept. 11, 2019, 08:50 P.M), https://iccwbo.org/publication/arbitration-rules-and-mediation-rules/.

[31] IBA Guidelines on Conflict of Interest in International Arbitration (adopted in 2004), IBA, (Sept. 11, 2019, 08: 40 P.M), the 2014 version is available on https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

[32] The IBA Guidelines on Party Representation in International Arbitration (2013), IBA, (Sept. 18, 2019, 04: 30 A.M), https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

Evidence in International Arbitration.[33] These IBA instruments codify the best procedural practices that attempt to fill the gaps left open by the national legislation and by the other soft law instruments used in international arbitration.

For example, the IBA rules on Taking of Evidence in International Arbitration have introduced the procedure for "document production" in this area.[34] Before this, a number of arbitral proceedings were been conducted without any known procedure for revealing or producing the documents which had become the cause of the increased cost of the proceedings and the sluggish pace of settling the dispute.[35] Hence, this adoption has not only cured the ailments vis-à-vis cost and time but has also set the framework apropos production of evidence in international arbitration.

Similarly, the Guidelines on Party Representation in International Arbitration provide the code of conduct for the counsel. These guidelines seek to achieve integrity and honesty by the party representatives, in order to ensure speedy resolution of the dispute, cost efficiency, and fair play.[36]

Likewise, the Guidelines on Conflict of Interest in International Arbitration endeavor to preserve the impartiality and independence of the arbitrator.[37] This is because the impartiality

---

[33] The IBA Rules on Taking of Evidence in International Arbitration (adopted in 1999), IBA, (Oct. 13, 2019, 04: 55 A.M), the 2010 version is available on https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

[34] Michael E. Schneider, *Yet another opportunity to waste time and money on procedural skirmishes: the IBA Guidelines on Party Representation*, 31(3) ASA BULL. 497, 497 (2013).

[35] *Id.*

[36] International Bar Association, *Practice Rules and Guidelines- Alternative Dispute Resolution: Arbitration, The IBA Guidelines on Party Representation in International Arbitration 2013*, IBA, (Oct. 12, 2019, 12: 05 P.M), https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

[37] *Id.*

and independence of the arbitrator with respect to the parties is one of the cornerstones of arbitration.[38] It is essential that the arbitrator and the parties should not be related to each other in any manner whatsoever, be it financially, professionally or personally, because any such relationship might influence the arbitrator to decide in favor of such party;[39] and even if there is no such favoritism on the part of the arbitrator, there might arise the apprehension of bias in the mind of the losing party.

Therefore, to save arbitration proceedings from getting vitiated due to bias and the apprehension of bias, most institutional rules,[40] the model law,[41] and national arbitration laws[42] require arbitrator(s) to disclose any connection they have with either of the parties. However, these rules do not lay down test/thresholds for the same which puts arbitrators into a dilemma as to what all information should they disclose and what are the standards that should apply on such disclosures?

In this regard, the IBA Guidelines on Conflict of Interest in International Arbitration stands out uniquely from all the other rules by providing *detailed* guidelines as to the procedure to be followed to determine the impartiality and independence of the arbitrator.[43]

---

[38] A REDFERN & J.M HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 31 (N. Blackaby & C. Partasides eds., 5 ed., Kluwer Law International 2009).

[39] KAREL DAELE, *Chapter 6: Challenge and Disqualification on the Ground of Independence Issues*, *in* CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 269, 270-71 (Kluwer Law International 2012).

[40] 2012 ICC Rules art 11(1), 2014 LCIA Rules art 5.3, 2013 SIAC Rules rule 10.1 and 2013 HKIAC Rules art 11.1.

[41] UNCITRAL Model Law art 12(1).

[42] English Arbitration Act of 1996 § 24(1), Singapore Arbitration Act art 12(1), Federal Arbitration Act (FAA) § 10.

[43] KAREL DAELE, *Chapter 1: Disclosure*, *in* CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 1, 64 (Kluwer Law International 2012); See also, International Council for Commercial Arbitration, *IBA Guidelines on Conflicts of Interest in International Arbitration 2004 English'*, *in* YEARBOOK COMMERCIAL ARBITRATION 314, 314 (ALBERT JAN VAN

## III. Role of the IBA Guidelines in Preserving the Impartiality and Independence of Arbitrator

The adoption of the IBA Guidelines on Conflict of Interest in International Arbitration (hereinafter 'IBA Guidelines') in 2004 and its subsequent revision in 2014 is the consequence of expediting challenges concerning the conflict of interest in international arbitration.[44] In 2004, the IBA set up a working group consisting of nineteen professionals from fourteen countries, who have studied national laws, institutional rules, practical experiences of experts in international arbitration, judicial precedents, and arbitral awards concerning the standards of impartiality and independence of arbitrator.[45] From this study, they have extracted the common features and codified them into comprehensive guidelines.[46] The purpose of these guidelines is to encourage and aid the arbitrator to disclose certain categories of information in order to level the playing field, to enhance the degree of transparency in international arbitration and to preserve the integrity of the arbitral award against unnecessary challenges.[47] Further, these Guidelines aim to aid the Courts, tribunals and

---

DEN BERG ed., vol. XXIX, Kluwer Law International 2004), where the author confirms that there was uncertainty, lack of clear explanations and the requirement for in detail guidance and uniformity in then-existing impartiality norms.

[44] The main objective of the 2014 amendment was to clarify that the Guidelines are applicable to investment-treaty arbitrations as well as commercial arbitrations, and to both legal and non-legal professionals serving as arbitrators. *See*, Paula Hodges, *Equality of Arms in International Arbitration: Who Is the Best Arbiter of Fairness in the Conduct of Proceedings?*, *in*, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY 599, 603 (ANDREA MENAKER ed., ICCA Congress Series No. 19, Kluwer Law International 2017).

[45] International Council for Commercial Arbitration, *IBA Guidelines on Conflicts of Interest in International Arbitration 2004 English'*, *in* YEARBOOK COMMERCIAL ARBITRATION 314, 315 (ALBERT JAN VAN DEN BERG ed., Vol. XXIX, Kluwer Law International 2004).

[46] Hodges, *supra* note 44, at 602.

[47] *Id.*

institutions to formulate harmonious, rational and intelligible decisions on disqualification of arbitrators.[48]

The IBA Guidelines comprises of General Standards, Explanatory Notes and the Application Lists also known as the "traffic light system" which furnish substantial direction as to whether the specific situation would lead the potential arbitrator to reject his/her appointment, order a disclosure or do not engender any dispute at all.[49] Accordingly, the Non-Waivable Red List enumerates the situations in which the arbitrator should refuse his/her appointment notwithstanding the views of the parties on the issue.[50] The Waivable Red List highlights the circumstances which necessitate significant deliberation and warrant disclosure by the arbitrator, but are competent to be waived by the mutual consent of the parties so as to allow the arbitrator to assume his/her appointment.[51] Further, the Orange List enumerates a number of situations which may give rise to justifiable doubt in the mind of the parties regarding impartiality and independence of the arbitrator, and hence such situations must be disclosed by the arbitrator.[52] Finally, the Green List lays

---

[48] KAREL DAELE, *Chapter 1: Disclosure*, *in* CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 1, 27 (Kluwer Law International 2012).

[49] Hodges, *supra* note 44, at 602.

[50] Total four situations are enumerated in this list ranging from Section 1.1-Section 1.4 of Part II, IBA Guidelines on Conflict of Interest in International Arbitration. This List is based on the principle of Natural Justice *Nemo iudex in causa sua*, which means that 'no person can be a judge in his own cause'.

[51] This List contains 14 types of circumstances, divided into three categories; category one: § 2.1.1-§ 2.1.2, category two: § 2.2.1-§ 2.2.3, category three: § 2.3.1-§.3.9 of Part II, IBA Guidelines on Conflict of Interest in International Arbitration.

[52] This List contains 23 situations, divided into five categories; category one: § 3.1.1-§ 3.1.5, category two: § 3.2.1-§ 3.2.3, category three: § 3.3.1-§ 3.3.7, category four: § 3.4.1-§ 3.4.4, category five: § 3.5.1-§ 3.5.4 of Part II, IBA Guidelines on Conflict of Interest in International Arbitration.

down the circumstances which do not warrant disclosure for their inability to cause potential conflict.[53]

These Guidelines are in nature of soft law and hence are non-enforceable and do not override any national or applicable procedural law.[54] However, these guidelines have found general acceptance in the international arbitration community, and have helped Courts, practitioners, tribunals, institutions and parties in effective decision-making regarding impartiality, independence, disclosure, objections and challenges carried out in the situations of conflict.[55]

For example, from 2004-2009, the ICC Court referred to these Guidelines in 187 cases. Out of these 187 cases, in 106 cases, the Court has relied upon at least one of the enumerated conflicting situations in the IBA Guidelines while examining the circumstances alleged to cause potential conflict.[56] Here, it is interesting to note that despite the non-binding nature of these

---

[53] *See* Hodges, *supra* note 44, at 602; *see also*, KAREL DAELE, *Chapter 1: Disclosure*, *in* CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 1, 28 (Kluwer Law International 2012), where the Working Group admitted that 'unnecessary disclosure' may escalate a false inference in the mind of the parties that the disclosed situations would impact the arbitrator's independence or impartiality. Unrestricted disclosures thus unnecessarily sabotage the parties' credence in the arbitral process; *See also*, M. Ball, *Probity Deconstructed: How Helpful, Really, are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?*, 21(3) ARB. INT. 326, 326 (2005), where the author recognized that unnecessary disclosure also gives counsel a probable ground to challenge the arbitrator, and whether or not it succeeds, it facilitates complications and hindrances in arbitral proceedings.

[54] Introduction, *IBA Guidelines on Conflict of Interest in International Arbitration*, *supra* note 31; *see also*, W Limited v. M SDN BHD [2016] EWHC 422 where the Court held that the Guidelines cannot override the national laws and are only for reference to assist the Courts.

[55] International Council for Commercial Arbitration, *IBA Guidelines on Conflicts of Interest in International Arbitration 2004 English*', *in* YEARBOOK COMMERCIAL ARBITRATION 314, 316 (ALBERT JAN VAN DEN BERG ed., vol. XXIX, Kluwer Law International 2004).

[56] IBA Conflicts Committee, *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009*, 4 DISP. RES. INT'L 5, 5 (2010).

Guidelines as well as the unwelcoming attitude towards these Guidelines by the leading arbitral institutes,[57] these Guidelines are been frequently relied upon by these institutions while deciding the cases concerning conflict.[58] In this regard, Prof. Gary B Born said that:

*"A number of arbitral institutions initially greeted the IBA Guidelines with considerable coolness, principally because of concerns that they would become bases for seeking judicial review of institutional decisions on challenges or for annulment of awards. The ICC stated that it would not apply the IBA Guidelines (or other guidelines) in considering institutional challenge; the LCIA also indicated skepticism about the Guidelines' usefulness in institutional challenges. Notwithstanding these statements, the IBA Guidelines are frequently relied upon in submissions to the ICC Court and LCIA, and are apparently referred to in internal decision-making at both institutions."*[59]

Thus, this shows the significant use of the IBA Guidelines by the institutions, although, the institutions remind the practitioners that they are not bound by these guidelines unless the parties consented to bound by it.[60]

Further, in US, in *Applied Industrial Materials Corp.* v. *Ovalar Makine Ticaret Ve Sanayi, A.S,*[61] the lower Court had vacated an arbitral award under Federal Arbitration Act,[62] because there was "evident partiality" on the part of the arbitrator. In this case, there existed a business relationship between the arbitrator's organization and one of the parties, which the arbitrator failed to disclose; subsequently, he had also failed to disclose the existence

[57] Hodges, *supra* note 44, at 604-5.
[58] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1850 (2 ed., Kluwer Law International 2014).
[59] *Id.*
[60] Hodges, *supra* note 44, at 604.
[61] No. 05 CV 10540, 2006 US Dist LEXIS 44789 (SDNY, 28 June 2006).
[62] 9 U.S.C. § 10(a).

of an information barrier to the parties.[63] Hence, to examine the required standards of disclosure for an arbitrator, the lower Court had relied upon the IBA Guidelines and the AAA Code of Ethics in Commercial Disputes. The Court quoted the relevant provisions of IBA Guidelines and held that:

*"It is important that courts enforce rules of ethics for arbitrators in order to encourage businesses to have confidence in the integrity of the arbitration process, secure in the knowledge that arbitrators will adhere to these standards"*[64]

The Court of Appeal upheld the decision of the lower Court and, quoting the relevant provisions of IBA Guidelines, reaffirmed that the standards to be applied while warranting the arbitrator to disclose the potential conflict should be much higher than the mere "appearance of partiality".[65]

Subsequently, in *New Regency Productions* v. *Nippon Herald Films*[66], the Court relied upon the General Standard 7(c) of the IBA Guidelines which imposes a duty upon the arbitrator to investigate for any possible conflict of interest or any situation that might give rise to doubts as to his/her impartiality and independence.[67] The Court found these Guidelines to be applicable as far as they direct the arbitrator to their customary duty of avoiding conflict of interest; the Court further reinforced the applicability of these Guidelines by holding that inferences of partiality can be drawn if the arbitrator is aware of the conflicting situation but fails to disclose it; the excuse that he failed to run

---

[63] Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, *A.S,* No. 05 CV 10540, 2006 US Dist LEXIS 44789 (SDNY, 28 June 2006).
[64] *Id.*
[65] *Id.*
[66] 501 F 3 d 1101; 2007 US App Lexis 21070.
[67] General Standard 7(c), *IBA Guidelines on Conflicts of Interest in International Arbitration (adopted in 2004),* IBA, (Sept. 11, 2019, 12:04 P.M), the 2014 version is available on
https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

the conflict check is not an excuse.[68] Subsequently, in *SN Capital LLC (USA)* v. *Productora y Comercializador de Televisión SA de CV (Mexico),*[69] the Court recognized that the increasing use of IBA Guidelines in international arbitration reaffirms the generally accepted standards of impartiality and independence of arbitrator. However, in these cases, the US Courts have only used them as reference.

On the contrary, in certain ICSID cases, the judges have specifically relied upon the IBA Guidelines. For example, in *Perenco Ecuador Ltd* v. *Republic of Ecuador and Empresa Estatal Petróleos del Ecuador,*[70] the parties agreed to resolve the challenge to an arbitrator's appointment in the Permanent Court of Arbitration (PCA), using the IBA Guidelines. The Court upheld the challenge to the arbitrator's appointment based on the General Standard 1 and General Standard 2 of the IBA Guidelines, which requires the arbitrator to remain impartial and independent throughout the arbitration proceedings.[71] In another ICSID case of *Alpha Projektholding GmbH* v. *Ukraine,*[72] the impartiality of one of the arbitrators was in question as he and the counsel of the claimant were schoolmates, and this relation was never disclosed before. The decision in this case was based extensively on the IBA Guidelines (although, the final judgment was passed under Article 57 of the ICSID Convention) and subsequently, the arbitrator was disqualified. Nevertheless, it is noteworthy that the reliance on the IBA Guidelines in this judgment was so extensive that it attracted severe criticism because it deemed the IBA Guidelines to be international standards for disclosure.[73] However, notably, several other ICSID

---

[68] New Regency Productions v. Nippon Herald Films, 501 F 3 d 1101; 2007 US App Lexis 21070.
[69] 2006 WL 1876941 (M D Fla) (5 July 2006).
[70] PCA Case No. IR-2009/1; ICSID Case (No ARB/08/16).
[71] Hodges, *supra* note 44, at 607.
[72] ICSID Case No. ARB/07/16.
[73] Hodges, *supra* note 44, at 607.

cases, for example, *Participaciones Inversiones Portuarias SARL* v. *Gabonais Republic,*[74] have pointed out that the IBA Guidelines only serve as directions.

The applicability of IBA Guidelines has also been reinforced by the Swiss federal tribunal in March 2008,[75] where it held that:

"*In order to verify the independence of the arbitrators, the parties may also refer to the IBA Guidelines on Conflicts of Interest in International Arbitration [...] Such guidelines do not have the force of law [...]; they are nonetheless a valuable tool, capable of contributing to harmonize and unify the standards applied in the field of international arbitration to conflict of interest issues, and one that will undoubtedly exert influence on the practice of arbitral institutions and courts. These guidelines state general principles.*"[76]

Progressively, in India, the principles enumerated in IBA Guidelines have been given the force of law. The Fifth, Sixth and Seventh Schedules added to the Arbitration and Conciliation Act, 1996 by the 2015 amendment are based on the IBA Guidelines.[77] It was held by the Supreme Court of India in *Voestalpine Schienen GmbH* v. *Delhi Metro Rail Corporation Ltd*,[78] that "*the Seventh Schedule is based on IBA Guidelines which are clearly regarded as a representation of international based practices and are based on statutes, case law and juristic opinion from a cross-section on jurisdiction. It is so mentioned in the Guidelines as well.*"[79] Further, this case was followed by the Supreme Court of India in *HRD Corpn.* v. *GAIL (India) Ltd.*,[80] and it was held that "*The enumeration of grounds given in the Fifth and*

[74] ICSID Case No ARB/08/17.
[75] Decision of the Swiss Federal Court of Mar. 22, 2008, 26 ASA BULL. 565 (2008).
[76] Decision of the Swiss Federal Court of Mar. 22, 2008, 26 ASA BULL. 565 (2008).
[77] HRD Corpn. v. GAIL (India) Ltd, (2018) 12 SCC 471.
[78] (2017) 4 SCC 665.
[79] Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd, (2017) 4 SCC 665, ¶ 23.
[80] (2018) 12 SCC 471.

*Seventh Schedules have been taken from the IBA Guidelines, particularly from the Red and Orange Lists thereof.*"[81]

It was further held by the Court that "*the items contained in the Schedules owe their origin to the IBA Guidelines, which are to be construed in the light of the general principles contained therein – that every arbitrator shall be impartial and independent of the parties at the time of accepting his/her appointment. Doubts as to the above are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision. This test requires taking a broad common-sensical approach to the items stated in the Fifth and Seventh Schedules. This approach would, therefore, require a fair construction of the words used therein, neither tending to enlarge or restrict them unduly. It is with these prefatory remarks that we proceed to deal with the arguments of both sides in construing the language of the Seventh Schedule.*"[82]

However, it is worth noting that while making disclosures under Section 12 of the Arbitration and Conciliation Act, 1996, "*Unlike the scheme contained in the IBA Guidelines, where there is a Non-Waivable Red List, parties may, subsequent to disputes having arisen between them, waive the applicability of the items contained in the Seventh Schedule by an express agreement in writing.*"[83]

Such wide acceptance of IBA Guidelines is also evident from empirical data. According to a survey, the IBA Guidelines are the second most used soft law in international arbitration: 7.9% users always apply them, 36.5% apply them regularly and another 36.5% apply them occasionally with only 19% having never used them.[84] According to another report, the IBA Guidelines are the

---

[81] HRD Corpn. v. GAIL (India) Ltd, (2018) 12 SCC 471, ¶ 14.
[82] *Id*, at ¶ 20.
[83] *Id.*
[84] Elina Mereminskaya, *Results of the Survey on the Use of Soft Law Instruments in International Arbitration*, KLUWER ARB. BLOG (Feb. 5, 2020, 09: 10 P.M),

most widely applied soft law instrument. They are used in 57% of the arbitrations, in which issue of conflict arises with 67% of the lawyers and 61% of the arbitrators having referred to them while running the conflict check with respect to the appointment of the arbitrator. Further, the arbitral institutions and the Courts have referred to them in 67% of the cases concerning impartiality and independence of the arbitrator.[85]

Hence, from the above discussion, it is quite evident that IBA Guidelines have been widely accepted by the international arbitration community. Hence, these Guidelines are given some form of normativity, which Gabrielle Kaufmann-Kohler defined as "soft normativity".[86] They are soft in the sense that they hold only influential value and are not mandatory rules. Therefore, the issue of their legitimacy arises. Also, before moving ahead with discussing issues of legitimacy, it is to be noted that these issues do not arise when parties through their agreement consented to abide by the IBA Guidelines, because then, these soft laws assume the form of hard law through incorporation by reference.[87]

## IV. Issues of Legitimacy

The first issue regarding the legitimacy of soft law is its mode of creation. The disapproval in this regard is that the soft laws are undemocratic in nature and incompatible in their application because all the people upon whom the soft laws apply weren't allowed to participate in its creation. Hence accordingly, this criticism falls within one of the two extreme hypotheses: that the rules of conduct in arbitration be either regulated by the statute

---

http://arbitrationblog.kluwerarbitration.com/2014/06/06/results-of-the-survey-on-the-use-of-soft-law-instruments-in-international-arbitration/.

[85] The IBA Arbitration Guidelines and Rules Subcommittee, *Report on the Reception of the IBA Arbitration Soft Law Products IBA Arbitration projects*, INTERNATIONAL BAR ASSOCIATION ¶¶ 108, 110, 111, 113 (2016).

[86] Kaufmann-Kohler, *supra* note 12*,* at 297.

[87] David Arias, *Soft Law Rules In International Arbitration: Positive Effects And Legitimation Of The IBA As A Rule-Maker*, 6(2) INDIAN J. ARB. L 29, 37 (2018).

sanctioned by democratically elected parliament or remain completely unregulated.[88] This criticism essentially indicates issues with the process of drafting these arbitration soft laws rather than their application in general. Hence, the criticism follows that the soft laws are drafted by the individuals behind closed doors without them having any legitimacy to act as legislators for the complete arbitration community.[89] In furtherance thereof, Felix Dasser comments that the IBA soft law norms are not welcomed essentially because "*the IBA Guidelines were drafted by a small circle within the IBA with the membership at large having no real say in the drafting*"[90]

These arguments purporting illegitimacy of IBA soft law norms are completely inaccurate. According to Alexis Mourre, legitimacy has three constituents: experience, internationality and inclusiveness.[91] IBA confirms with all the three constituents.

First, that the IBA has experience and representation, which are confirmed by the fact that IBA Council comprises more than 80,000 lawyers as authorized representatives of more than 190 bar associations encompassing 170 jurisdictions.[92] Additionally, the Arbitration Committee of IBA who had appointed the working

---

[88] Alexis Mourre, *Chapter 25: About Procedural Soft Law, the IBA Guidelines on Party Representation and the Future of Arbitration*, *in* LIBER AMICORUM PIERRE A. KARRER, THE POWERS AND DUTIES OF AN ARBITRATOR 239, 241 (PATRICIA SHAUGHNESSY AND SHERLIN TUNG eds., Kluwer Law International 2017).

[89] *Id. At 242.*

[90] Felix Dasser, *A Critical Analysis of the Guidelines on Party Representation, in* THE SENSE AND NON-SENSE OF GUIDELINES, RULES AND OTHER PARA-REGULATORY TEXTS IN INTERNATIONAL ARBITRATION 33, 35-6 (D. FAVALLI ed., ASA Special Series 37, Juris Publishing LLC 2015).

[91] Mourre, *supra* note 88, at 242.

[92] IBA Arbitration Committee, Committee Home, *About the Committee*, IBA, (Sept. 11, 2018, 08: 13 P.M), https://www.ibanet.org/About_the_IBA/About_the_IBA.aspx.

group to draft IBA Guidelines instruments comprises more than 2500 members from more than 90 countries.[93]

Second, these figures also confirm the IBA's adherence with the second constituent of legitimacy i.e., internationality. Internationality means that any rulemaking operation should consider the cultural diversity of all the stakeholders so that the eventual outcome should not be perceived as a pronouncement of a specific legal culture.[94] As above data suggests, the IBA as rulemaking body comprises representatives from over 170 jurisdictions, it clearly stands in conformity with the requirement of internationality. However, here it is worth clarifying that the cultural diversity doesn't mean the conglomeration of procedures both from civil law and common law cultures; it only means that the rulemaking operation should be equitable, inclusive and open so that the ultimate work product is acceptable to the lawyers from both civil law and common law countries, even if that includes more cultural traits of one side than of the other.[95]

Third, IBA rulemaking process is inclusive in the sense that it considers the views of the arbitration community while drafting its instruments.[96] For example, the subcommittee set up by IBA in 2012 to review and amend the initial version of IBA Guidelines (2004) took into consideration the views of arbitration practitioners, institutions and arbitrators through various surveys and questionnaires.[97] Examining these views, the subcommittee prepared various drafts that were deliberated upon by arbitration committee members and then were circulated to arbitration

---

[93] IBA Arbitration Committee, *Overview, Membership*, IBA, (Sept. 15, 2019, 09: 56 P.M), https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Overview.aspx.
[94] Mourre, *supra note* 88, at 242.
[95] *Id*. at 243.
[96] David Arias, *Soft Law Rules In International Arbitration: Positive Effects And Legitimation Of The IBA As A Rule-Maker*, 6(2) INDIAN J. ARB. L 29, 38 (2018).
[97] *Id*.

practitioners, arbitrators and institutions for their feedback and comments.[98] The final IBA Guidelines (2014) reflects the inclusion of most of these remarks by the arbitration community.[99] The similar inclusiveness was followed by the task force set up for drafting IBA Guidelines on Party Representation in International Arbitration.[100]

Hence, from the above discussion, it is quite clear that the IBA conforms to all the constituents of legitimacy and hence, is a legitimate professional rulemaking body. Lastly, as far as democratic legitimacy of IBA soft law norms is concerned, the argument that there is no role of a public body in rulemaking stands negated. The reason being, in arbitration, which is non-government dispute settlement technique, it seems antithetical to argue that the legitimacy of rulemaking will increase if such rule is been tailored by the government body rather than by the IBA, which is a professional organization dedicated to the improvement of international arbitration practices.[101] The argument of enhanced legitimacy of the statutory laws stands justified when parties settle their disputes in national Courts, but when the parties choose arbitration, they expressly "opt-out" of the procedural hard law of their respective nation, and become flexible to resort to best procedural practices. Here, a counter-argument may be raised that since all arbitrations must be anchored to some municipal system, the parties are bound by the procedural law of that country. However, this argument does not hold ground because the party autonomy in arbitration enables the parties to tailor the applicable procedure law according to their requirements, by virtue of which they can agree to use soft law instruments for those purposes upon which the law of the

[98] *Id.*
[99] *Id.*
[100] IBA Guidelines on Party Representation in International Arbitration, pmbl. (2013).
[101] Lüth/Wagner, *supra* note 11, at 419.

seat might be silent; (of course, the soft laws can be used only as far as they complement the applicable procedural law and do not conflict with the same). Therefore, the use of soft law instruments in complement to the applicable procedural law enables the parties to avail an all-round procedure for their dispute settlement - a feature that is absent while resolving disputes in national Courts because parties in Courts, unlike in arbitrations, do not have the autonomy to select and tailor the applicable law.

The second issue concerning the legitimacy of soft law is that it has traded flexibility for predictability.[102] However, this is not true because soft laws provide additional flexibility in the arbitration process.[103] Soft laws provide "equality of arms" to the parties to ensure "due process"[104] which ultimately complements predictability. Consider a situation of disagreement on particular question of procedure between the parties from two different cultures; now if the arbitrator formulate some solution to this issue on his own accord, there will arise the risk of seeming arbitrariness on his part.[105] Or else, without soft laws, the parties will either try to argue on the basis of the law of the seat, which ultimately might not fetch solution on the existing procedural disagreement, or they may resort to their national procedural laws which will again give rise to cultural dissent. In this matter, Rusty Park noted that "*the benefits of arbitrator discretion are overrated; flexibility is not an unalloyed good, and arbitration malleability often comes at an unjustifiable cost*".[106] Therefore, to level the playing field, to bring fairness in the proceedings and to ensure that the arbitrator does not apply rules on his own accord, the reliance on different soft law instruments by the parties as well as by the tribunal from

[102] Kaufmann-Kohler, *supra* note 12, at 298.
[103] Mourre, *supra* note 88, at 245.
[104] Park, *supra* note 15, at 146.
[105] Mourre, *supra* note 88, at 245.
[106] William W. Park, *The 2002 Freshfields Lecture – Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion*, 19 Arb. Int'l 279, 283 (2003).

case to case basis is the most satisfactory solution. Nevertheless, the tribunal cannot impose the norms of soft laws without the prior consent of the parties or without the backing of the soft law's provision in the law of the seat, and hence, the argument that the use of soft law instruments results in loss of flexibility stands negated. In fact, the soft law instruments are the tools of facilitating flexibility in order to achieve the procedure that is "regular" and is in accordance with the principle of "rule of law".[107]

The third issue that concerns the legitimacy of soft laws is that they lead to "judicialisation" of arbitration proceedings i.e., the arbitration proceedings resembling more closely to the Court proceedings.[108] However, is it really bad? This does not seem to be a criticism. In fact, although the "judicialisation of arbitration" may seem contradictory phrase, the characteristics of legal process unfailingly enters arbitration as soon as the parties desire for binding result. The significant respect to the legal rights of the litigants is given because of the fact that one party cannot on its own accord disregard the arbitrator's decision. Arbitration proceeds in the shadow of judicial power, in as much as it extends to the seizure of assets or granting of *res judicata* to the arbitrator's decision.[109] Hence, the soft laws helps in maintaining the procedural stability during arbitration proceedings which ultimately ensures fairness and protects the legal right of the parties at all stages.

In this regard, the soft law instruments aid the universal justice system by improving the efficiency of system of arbitration in its pursuit of delivering justice at the stages where national courts fail to outreach.

---

[107] Park, *supra* note 15, at 146.
[108] *Id.*
[109] *Id,* at 146-7.

Hence, from the above discussion on legitimacy of soft law, it is quite evident that the IBA instruments are not only legitimate in its application but are also successful and are widely accepted by the international arbitration community.

## V. Conclusion

Arbitration is an institution of justice. Where national Courts fall short to deliver justice, arbitration extends its arms to it. In the era of globalization, arbitration plays the major role in settling multinational trade and party disputes, cross-border funding disputes and inter-state investment disputes, covering the claims running into billions of dollars and the interest of different states and state bodies. In wake of such high significance of arbitration, it is incomprehensible that the crucial facets of procedure-evidence taking, counsel conduct and disclosure are among some of those facets that call for regulation. The globalization has weakened the functionaries of state to fill this vacuum on the global level and hence the professional organizations such as IBA steps in to fulfill the vital needs of procedure in international arbitration through its three instruments concerning counsel conduct guidelines, disclosure guidelines and rules on taking evidence. Here, the IBA as a rulemaking body is completely legitimized as it is an experienced body whose rulemaking operation is inclusive as much as it considers the views of stakeholders in arbitration community, and reflects the wide cultural diversity. Further, these IBA instruments especially the IBA Guidelines on Conflict of Interest in International Arbitration as seen above have been widely accepted by the Courts, institutions, arbitration practitioners and professionals, because these Guidelines serves the vital requirement of arbitral procedure i.e., ensuring impartiality and independence of arbitrator, and protects the integrity of arbitral award against frivolous challenges.

The complaints by the critics that the soft laws are overregulated are also unsustainable. In fact, soft laws are the exponents of regulations. These soft laws are the requisites for ensuring certainty, fairness and level play in the arbitration proceedings. With the speedy evolution of arbitration as an effective mode of dispute settlement, new challenges in future are inevitable. However, with the existence of soft laws like IBA instruments and the dedication of professional bodies like IBA to continue improving the institution of arbitration, the author is sure that these new challenges will be overcome in most efficient manner and therefore the mechanism of arbitration will run with expediting pace.

Vol. 11 Feb 2020

# ENFORCEMENT OF SET ASIDE AWARDS

*Bedanta Chakraborty*[*]

**Abstract**

*The question whether an arbitral award, set aside by the court in the seat arbitration, could be enforced in another state or not has received significant attention from various scholars. This issue arises due to myriads of interpretations given by various national courts to the meaning of Article V(1)(e) of the New York Convention, 1958. Two schools of thought- the Territorial and the Delocalised view, have mired the entire debate. The problem in the territorial approach lies in the fact that even after the 1958 Convention there is no uniformity in the grounds on which an award is set aside. On the other hand, critics of the delocalised approach have argued that if the losing party is not afforded the right to challenge the award in one jurisdiction then the losing party could be pursued by the claimant with enforcement actions from country to country until a court is found which grants the enforcement. These uncertainties and conflicts call for a reform of the current international legal framework for enforcing arbitral awards. Harmonisation – uniform laws for enforcement/annulment of awards, and Unification – establishing a supranational court for the control of award, are the two broad categories of the proposed solutions. This paper analyses the viability of these solutions, and also addresses the functioning of bodies such as the ICSID, the Arab Centre for Commercial Arbitration, the Joint Court of Justice and Arbitration. These institutions with prerogatives similar to a supranational court, have been working well and are thus evidence to the fact that the establishment of a supranational court for the control of annulment/recognition of an award is far from being impracticable and unrealistic.*

[*] The author is a student at Gujarat National Law University, Gandhinagar.

# I. INTRODUCTION

The widespread use of arbitration as a dispute settlement mechanism in international commerce comes with a sophistication of its governing legal mechanisms.[1] Importance in this area is no longer limited to the standard and current question of the enforcement of awards, but also on the enforcement of decisions of national courts on annulment actions against arbitral awards.

In order to enforce an award, the same needs to be presented in the court of the country wherein the award creditor would have interest. However, the award may have been challenged through a setting aside action before the court at the seat of the arbitration. In case the same gets set aside, it leads to the very complex question of its effect on other states. Should the award be vacated by the court in the country of origin be given so much importance that it overshadows or precludes its enforcement in other countries?

To give an example, say A and B have a commercial dispute arising out of their contract. According to their Dispute Settlement clause, the same needs to be resolved by the Arbitration rules of LCIA seated at London. Suppose the award comes in favour of A but B is successful in getting it set aside by the court in London. A, a French national, applies to the court in Paris to enforce the LCIA award in his favour to protect his assets in France. The question which arises now is, if the court in Paris would enforce the award of the LCIA given that the same has been set aside by the court in London i.e., the seat of arbitration?

In most states, the recognition and enforcement of foreign arbitral awards is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958

[1] HAMID G GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD XIII (Kluwer Law International 2002).

("New York Convention").[2] To answer the above mentioned question it is necessary that to turn to the New York Convention. This, however, is problematic because the provisions in the New York Convention have been subject to different interpretations and therefore, creates a plethora of ambiguities. The entire dispute therefore hangs on the tip of the question if whether one favours Article V to the detriment of Article VII, or opts for the opposite approach.

Article VII of the New York Convention allows the party seeking enforcement of the award to rely on the domestic laws of the country in which enforcement is sought, if these provisions are more favourable to enforcement than those of the New York Convention. However, Article V, which lists the grounds under which an award may be denied enforcement, retains in its paragraph (1)(e) the annulment of the awards in the country in which or under the law of which it was made among these grounds.

Because of this apparent conflict and anomaly, a situation arises wherein due to differences in the legal systems across the world different legal outcomes may be reached on the same set of facts. As a result, there is a systematic uncertainty which ultimately undermines the New York Convention.

There are widely two approaches or schools of thought to deal with this problem- the delocalised approach and the territorial approach. The proponents of the delocalised approach stress on the fact that an award sought for enforcement is independent from the legal system of the country wherein the award was rendered and as such the question of its validity should be judged by the courts in the enforcing country without taking into consideration the decision of the court in the seat of arbitration,

---

[2] DANIEL GIRSBERGER & NATHALIE VOSER, INTERNATIONAL ARBITRATION: COMPARATIVE AND SWISS PERSPECTIVES 1978 (3rd ed. Kluwer Law International 2016).

or in simpler words, an annulled award may be enforced by a court in the enforcing country. Under the territorial school of thought, an arbitral award is viewed to have been integrated in the legal system of the seat of arbitration and hence, once the same is set by the court in the seat of the arbitration the award loses its validity and ceases to exist. and therefore, the same cannot be enforced by the courts in the country where enforcement of the award is sought.

Part II of this paper discusses in detail the different schools deliberating over this issue and their demerits. Considering that the transnational or the delocalised approach have been widely lauded for its international approach, Part III of the paper explores the foundational basis of this approach through the decisions of various courts, including the courts in France, Belgium, Austria and the US, wherein the delocalised approach has been adopted to recognise an award set aside at the seat of arbitration. Part IV of the paper makes an attempt to deal with the question in light of the Indian experience with enforcing awards. Stressing on the point that India has in general a territorial approach and follows the English courts with respect to arbitration laws, it is shown as to why India would not enforce an award set aside by the court in the seat of Arbitration. There are many existing literature identifying the above problem. There have been further more research into the question of the best choice out of the two schools. In Part V of this paper the suggested solutions to do away the problem has been explored. The debate between harmonisation and unification has been addressed to show why unification of the system should be the way to tackle this issue. Further, the need to have a new multilateral convention and establish a new supranational court for the control of arbitral awards has been suggested.

## II. DELOCALISED AND TERRITORAL APPROACH

Article V(1)(e) provides that foreign arbitral award may be refused enforcement if the same has been set aside in the country where the arbitration was seated. The traditionalists thus, in pursuance to this provision, state that an award vacated in the court of the jurisdiction where arbitration took place has no further legal force or effect, and cannot be thus enforced in any other jurisdiction.[3] This view, drawing inspiration from the notions of Westphalian sovereignty, argues that since each State has the exclusive power to regulate and enforce laws relating to persons, property, or events within its boundaries, the law of the seat of arbitration should exclusively regulate the legitimacy and legality of arbitrations that take place within it.

Diametrically opposite is the view which advocates that the system of arbitration is a part of a transnational legal order that is independent of any national legal system. Therefore, the seat court's decision to set aside an award is confined to its own jurisdiction only. As many commentators would argue the delocalised view does not preclude the application of the New York Convention. Article V(1)(e) of the New York Convention, is not a bar to disregarding the national laws and preventing the enforcement of foreign awards. Even if Article V(1)(e) were such a bar, it may be overcome by Article VII which makes this clear, by stating that in case the national laws are more favourable to enforcing or recognising a foreign award, the same shall be given precedence over any other international obligation.

## A. THE DELOCALISED VIEW

Under the 1923 Geneva Protocol, the arbitration was governed by both the will of the parties and the law of the country in which the arbitration was conducted.[4] The New York Convention, in a

---

[3] Albert Jan van den Berg, *Annulments of Awards in International Arbitration*, *in* INTERNATIONAL ARBITRATION IN THE 21ST CENTURY, TOWARDS JUDICIALIZATION AND UNIFORMITY (Richard B. Lillich eds. Martinus Nijhoff 1994).

[4] Protocol on Arbitration Clauses 1923 art 2.

first, marked the beginning of the decline of the role of the seat in an arbitration by way of Article V(1)(d).[5]

The theory of delocalisation can be traced from the 1958 Aramco award[6] in which a tribunal seated at Geneva applied a principle of international law instead of *lex situs* which was the Swiss law in the present case. Taking inspiration from such cases, those advocating for this approach grew in numbers. Till date there has been only so many attempts to define the term 'delocalisation of award'. According to one commentator,[7] delocalisation "*is one of the various aspects of internalisation. It derives mainly from the idea that parties from different countries, in order to achieve neutrality, wish to avoid as much as possible the intervention of their respective courts, and at the same time the application of the rules of their respective countries.*"

Delocalisation, thus, in light of the above definition and the several approaches taken by the courts, would mean the impossibility for any State court to block, through an annulment decision, the enforcement of an award outside its boundaries.[8] Proponents of the delocalised theory would argue that an award, irrespective of the state's local policy or non-arbitrability rules which furthers setting aside an award, must be enforced. The fact that a legal system provides for a review of awards made in locally seated arbitrations, notwithstanding the parties' agreement to resolve disputes by arbitration, should be immaterial for recognition of arbitral awards in foreign jurisdictions.[9] One of the most celebrated commentators, Emmanuel Gaillard, in support

---

[5] HAMID G GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 108 (Kluwer Law International 2002).
[6] Aramco award, ILR 117 (1963).
[7] P Mayer, *The Trend towards Delocalisation in the last 100 Years*, *in* THE INTERNALISATION OF INTERNATIONAL ARBITRATION, THE LCIA CENTENARY CONFERENCE (Martin Hunter ed. Springer 1993).
[8] HAMID G GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 114 (Kluwer Law International 2002).
[9] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3642 (2nd ed. 2014).

of this theory reiterated the finding of the *French cour de Cassation*[10] in stating that refusing to enforce an arbitral award on account of it being set aside by the seat court is unacceptable because the award in not integrated into the legal order of the country of the state simply by virtue of the geographic location. The state of enforcement assumes greater importance in such cases because pursuant to the New York convention the state needs to apply its own local laws to enforce an arbitral award.[11]

This view has received criticism mostly from the proponents of the territorial schools of thought. The seat of arbitration is a very important element of arbitration and as such has greater connection with the arbitration. Seat is the factor which connects the arbitration with a particular State. That state should hence not only govern the procedure related to the Arbitration but also exercise control over the award.[12]

This view finds its basis from Article V of the New York Convention which states that the state in which the award was rendered is free to set aside or modify the award in accordance to its internal laws. If this is applied in its strictest sense it would mean that an annulled award is non-existent as the award would cease to exist *erga omnes*.[13] Therefore, if the award is non-existent at the seat of the arbitration its validity in any other country should not be a question.

---

[10] *Pabalk Ticaret Ltd Sirketi* v. *Norsolor SA,* (1986) 11 Y.B. Comm. Arb. 484 (ICC Int'l Cl. Arb.).

[11] Emmanuel Gaillard, 'The Enforcement of Awards Set Aside in the Country of Origin', [1999] 14 *ICSID Review - Foreign Investment Law Journal* 16, 40

[12] Giovanni Zarra, *L'esecuzione dei lodi arbitrali annullati presso lo Stato della sede e la Convenzione di New York: verso un'uniformità di vedute?*, RIV. ARB 561, 574 (2015).

[13] Thomas Clay & Sara Mazzantini, *Reasons and Incoherencies regarding the Enforcement of Annulled Foreign Arbitral Awards*, 7 INDIAN J. OF ARB. L. 141 (2018).

Further, this view may also propagate the problem of forum shopping[14] and creating an international disharmony, both of which are clearly inconsistent with the ethos of the New York Convention. It creates international disharmony in the decision-making in the arbitral sphere as the delocalised view would more often than not end up disregarding the will of the parties. When parties choose a particular country as their seat for the arbitration they also submit to the legal system of that country. So, by refusing to give recognition to a possible annulment decision by a court of that country, the will of the parties would be violated.

Forum shopping is bound to crop up for the simple reason that parties dissatisfied with the decision of one court would immediately move to another country with the most liberal judge in order to enforce the arbitral award. This also furthers disregarding the principle of international comity[15].

B. TERRITORIAL VIEW

Under this approach, every arbitration is believed to be attached to a particular jurisdiction and a seat of arbitration, and is thus subjected to the laws and jurisdiction of the courts in the seat of the arbitration. One commentator in favour of the territorial approach has argued that when the award sought to be enforced has been set aside in its state of origin the very premise of its enforcement gets eroded and as such becomes a non-existing award. It thus, then becomes trite to refuse its enforcement.[16] Further, Albert Jan van den Berg, contends that when an award is applied for enforcement or recognition to a foreign court, then the court is bound by the decision of the court in the country of

[14] Robert C Blind, *Enforcement of Annulled Arbitration Awards: A Company perspective and an Evaluation of a New York Convention*, 37 NC J INT'L & COM REG 1013, 1044 (2011).

[15] J Paulson, *Rediscovering the New York Convention: Further Reflections on Chromalloy*, 12 MEALEY'S INT. ARB. 26, 28 (1997).

[16] MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW AND PRACTICE 930 (3rd ed. Juris Net Llc 2014).

origin. And as such, if the award was set aside in the country of origin then the foreign court must respect the said decision and refuse to enforce the annulled award.[17] Similarly, Prof. William Park in his seminal work, "The Lex Loci Arbitri and International Commercial Arbitration", following certain decisions[18] refusing to enforce an award annulled in the seat of arbitration, suggested that if an award has been annulled by the court where it was made, enforcement in another country would be difficult as practical matter and hence should be avoided.[19]

This view again has its own demerits. First, there is uncertainty with regard to the contours of transnational public policy. In line with the New York Convention and the UNCITRAL Model Law, most states describe public policy as that which protects principles of 'fundamental justice'. However, the principles encapsulated by the term 'fundamental justice' is a task left to be determined by the States.[20] There may be certain principles subscribed to by many nations although differently interpreted. There may also be principles which go beyond agreement of states which form part of natural law.[21] In the absence of clarity on the source of such transnational principles, they appear as normative rules. It is difficult for courts to apply them without finding them to be an inherent part of domestic public policy.[22]

---

[17] Albert Jan van den Berg, *When Is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, 6 PACE L. REV. 25, 42 (1985).
[18] *Judgment of 28 October 1999*, 25 Y.B. Comm. Arb. 718 (ICC Int'l Ct. Arb.); *Judgment of 8 September 2011*, Case No. 4390-2010 (Chilean Corte Suprema).
[19] Park William W, *The Lex Loci Arbitri and International Commercial* Arbitration, 32 INT. & COMP. L. Q. 21, 27 (1983).
[20] Dirk Otto & Omaia Elwan, *Article V(2)*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION (Herbert Kronke et al. eds. Wolters Kluwer 2010).
[21] Emmanuel Gaillard, *The Representations of International Arbitration,* 1 J. INT'L DISP. SETTLEMENT 271, 278 (2010).
[22] *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards: Explanatory Note*, in 50 YEARS OF THE NEW YORK CONVENTION 649 (Kluwer Law International 2009).

The adherents of the delocalised view have for long held the view that the use of the word may and not shall or must necessarily point towards the fact that Article V(1)(e) is in fact optional and not mandatory.[23]

One example wherein the enforcing court might not wish to be bound by the decision of the seat court may be found in the *Yukos*[24] case. In this case, an award seated in Russia was successfully set aside by the award debtor in the court of Moscow. This award was then applied for recognition in Netherlands. The respondent resisted the same by stating that the same was set aside by the courts in the seat of arbitration. The petitioner in this case argued that the judicial process in the Russian courts was not entirely free from bias and partiality. Accepting the same, the Dutch courts found it unreliable to depend upon the Russian courts and as such recognised the award set aside at the seat of arbitration. When the same award was placed for enforcement in the English court, the English court too followed the experience of the Dutch court and recognised the award which was set aside by the court in Moscow.[25]

Therefore, the task left to the states is a mammoth one. They need to first, deduce the principles of fundamental justice and public policy which is inherently subjective. The facts in light of the religious, cultural, political, economic scenarios at that time will influence the outcome of the decision. To generalise and then apply them in enforcement applications is difficult.

## III. FOUNDATIONAL BASIS OF THE DELOCALISED APPRAOCH

[23] SIMON GREENBERG, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE (Cambridge University Press 2011).
[24] Yukos Capital SARL v. OAO Rosneft, Gerecht-shof Amsterdam, (2009) 34 Y.B. Comm. Arb. 207 (Supreme Court of the Netherlands).
[25] Yukos Capital SARL v. OJSC Rosneft Oil Company, 2014 EWHC 218 (Comm.) 20.

The French courts were the first to have applied the delocalised approached in considering the fate of annulled awards. In France, this rule of law has become the preferred approach for the matter under consideration. This approach can be seen to have been established by the progression of four cases.

### A. THE *NORSOLOR*[26] CASE

In 1984, the *Cour de cassation*, the French Supreme Court laid down that it was in fact possible for the French courts to recognise and apply awards which have been set aside by the courts at the seat of the arbitration. The Supreme Court overruled the decision of the Court of Appeals in Paris, which pursuant to Article V(1)(e) of the New York Convention had refused to recognise an award rendered in Austria which was set aside by the Court of Appeals in Vienna.[27]

The French Supreme Court decided so because of Article VII of the New York Convention and also because under Article 12 of the New Code of Civil Procedure, the Court of Appeal was required to consider the recognition of a foreign award under its domestic laws only.

### B. THE *POLISH OCEAN LINE*[28] CASE

In 1993 the French Supreme Court again refused to recognise an award despite it being set aside by the court in the seat of arbitration. The Supreme Court upheld the decision of the Court of Appeal in Douai confirming the enforcement of an award suspended in Poland. The Supreme Court held that French courts could not take support of Article V(1)(e) of the New York Convention to refuse recognition of an annulled award. It stated that Article VII of the same convention gives primacy to the

---

[26] French Supreme Court decision of October 9, 1984, Rev Arb 1985, 341.
[27] Decision of January 29, 1982, Rev. Arb. 1983, 516.
[28] Societe Polish Ocean Line v. Societe Jolasry, (1994) 19 Y.B. Comm. Arb., 662 (French Supreme Court).

domestic laws of the courts in the country where the enforcement of the award is sought. So, unless the grounds under which the award was set aside by the court in the seat are recognised as grounds under the laws of the enforcement country, the award will not be refused recognition.

### C. THE *HILMARTON*[29] CASE

The delocalised approach as a firm practice was established by the French Court in this case. Upholding the decision of the lower court, the court held that Article VII of the New York Convention was correctly applied to the given case. The court further held that the award rendered in Switzerland is an international award and is not integrated in the legal system of that State, and thus it remains in existence even if set aside and its recognition in France is not against international public policy.

### D. THE *CHROMALLOY*[30] CASE

The delocalised view in the French courts was finally resolved and set firm in the decision given by the Court of Appeal in the *Chromalloy* case. The court held in clear terms that in an application for the recognition of a foreign award before a French court, only the provisions of the New Code of Civil Procedure (domestic law) are important. And if there are clashes vis-à-vis Article V of the New York Convention, pursuant to Article VII the domestic law would prevail. The award made in Egypt is an international award which is not integrated into the legal order of the seat of the arbitration. Therefore, it being set aside at the seat is immaterial for the courts in France.

In Belgium as well, the delocalised approach has been celebrated as the most appropriate approach for the given problem. The

---

[29] Societe Hilmarton Ltd. v. Societe OTV, (1994) 19 Y.B. Comm. Arb 665 (French Supreme Court).

[30] Chromalloy Aeroservices, Inc. v. The Arab Republic of Egypt, (1997) 22 Y.B. Comm. Arb. 692 (Paris Court of Appeal).

Belgian Court of Instance, in its decision of December 6, 1988 in the *Sonatrach*[31] case refused to interfere with the decision of a lower Belgian court which had recognised and applied an award rendered in Algeria even though the Algerian court had struck the same as being against public policy. In the Belgian experience, the parties resisting the recognition of the annulled award raised Article V(1)(e) of the New York Convention. The same did not come in rescue of the party because, as the Belgian court notes, Algeria was not a party the Convention then and hence the court did not even make reference to Article VII of the Convention unlike the French Court. It is also important to note that like the French New Code of Civil Procedure, even under the Belgian legal order, only the grounds under its laws are considered for setting aside an award and not beyond. The Belgian case law, therefore, due to the peculiarity of the facts, cannot be considered to be as firm and clear as the French case laws. However, the enforcement of set-aside awards under Belgian laws is more justifiable than the French experience because the delocalisation under Belgian law is complete and consistent. Indeed, Belgium's disregard of foreign annulment decisions is in conformity with the possibility Belgian law offers to parties to exclude the annulment control over certain awards rendered in Belgium.[32]

Further, in Austria, the decision widely referred to in support of the delocalised view is the *Radenska* case where the Austrian Supreme Court reversed the decision of the Court of Appeal of Graz which refused to recognise an award rendered in Belgrade that had been annulled by the Supreme Court of Slovenia for

[31] Societe Nationale pour la Recherche, le Transport et la Commercialisation des Hydrocarbures v. Ford, Bacon and Davis Inc, (1990) 15 Y.B. Comm. Arb. 370 (Brussels court of First Instance).

[32] HAMID G GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 89 (Kluwer Law International 2002); E GAILLARD & J SAVAGE, FOUCHARD, GAILLARD AND GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 903 (Wolters Kluwer 1999).

violation of public policy.[33] The court relying on Article IX of the European convention, which provides the bases for setting aside an arbitral award akin to Article V of the New York Convention, held that a plain reading of the Article IX would show that the setting aside of an arbitral award for violating public policy where it was given does not form a part of Article IX and as in Austria the award retains its legal validity, it thus follows recognition.

This approach of the French court can be seen to have percolated in common law countries as well, such as the USA. This can be seen by considering the following cases.

### E. THE *PEMEX* CASE[34]

In this case the US Court of Appeals for the Second Circuit affirmed the decision of the district court which recognised an arbitral award which was set aside by a court in Mexico, the seat of arbitration. In deciding so, the court undertook a liberal interpretation of the Panama Convention (similar to the New York Convention) and held that the use of the word "may" in the Convention means that the court has the discretion to decide if the award set aside according to a foreign law would have the same effect in the enforcing country. Further, the court also noted that neither the New York Convention nor the Panama Convention expressly requires for the non-recognition of an award set aside at the seat of Arbitration. Such a stipulation is required only in terms of the 'principle of comity'.

### F. THE *CHROMALLOY*[35] CASE

This case involves the aforementioned award enforced by the Court of Appeals in Paris irrespective of the fact that the same

---

[33] DO Zdravilisce Radenska v. Kajo-Erzeugnisse Essenzen GmbH, (1999) 24 Y.B. Comm. Arb. 922 (Austrian Supreme Court).
[34] Corporacion Mexicana de Mantenimiento Integral v. Pemex-Exploracion Y Produccion, 962 F. Supp. 2d 642 (2013).
[35] In Re Chromalloy Aeroservices and the Arab Republic of Egypt, 939 F. Supp. 906 (D.C. Cir. 1996).

was annulled in Egypt where the award was rendered. Subsequent to its annulment but prior to its enforcement in France, the award was enforced by the United States District Court for the District of Columbia. The decision of the Court here was in line with the reasoning given by the French Courts. The court therein contrasted Article VII from Article V of the New York Convention to state that while the former provision puts laws more favourable to arbitration (domestic laws in this case) on a higher pedestal the latter provision on the other hand, only qualifies the importance of a foreign court's decision as regards its validity with a "may". That is to say, a court would enjoy absolute discretion vis-à-vis the application/recognition of an award. The court also conducted a comparative analysis of the reasons given by the court at the seat of arbitration (Egyptian court) to set aside the award and the provisions of the Federal Arbitration Act (the American Arbitration Act). The court concluded that the American laws do not recognise the grounds based upon which the award was vacated and as the Egyptian court's decision would in no way effect the application for enforcing the award rendered in Egypt.

Thus, the judicial decisions on various instances have in fact recognised awards which have been annulled at the seat of arbitration. What is important to note at this instance is the flexibility offered by Article VII of the New York Convention to states to enforce set aside awards where their forum's law does not necessarily consider the annulment of awards as a refusal for enforcement of an award. Many often refer to this provision as the hidden treasure[36] of the New York Convention. Article VII offers an evolving and teleological interpretation.

---

[36] Ph Fouchard, *Suggestions to Improve the International Efficiency of Arbitral Awards*, in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, (Albert Jan van den Berg ed. Wolters Kluwer 1999).

The international enforcement mechanism has thus travelled a long way from the system of double exequatur requirement under the Geneva Convention to the practice of enforcing annulled awards- thus going from total dependence to total indifference towards the fate of the award in the State in which the arbitral award is rendered.[37]

## IV. THE APPROACH IN INDIA

In India, enforcement of foreign awards is subject to the New York Convention and is governed by Part II of the Indian Arbitration and Conciliation Act, 1996. Clause (e) of S. 48(1) of the 1996 Act corresponds to Article V(1)(e) of the New York Convention.

S. 48(1)(e) thus states that the foreign award cannot be enforced if – (i) the award has not yet become binding; or (ii) the award has been set aside or suspended by a competent authority of the country in which or under the law of which the award was made.[38]

So far the courts in India have not as yet delivered a judgment whose ratio can be used to settle the debate as far as the Indian context in concerned.[39] There are a couple of decisions where in the apex institution has in fact held that international arbitration awards must be enforced internationally, and therefore should be international in their validity and effect[40], but an extension of the same to recognise annulled awards is not present.

Many have expressed views with respect to the question if an award annulled at the seat of arbitration can actually be enforced

---

[37] HAMID G. GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 107 (Kluwer Law International 2002).

[38] 2 ANIRUDH WADHWA & ANIRUDH KRISHNAN, JUSTICE RS BACHAWAT'S LAW OF ARBITRATION & CONCILIATION 2685(6th edn. Lexis Nexis 2018).

[39] Ciccu Mukhopadhaya, *India*, *in* 23 ICC GUIDE TO NATIONAL PROCEDURES FOR RECOGNITION AND ENFORCEMENT OF AWARDS UNDER THE NEW YORK CONVENTION (ICC 2012).

[40] Brace Transport Corp. of Monrovia, Bermuda v. Orient Middle East Lines Ltd., AIR 1994 SC 1715, 1720.

by the Indian courts under a S.48 application. It is argued that such an application would fail because India majorly has a territorial approach for arbitration and this is so for the following reasons:

1. In Oil and Natural Gas Commission v. Western Co. of North America[41], the Supreme Court was of the view that an arbitral award made under the Indian law could not be enforced by a foreign court unless recognised by the Indian courts. The court held that if an Indian court does not recognise a particular award, the same cannot be enforced even by a foreign court. This case manifested by virtue of an anti-suit injunction and as such the Supreme Court passed injunction against the party to ensue enforcement proceedings in the US courts. The court asserted its jurisdiction over the arbitration even though it was initiated outside India, for the reason that Arbitration Act of 1940 was made applicable. It rejected the contention that an award was independent and stateless and that its enforcement could be done in other country.

2. In another instance, in Badat & Co v. East India Trading Co[42], the court held that foreign arbitral awards, other than awards that are enforceable under the legislation implementing the Geneva Convention and the New York Convention, are enforceable in India on the same grounds and in the same circumstances as they enforceable in England, under the common law grounds of justice, equity and good conscience. English courts generally refuse to recognise awards which have set aside by courts at the seat of arbitration. Under the English laws, when the court at the seat has made an order to set aside the arbitral award, the English court would usually, if not invariably, recognise the said order

[41] Oil and Natural Gas Commission v. Western Co. of North America, (1987) 1 SCC 496.
[42] Badat & Co v. East India Trading Co., AIR 1964 SC 538.

and decline to enforce the award. Therefore, Russel notes, "*Where the competent authority suspends the binding effect of an award, the English court may dismiss the application for enforcement as premature or it may adjourn the application until the suspension is lifted.*"[43]

3. Further, a foreign judgement operates in India as res judicata if it meets the requirements under S. 13 of the Code of Civil Procedure, 1908.[44] Indian courts do not look into the merits of a foreign judgment.[45] If a judgement, therefore, setting aside an award, meets the conditions laid down in S.13, it will act as res judicata and an Indian court will accordingly refuse enforcement of the same award.[46]

Thus, for the above mentioned reasons it is clear that if circumstances were to arise, Indian courts adopting the English approach and the territorial approach would refuse to recognise an award which has been set aside by the court at the seat of arbitration.

## V. SUGGESTED SOLUTIONS

The problem arises due to the reason that there is no singular approach which can definitively resolve the dispute. While the territorial approach has been widely favoured for the finality it receives, it is mired with controversies as identified in the previous chapters. The transnational approach adopted by the delocalists even though international in nature affects comity and disturbs international harmony in Arbitration.

Therefore, several commentators have called in for suggestions to improve and work over these anomalies. The solutions are of

---

[43] DAVID ST JOHN SUTTON ET AL., RUSSEL ON ARBITRATION 469 (23rd ed. Sweet and Maxwell 2014).
[44] R. Vishwanathan v. Rukn-ul-Mulk Syed Abdul Wajid, AIR 1963 SC 1.
[45] Renusagar Power Co. Ltd v. General Electric Co., AIR 1994 SC 860.
[46] P. Ramaswamy, *Enforcement of Annulled Awards- An Indian Perspective,* 19 J. OF INT'L ARB. 461, 469 (2002).

varied nature. Widely these suggestions can be categorised into Harmonisation and Unification. Under the first category suggestions such as harmonisation by the UNCITRAL Model Law (A), annulment pursuant to a local standard (B), exclusion of annulment proceedings (C), have been made. The second category includes formulating a new multilateral convention (D) and, establishing a supra-national body with oversight authority over arbitral awards (E).

### A. UNCITRAL MODEL LAW

The attempt towards harmonisation through a uniform system dates back to 1936- the UNIDROIT Uniform Law on International Commercial Arbitration. The dream came true only in 1985 through the UNCITRAL Model Law. The Model law was adopted by many countries to have a uniform legislation for the Arbitration laws. The model law would thus be considered a success if it infact has resulted in ensuring uniformity in the grounds of setting aside an award. However, this statement is far for being considered true.

Several countries have had their deviations from the Model Law. There are countries which are inflexible in their approach and have retained their arbitration laws which are still based on archaic traditions, such as Saudi Arabia and Morocco, and they refuse to come anywhere close to the provisions of the Model Law.[47] For instance, even after the new rules on Arbitration in Saudi Arabia, courts still can review merits of a case to ensure compliance with Islamic laws.[48] And then there are also countries like France, which are so liberal in their approach that they have adopted laws which are far more favourable to arbitration than envisaged by

[47] HAMID G GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 142 (Kluwer Law International 2002).

[48] George Sayen et al., *Arbitration in the Kingdom of Saudi Arabia*, THE IN-HOUSE LAWYER (Feb. 09, 2020, 10:05 PM), http://www.inhouselawyer.co.uk/legal-briefing/arbitration-in-the-kingdom-of-saudi-arabia.

the Model Law. Furthermore, there are countries which have expressly deviated from significant provisions of the Model Law like Tunisia, Brazil, Kenya, Australia, Finland, Iran, Malta and more.[49] Only a handful number of countries like Germany, Hungary, Mexico, Russia, Scotland, Ukraine, Bahrain, Bermuda, Bulgaria, Canada (federal law) etc. have retained the annulment related provisions of the Model Law.

Apart from the issues concerning deviations from the Model law there is the issue of ambiguity and uncertainty with the terms and stipulations in the Model Law. As a result of which courts across the world often end up deciding enforcement applications in a manner which results in anomalies and clashes. This happens because the boundaries of national public policy are not fixed[50]. For instance, Japanese legislation applies the test of "public policy or good morals" in the enforcement process;[51] and Vietnamese legislation requires that the award should not be contrary to the basic principles of Vietnamese law.[52] In such cases even the *traveaux preparatoires* are no significant help especially for flexible terms such as 'public order' or 'binding award' in the Model law.

For these foregoing reasons, use of the UNCITRAL Model to harmonise the arbitration law across countries is not the best solution.

### B. INTERNATIONAL STANDARDS OVER LOCAL STANDARDS OF ANNULMENT

This solution recommended by Mr. Paulsson suggests the enforcement of awards which have been annulled on local

---

[49] HAMID G GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 141 (Kluwer Law International 2002).

[50] NIGEL BLACKABY ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 659 (5th ed. Oxford Publication 2009).

[51] Kerr, *Concord and Conflict in International Arbitration*, 13 ARB INTL 140, 141 (1997).

[52] Jan Paulsson, *The New York Convention in International Practice: Problems of Assimilation*, ASA BULLETIN 101, 102 (1996).

particularities.[53] According to him if an award is set because of local standards then enforcement of such an award need not be refused. To distinguish local standards from international standards one needs to take heed of the first four elements of Article V(1) of the New York Convention. The court needs to deduct the incidental renvoi made in Article V(1)(a) to Article V(1)(d) of the New York Convention. This is necessary to prevent the backdoor entry of the local standards of annulling an award. What remains after these deductions are the International Standards of Annulment (ISA). Only ISAs may block the enforcement of an award. Because of the use of the word "may", the discretion is therefore on the courts to enforce an annulled award or not.

However, this approach has been severely criticised by many. First, it would be wrong to assume that the use of the word "may" puts the discretion on the enforcement court because Article V(1)(e) then becomes optional. Such an interpretation does not infact enjoy popular support. Second because, practically, it would not be possible for many countries to adopt such International Standards after years of practice. Many countries have gone through a lot of trouble in adopting the Model Law, or adding a local touch and adopting a system of law which may be considered Arbitration friendly, for example Morocco[54] and Saudi Arabia[55]. Therefore, to forth an international standard with deductions of the incidental renvois might not be something which would be readily accepted by the countries at large.

Finally, this approach may also further aggravate the problem of conflicting decisions because of the discretionary power

---

[53] J. Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment*, 9 ICC BULLETIN 14 (1998).

[54] J Robert, *La Convention europeenne sur l'arbitrage commercial international signee a Geneve le 21 avril*, 33 CHRONIQUE 182 (1961).

[55] W Craig, *Uses and Abuses of Appeal from Award*, 4 ARB. INT'L. 201 (1998).

supposedly derived from the use of the word 'may' in Article V of the New York Convention.

### C. EXCLUSION OF ANNULMENT PROCEEDINGS

Proposed by Professor Fouchard, this suggestion states that annulment proceedings for international awards as a whole should be dropped.[56] If the annulment proceedings are abolished then the malfunction of the different schools of thought would not exist to begin with.

However, the same cannot be an ideal solution for two reasons. First, history is a living proof of the fact that such an experiment would not be well for the international community. Both in Belgium and Austria such an attempt was made. The international business community vehemently rejected such a change.[57] Second, this approach faces another major problem of defining an international award. In the international arena, there are plethora of instances wherein the countries have shown distinctions in their approach of defining what an international award constitutes. For some countries such as France and Tunisia, international award has been defined in terms of international trade. On the other hand, countries such as Iran and India have adopted an approach of defining international award in terms of the parties i.e., international if one of the parties are not of the home country.

Even if the state was to achieve uniformity in defining "international award" the proposition would still be unreasonable because no one would still be able to ensure that the terms are homogenously and uniformly construed. For instance, the Chinese Supreme Court in an instance had excluded the

[56] Ph Fouchard, *La portee internationale de l'annulation de la sentence arbitrale dans son pays d'origine*, REV. ARB. 329, 351 (1997).
[57] Fraser P Davidson, *Where is an arbitral award made?: Hiscox v. Outhwaite*, 41 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 637 (1992).

enforcement of awards wherein the dispute was between the foreign investor and the government of the host state.[58]

It is also undesirable for the reason that first, the interests and amounts at stake justify annulment proceedings and require an articulation of annulment/enforcement controls so as to avoid that a doubtful award lead to enforcement actions in all States where the losing party has assets until one State finally grants enforcements. And second, this suggestion would deprive the losing party the fundamental prerogative, the right to obtain annulment of the award.[59]

### D. A NEW MULTILATERAL CONVENTION

As is clear, there is no uniformity on how the annulment proceedings are to be undertaken, the ground on which an award can be annulled or the procedure post annulment for the enforcement of the same in another country. The new convention would therefore have to cover questions of jurisdiction over the annulment of the award, grounds for setting aside an award and effective annulment/enforcement controls.[60]

A new multilateral convention would essentially fill in the gaps which the New York Convention failed to cover. It is necessary that the provisions of the Article VI of the New York Convention be preserved in the new convention to allow the enforcement court to grant enforcement of an award against which annulment proceedings have been initiated for dilatory purposes. The language however, should be revised to prevent the enforcement court from adjoining its decision on enforcement if annulment

---

[58] Wang Shen Chang, *Enforcement of Foreign Arbitral Awards in the People's Republic of China*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, (Albert jan van den Berg ed. Wolters Kluwer 1999).

[59] E Hovarth, *Arbitration in Hungary. The Problematics of the Moscow Convention*, 10 J. INT. ARB. 17 (1993).

[60] Hamid Gharavi, *Chromalloy: Another View,* 12 MEALEY'S INT ARB REP. 21 (1997).

proceedings have been initiated before courts of any country other than the one in which the award has been rendered. The new convention should have a provision alike Article 34(2) of the Model law and retain annulment grounds covering only serious irregularities and not interfere with the merits of the case. The convention should preferably reduce the grounds of annulment under the UNCITRAL Model law. Grounds contained under Article 1502 of the French New Code of Civil Procedure would be apt for the purpose which are:

1. if the arbitrator has rendered his decision in the absence of an arbitration agreement or on the basis of an arbitration agreement that is invalid or that has expired;
2. if the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly appointed;
3. if the arbitrator has not rendered his decision in accordance with the mission conferred upon him
4. if due process has not been respected, and
5. if recognition or enforcement is contrary to international public policy.

However, this is also not free from criticism. The new convention may not be fruitful if it is mired with the same problem of contrasting interpretation by state courts. This may happen because the grounds' ultimate interpretation would still lie under the purview of the national courts when they are deciding on the fate of the award. This may be remedied by a renvoi to an existing supra-national court like the International Court of Justice or establishing a supra-national court with exclusive jurisdiction over the control of arbitral awards.

### E. ESTABLISHMENT OF A SUPRA-NATIONAL COURT

Judge Holtzmann suggests the establishment of a supra-national court vested with exclusive jurisdiction over the control of arbitral awards.[61] This court would have the exclusive jurisdiction to monitor the application of the grounds mentioned under Article V of the New York Convention. Each contracting state would have the obligation to abide by and enforce the decisions of the supra-national court.

This court with its supervisory and exclusive jurisdiction would have the sole authority to decide upon the awards rendered by it and would be treated as if they were declared by the apex institution of that particular country.

This proposition has received the endorsement of personalities like Judge Stephen Schwebel, Judge at the International Court of Justice, who has further suggested that the composition of the supra-national court be of 11 to 15 judges, selected to represent the principal international legal systems and civilisations, and the principal trading and arbitration nations of the world.[62]

## VI. ESTABLISHMENT OF A SUPRA-NATIONAL COURT: THE APPROPRIATE SOLUTION

While the debate between harmonisation and unification can ensue a neverending debate, the question which requires deliberation is, "which approach would be the best to meet the requirement of the current situation?". It is argued that unification is better than harmonisation because it is both desirable and conceivable.

[61] HM Holtzmann, *A Task for the 21st century: creating a new international court for resolving disputes on the enforceability of arbitral awards*, *in* THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION, THE LCIA CENTENARY CONFERENCE (Martin Hunter ed. Springer 1993).

[62] SM Schwebel, *The creation and operation of an International Court of Arbitral Awards, in* THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION, THE LCIA CENTENARY CONFERENCE (Martin Hunter ed. Springer 1993).

Harmonisation in form of the UNCITRAL Model law never actually materialised into an event which can be celebrated as a success. More so, as explained in the previous chapter, there are glaring examples of the fact that the due to the ambiguities which existed with the Model law framework, confusions were created which ultimately made the entire process futile and thus adding to the already existing problem of contradictions and disharmony.

With unification in the form of creating a supra national court, all the contradicting decisions in the form of recognition and refusal of applying awards can come to rest because of the reason that the body now empowered with the exclusive jurisdiction to sit over annulment proceedings would have a uniform rule for ascertaining if an award needs to be set aside.

Further, all confusions arising out of interpretations of ambiguous terms lead to clashing decisions of various national courts. For instance, with respect to the interpretation of the term public policy or foreign award. It has been proposed that the public policy ground contained in Article V(2)(b) of the New York Convention be replaced by international public policy. This is material because enlightened municipal courts already follow the practice of applying international public policy in cases involving international commercial arbitration.[63] This proposal ensures (a) that the supra-national authority need not attempt to investigate and implement the public policy of any particular state and (b) all confusion is thus done away with given that universal, binding decision with respect to the term's interpretation is given by a supranational court. This also ensures that the arbitration becomes autonomous in its truest sense since the link to the national courts now gets severed.

---

[63] HM Holtzmann, *A Task for the 21st century: creating a new international court for resolving disputes on the enforceability of arbitral awards*, *in* THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION, THE LCIA CENTENARY CONFERENCE (Martin Hunter ed. Springer 1993).

Most importantly, unification is the only way by which both the schools of thought reach a situation wherein their views are not severely affected. For instance, the proponents of the delocalised approach are content because the legal validity of an award is no longer linked to the laws of a particular state. And for the other, the award debtor still has a recourse to challenge the validity of the award at a supra national body whose international effectiveness would remain preserved.

It is also important to note that given the ever increasing international trade and business transactions, there are several bodies such as the International Centre for Settlement of Investment Disputes, which is testamentary to the success of a supranational body. These institutions have been working well and thus an evidence to the fact that the establishment of a supranational court for the control of annulment/recognition of award in International Commercial Arbitration is far from being impracticable and unrealistic.

The International Centre for Settlement of Investment Disputes (ICSID) was established in 1965 to address the increasing number of investment arbitration brought against the sovereign states. Since then the ICSID has become a responsible institution in terms of the awards it renders. The originality and effectiveness of the ICSID can be attributed in part to the exclusive jurisdiction which ICSID enjoys over the stay of enforcement,[64] and the annulments of its awards.[65]

Under the ICSID Convention, pursuant to Article 52 an ad hoc committee is responsible to ascertain if an award needs to be set aside. Its enforcement in the courts of the contracting states is a matter which can be decided only by the ICSID. Failure to abide

---

[64] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1996 art 52(1).

[65] Christoph Schreuer, *Commentary on the ICSID Convention: Article 52,* 13 ICSID REV. – FOREIGN INVESTMENT LAW JOURNAL 507 (1998).

by the same may invite measures from the World Bank with respect to its policy on extension of credit.[66]

The Amman based Centre established under the Convention on the Settlement of Investment Disputes between the Host States of Arab Investments and Nationals of Other Arab States has prerogatives similar to that of the ICSID.[67] Like the ICSID, the Arab Centre too has exclusive jurisdiction over awards rendered under its auspices[68] and the grounds under which such an award can be set aside are ones similar to Article 52 of the ICSID Convention.[69] Further, the convention also states that the decision on annulment given by the centre is to be treated as if they were given by the national court of the contracting state.[70]

The Arab Centre for Commercial Arbitration is yet another supranational court which functions as the nodal court of control for the annulment/recognition of arbitral award rendered by it in the courts of the contracting states. This court established under the Amman Convention of 1987, functions both as an arbitral institution and as a court of control. The decisions rendered by this centre are considered final and the awards are not subject to review before courts of any of the contracting state.[71] Further, pursuant to the convention[72] this court has the exclusive jurisdiction with respect to the awards rendered under its auspices.

---

[66] A Giardina, *L'execution des sentences du Centre international pur le reglement des differendes relatifs aux investissements*, REV CRIT DIP 27 (182).
[67] AH El-Ahdab, *General Introduction on Arbitration in Arab Countries,* INTL HANDBOOK ON COMM. ARB. SUPPL. 24 (1993).
[68] Convention on the Settlement of Investment Disputes between the Host States of Arab Investments and Nationals of Other Arab States 1974 art. 25.
[69] Convention on the Settlement of Investment Disputes between the Host States of Arab Investments and Nationals of Other Arab States 1974 art. 24.
[70] Convention on the Settlement of Investment Disputes between the Host States of Arab Investments and Nationals of Other Arab States 1974 art. 26(a).
[71] Amman Convention 1987 art. 27.
[72] Amman Convention 1987 art. 34.

The Joint Court of Justice and Arbitration established under the Organisation for the Harmonisation of Business Laws in Africa in 1993 is another supranational court celebrated for its laudatory attempts to reconcile the arbitration laws all across the African continent. The main aim of the court is to reconcile the differences and the insecurities which exist in the countries because of the contradictory decisions and legal rulings.

The decisions given by the court are considered to have a res judicata effect over the courts of the contracting states and as such the decisions on annulment given by this Joint court are to be considered as if they were rendered by the national courts itself.[73] This court alike other supranational institutions also has the exclusive jurisdiction with respect to the awards rendered by it.[74]

This court is often lauded because of its work towards unifying the arbitration laws in a country wherein a systemised domestic and international arbitration laws did not even exist. Such an accomplishment portrays that forming a supranational court with exclusive jurisdiction is not a utopian idea.

The abovementioned arguments go on to show that the establishment of a supranational body is not in fact unconceivable. There are examples to show how the existence of a supranational body has helped towards creating a system which ensures certainty and harmony. One court to control the commercial arbitral awards would ensure that there are no inconsistencies and confusion with respect to the interpretation of the law and help achieve uniformity which would ultimately propel business transactions and international trade and investments. Thus, establishment of a supranational court is an

[73] Arbitration Rules of the Joint Court of Justice and Arbitration 1993 art. 20.
[74] Arbitration Rules of the Joint Court of Justice and Arbitration 1993 art. 30.6.

appropriate solution to the given problem of enforcing a set aside award.

## VII. CONCLUSION

The problem or question if a set aside award can be enforced or not cannot be answered in a normative manner. The two popular schools of thought are correct in their own right but again are severely criticised for their blatant inconsistencies and lacunas.

While the territorial view would assure certainty and effectiveness of a judgment on one hand, the delocalised approach, on the other hand, would stress on the international effectiveness of international arbitration awards. It is correct that an arbitration just because of it being seated at a particular location may not become a part of the legal order of that particular state. It is also thus correct to state that nowhere in the New York Convention is the optional character of Article V(1)(e) clearly indicated. All these contradictions and clashes make it impossible to rule out one particular option for being wrong.

While the French courts have mostly adopted the delocalised approach, it also has been criticised for adopting a flexible arbitration regime which goes much beyond the contours of the New York Convention and the UNCITRAL Model law. Such confusions and anomalies however have not as yet reached the Indian scenario.

In India this question is still considered to be a part of the grey area. As such there has been no decision either by the Supreme Court or any of the High Courts deliberating over the question if an annulled award can be enforced by the Indian Courts. However, given that India has a tendency to adopt a territorial approach given the decisions identified above and the fact that the English court as a rule adopt the territorial approach, it is argued and subsequently proved that the delocalised approach would not apply in India and as such awards which are set aside

at the seat of arbitration would not be enforced by the courts in India under S.48 of the Arbitration and Conciliation Act, 1996. Further, considering the fact that there is no correct way of dealing with the problem, there have been several suggestions to prevent the occurrence of such a problem. It is now sufficiently clear why harmonisation of the annulment laws would be a dead letter. Such efforts were already made in the form of the UNCITRAL Model Law but has not exactly been a success story. There are several inconsistencies and ambiguities with regard to the application of the Model Law. It is not mandatory in nature.

Given these anomalies, the two most suitable solutions would be to have a new multilateral convention for the annulment of international commercial arbitration awards but for its implementation and for the prevention of any allied ambiguity it is necessary that there be a supranational court of control for annulment/recognition of international arbitration awards.

The supranational court, like the similarly existing bodies such as ICSID and JCJA, would have exclusive jurisdiction over the awards rendered under its auspices and would be responsible for deciding upon its annulment and enforceability. Such decisions of the supranational court would preclude the review of any national court and would be considered final and binding upon all the courts of the contracting states. The judgments would be considered to have precedential values over the lower courts as if they so declared by their national courts.

This approach also takes cares of the needs of both the schools of thought. The delocalised adherents are content with the fact that the national legal order of a state does not subsume within itself the arbitral award. The proponents of the territorial approach would accept the same because awards can still be challenged and such a decision would have international effectiveness.

Undoubtedly arbitration continues to be the most preferred international dispute settlement mechanism today. Yet it is mired with controversies, insecurities and tension. There are issues with the overzealous interactions of arbitration with national courts etc. But given these problems there is a unique opportunity with the arbitration community to get over these problems and more with the establishment of a supra-national court which only work towards a quasi-absolute autonomy and independence for the regime of arbitration.

It is now up to the International Private Law community to showcase ambition, zeal and the industry and more importantly imagination and creativity to make this, otherwise ambitious attempt, a living reality. "*It will be the difficult but magnificent task of all those who will be called upon to participate in the construction of this new universe.*"[75]

[75] H Motulsky, *L'evolution recente en matiere d'arbitrage international*, REV. ARB. 11 (1959).

Vol. 11 Feb 2020

# "EFFECTIVE MEANS OF ENFORCING RIGHTS": AN ADDITIONAL SWORD FOR INVESTORS AGAINST DEVELOPING NATIONS?

*Kishan Kumar Gupta[*] & Kashish Sinha[*]*

## Abstract

*In the sphere of international investment arbitration, the discourse on conduct of host states in providing access to judicial remedies to an investor has stagnated on the highest standard of treatment i.e. denial of justice. Owing to the same, a diluted standard in the form of "effective means" has been brought to the disposal of modern-day investors to counter the inadequacies of the defaulting state's judicial mechanism to enforce its rights. While "denial of justice" remains an overused and over-analysed standard, the "effective means" standard is gaining prominence nowadays. Nonetheless, the standard remains half-baked and only superficial. This paper attempts to trace the inception and explore the shift of balance of convenience in favour of the investors against the developing nations, brought about by this 'newly-found' treaty standard. In doing the same, the paper seeks to analyse recent arbitral awards and highlights the importance accorded to the effective means standard owing to its wording, placement and linkage to other operative parts of a relevant BIT. The paper also seeks to redefine this misinterpreted first-world favouring treaty standard and attempts to renegotiate the standard to the interests of developing nations, which due to insufficient resources and court congestions might face difficulties in providing such a standard of protection. In doing so, it looks into some pending cases initiated by investor in developing nations like Nigeria and Bangladesh, which may, in future,*

[*] The author is a student at Dr. Ram Manohar Lohiya National Law University, Lucknow.

[*] The author is a graduate of Dr. Ram Manohar Lohiya National Law University, Lucknow.

*result in invocation of the said standard under the relevant investment treaty.*

## I. Introduction

The first Bilateral Investment Treaty (BIT) concerning the safety accords to be ensured to an investor by the host state dates back to 1959, *i.e.* the Germany-Pakistan BIT. In the current international law regime, the same has received recognition and has developed into a dense network of more than three thousand treaties concerning the protection of foreign investments.[1] The starlight feature of these BITs is the creation of a mechanism for the compulsory adjudication of investment disputes between a national of one of the contracting state and the host state to such national's investment. The rationale for creation of such a mechanism is that if the foreign investor is to seek remedy against the host state's actions in its domestic courts, the courts may not guarantee a level-playing field.

Even though adjudication has been divorced from the host state's courts by virtue of international tribunals, the threshold requirement to hold a host state internationally responsible for its actions is considerably high. Taking a cue from this reality, the home states of such investors have started to negotiate a separate and distinct treaty standard. The standard guarantees an effective means to the investors to enforce their claims and assert their rights before any judicial or administrative body of the host state failing which, the host state can indubitably be held liable for violating an express obligation under the treaty.

The existing commentaries on the standard of "effective means" in International Investment Agreements (IIAs) have already spilled much ink on the interpretation of the clause in the initial

[1] James Zhan, *UNCTAD World Investment Report 2011: Non-Equity Modes of International Production and Development*, U.N.C.T.A.D. (Oct. 15, 2019, 11:35 AM), https://unctad.org/en/PublicationsLibrary/wir2011_en.pdf.

cases of *Chevron* v. *Ecuador*[2] and *White Industries* v. *India*.[3] Nonetheless, there is hardly any narration which traces the very purpose of its inclusion in the present day IIAs. Most of the tribunals have considered the standard as an alternative to the archetypal breach of "Denial of Justice" (DOJ) by domestic courts and therefore, the examination of the said standard is only limited to a comparative analysis. This has led to a complete transformation of the intention with which the clause is used in present day IIAs.

The "effective means" clause was never intended to be a standard that merely rephrases the DOJ protection. As it currently stands, the dominant position taken by the proponents of the clause generally revolves around the idea of providing an effective remedy to private investors who struggle with the incongruous judicial, administrative or executive remedies available in the host state. Such erroneous interpretation does not pay due heed to the context in which it was intended to be used. The jurisprudence

---

[2] Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, P.C.A. Case No. 34877, ¶¶ 121-122 (Mar. 30, 2010) (partial award on the merits); Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, I.C.S.I.D. Case No. ARB/04/19, ¶¶ 105-106 (Aug. 18, 2008) (award).

[3] White Industries Australia Limited v. The Republic of India, (Nov. 20, 2011) (U.N.C.I.T.R.A.L. Final Award); S. K. Dholakia, *Investment Treaty Arbitration and Developing Countries: What Now and What Next? Impact of White Industries v Coal India Award*, (2013) 2 I.J.A.L. 4; P.L.C. Arbitration, *Breach of BIT obligation to provide effective means of asserting claim*, (Oct. 12, 2019, 10:45 AM), https://uk.practicallaw.thomsonreuters.com/3-501-9494?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1; Jessica Wirth, *"Effective Means" Means? The Legacy of Chevron v Ecuador*, (2014) 52 COLUM J. TRANSNAT'L L. 325; Seungwoo Cha, *Losing Credibility of Tribunals' Interpretations: The Standards of Review of "Denial of Justice" Lacking in Relationships with Treaty Wording*, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL (Sept. 25, 2019, 03:12 AM), http://pennjil.com/losing-credibility-of-tribunals-interpretations-the-standards-of-review-of-denial-of-justice-lacking-in-relationships-with-treaty-wording/; Marc Allen, *Effective Means and The Perils of Standard-Setting*, (2014) 1 S.P.I.L. I.L.J. 8; Mavluda Sattorova, *Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct*, (2012) 61 INT. & COMP. L. QUART. 223; Mann Sanan, *The White Industries award - Shades of Grey*, (2012) 13 J.W.I.T. 661.

relating to the interpretation of such a clause has majorly been developed in *Chevron* and *White Industries* awards. In both the cases, developing nations were seen grappling with the investors. Therefore, the initial interpretation itself sets a wrongful precedent which is likely to hamper the interests of other developing nations in the near future.

This paper will attempt to highlight the need for revamping our understanding regarding the said clause by focusing on some of the recent incidents that suggests the need of such departure. To provide footing to the pressing need for change, the last part of the paper dwells into an analysis of the effectiveness of means provided for enforcement of awards by certain developing nations across the globe. The analysis is based on the pretext that if the erroneous interpretation in *Chevron* case is further continued, then developing states like India, Bangladesh and Nigeria stand to face fate of investment awards running into millions of US Dollars. To that end, the conclusion part will also suggest some measures that could be adopted in achieving a favourable result.

## II. Interpretation of the clause

In investment arbitration jurisprudence, effective means came to be recognised as a separate and distinct treaty standard only recently.[4] After its inclusion in modern day BITs post-1980s, it was subjected to differing interpretations. It was only after the award of *Chevron*[5] in the year 2010 that it attracted the attention of practitioners and states that had negotiated them in their investment agreements. The importance bestowed to such standard by the *Chevron* tribunal portends an era of foreign investment protection wherein the host states are not only promising to refrain from denying access to domestic courts

[4] BERK DEMIRKOL, JUDICIAL ACTS AND INVESTMENT TREATY ARBITRATION 41 (1 ED. CAMBRIDGE UNIVERSITY PRESS 2017).
[5] *Chevron, supra* note 2.

(negative obligation) but also guaranteeing its investors an effective manner of contesting their rights in the territory (positive obligation).[6] Before understanding the implications of having such a standard in an investment treaty, it is necessary to reflect on pre-Chevron arbitral jurisprudence to understand the full extent of the clause's meaning.

### A. *Petrobart* v. *The Kyrgyz Republic*: Negative Obligation On States

The first known arbitral award concerning the interpretation of the "*effective means*" standard was *Petrobart* v. *The Kyrgyz Republic*.[7] The investor i.e. Petrobart invoked the arbitration to scrutinise the intervention caused by the Vice Prime Minister of the Kyrgyz Republic in the execution of a judgement in its favour. The Vice Prime Minister wrote a letter to the Chairman of the executing court to grant a deferral of the enforcement of the court decisions in view of the critical financial standing of the judgment debtor (state joint stock company). The investor contended that the said actions were in violation of Article 10 (12) of Energy Charter Treaty (ECT) i.e. ensuring effective means for the assertion of claims and enforcement of rights.[8] The tribunal agreed with Petrobart without detailing its reasons for finding such breach. Instead, it combined the standard's breach with the breach of a different Fair and Equitable Treatment (FET) standard altogether.[9] This award, therefore, can be understood to elucidate the breach of effective means standard by deliberate interference

---

[6] Joshua Robbins, *The Emergence of Positive obligations in Bilateral Investment Treaties*, 13 U. MIAMI INT'L & COMP. L. REV. 403, 425 (2006); Chester Brown, *Evolution in Investment Treaty Law and Arbitration* 130 (Philippe Sands and David Williams, Cambridge University Press 2011); JAN OLE VOSS, THE IMPACT OF INVESTMENT TREATIES ON CONTRACTS BETWEEN HOST STATES AND FOREIGN INVESTORS 45 (4 ED. MARTINUS NIJHOFF PUBLISHERS 2010).

[7] Petrobart Limited v. Kyrgyz Republic, S.C.C. Case No. 126/2003 (Mar. 29, 2005).

[8] *Id*, ¶ 28; The Energy Charter Treaty. art. 10(12).

[9] *Petrobart*, *supra* note 7, ¶ 77.

in judicial access by state executives, thus imposing a negative obligation on host states not to deny an investor access to domestic courts by causing unreasonable hindrance through the executive arm of the state.

### B. *Limited Liability Co. Amto* v. *Ukraine*: Effective Legislative Framework Requirement

In 2008, *Limited Liability Co. AMTO v. Ukraine*[10] became the second investment arbitration award wherein the investor brought about a claim for violation of the effective means standard of ECT. This was the first case wherein the investor also claimed that the standard imposes a positive obligation on host states to provide an "effective legislative framework" to foreign investors.[11] The tribunal, however, evaded its responsibility of engaging with the investor's contention and confined itself to the analysis of the "effectiveness" of the bankruptcy legislation in question. It observed that "existence" of a legislative mechanism is a *sine qua non* for providing effective means to an investor. This award, therefore, clarified that the standard can be breached by showing lack of a legislative framework which guarantees adequate rules of procedure to allow investors to avail remedies in domestic tribunals.

### C. *Duke Energy* v. *Ecuador*: Performance Requirement

*Duke Energy* v. *Ecuador*[12] became the last investment award before Chevron's expansionist interpretation, which dealt with the standard of effective means as stated in the Ecuador-US BIT. The Claimants in this case restricted their claim to violation of DOJ standard by Ecuador as the host state failed to settle the claims in

[10] Limited Liability Co. A.M.T.O. v. Ukraine, S.C.C. Case No. 080/2005 (Mar. 26, 2008) (final award).
[11] *Id*, ¶ 29.
[12] Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, I.C.S.I.D. Case No. ARB/04/19 (Aug. 18, 2008) (award).

tax matters in a timely manner.[13] The tribunal, however, went on to hold that mere existence of such mechanisms that ensures investors an effective means to assert their rights and claims is not adequate. In addition, the *"performance"* of such framework is essential in achieving the end. The tribunal upheld the claim of investor i.e. the clause seeks to implement and provide for more general guarantee against DOJ.[14]

Whatever may be the method of interpretation, none of these awards comprehensively determine the extent of such a treaty standard. At the very best, they suggest a murky concept of providing the investor an *"effective"* access to an efficacious domestic forum, which is free from unreasonable executive interference and is governed by the "*rule of law*". This interpretation remains questionable because the extent of "*effectiveness*" has nowhere been clarified. At the outset, the standard appears to achieve the same goal as DOJ. If so, then what was the need to create a new positive obligation on states if there already existed one?[15] Was it a mere reiteration or a distinct treaty standard in itself? For a clearer understanding, it is imperative to analyse the reasons behind formulation of such treaty standard.

## III. Inception and Coming into effect of the said clause

Kenneth J. Vandevelde, attorney-adviser of the Office of Investment Affairs at the Department of US[16], details the position taken by US with respect to the interpretation and application of BITs. His book titled *'US Investment Agreements*', which was later

---

[13] *Id*, ¶ 385.
[14] *Id*.
[15] Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, P.C.A. Case No. 2009-23, ¶ 25 (Mar. 12, 2012) (opinion of Jan Paulsson).
[16] *Kenneth J. Vandevelde*, (Aug. 13, 2019, 11:35 AM), https://www.tjsl.edu/directory/kenneth-j-vandevelde.

relied on by the *Chevron* tribunal, reasoned the inclusion of *'judicial access provision'* in US Model BITs. This provision first arrived in the 1983 Model, set forth in Article II (8), wherein the same appeared under the heading *'Treatment of investment'* and conferred three separate rights upon investors. One of such standards was *"effective means of asserting claims and enforcing rights with respect to investment agreements, investment authorizations and properties"*.[17] According to him, disagreement amongst publicists concerning the right of access to domestic courts forced US to seek treaty protection[18] by including 'judicial access provision' in it.[19] He further clarifies that effective means standard was added solely to create an "absolute standard for measuring the effectiveness of remedies and procedures for enforcing substantive rights".[20] The practice of including the effective means standard in negotiating texts of US-BITs continued for around two decades, with slight modifications, until it was finally scrapped from the operative part of its Model BIT in the year 2004. The reason cited by US drafters for shifting the standard from operative part to the preamble of the 2004 model BIT was that the customary international law standard of DOJ accorded sufficient protection and there was no need for a separate treaty obligation. [21] Such a course of action saved it from a positive obligation to provide effective remedy in situations when it acted as a host state.

It is not entirely known as to why developing nations like Kuwait, which played a dominant role in the *White Industries* award, began including such treaty provisions as a substantive obligation in their respective model BITs. One of the chief reasons is that they

---

[17] KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 413 (OXFORD, 2009).
[18] Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L. L.J. 427, 438-39 (2010).
[19] Kenneth, *supra* note 17, at 411.
[20] *Id*.
[21] US Department of State, *2012 US Model Bilateral Investment Treaty*, (Oct. 15, 2019, 11:35 AM), http://www.state.gov/documents/organization/188371.pdf.

desired to follow the footprints[22] of developed nations like US to bolster their developing economy and grab every possible opportunity that reflects the ease of doing business in their territory. In an attempt of doing so, Kuwait also ended up negotiating such treaty standards in its investment agreements with other nations, for example Hungary[23], Austria[24], Belarus[25] and India[26]. Such developing nations, however, never intend to assume a positive obligation while attracting foreign direct investment. This is evident from the reaction of Kuwait post the *Chevron* interpretation of the standard since none of the BITs negotiated by Kuwait after 2010 contain such a treaty provision.[27] This intention of developing nations will be further strengthened by the analysis done at a later stage of this paper.

## IV. Interpretation accorded in *Chevron Corporation* v. *Republic of Ecuador*

The seminal award of *Chevron Corporation* v. *The Republic of Ecuador*[28] has played a dominant role in moulding the clause's existing interpretation and interplay with the customary international law principle of DOJ. The factual matrix of the case dates back to a 1973 agreement between TexPet (which was later acquired by Chevron) and the Ecuadorian government under which the investor got the permit to explore and exploit oil reserves in Ecuador. The Agreements required TexPet to provide the Government a part of its production at a subsidised rate to help the host state meet its domestic needs. On top of the

[22] U.S.-Senegal B.I.T. (1983). art. II(9); *see* U.S.- Turkey B.I.T. (1985). art. II(8); Haiti - United States of America B.I.T. (1983). art. II(8); Cameroon - United States of America B.I.T. (1986). art. II(7).
[23] Hungary - Kuwait B.I.T. (1989). art. 10.
[24] Austria - Kuwait B.I.T. (1996). art. 3(5).
[25] Belarus - Kuwait B.I.T. (2001). art. 3(3).
[26] India - Kuwait B.I.T. (2001). art. 4(5).
[27] Kuwait - Mexico B.I.T. (2013); *see* Kuwait - Kenya B.I.T. (2013); Kuwait - Pakistan B.I.T. (2011); Kuwait - Kyrgyzstan B.I.T. (2015).
[28] *Chevron*, *supra* note 2.

subsidised produce, the government was also entitled to purchase the produce at the international market price for export purposes. In such a situation, TexPet suspected that the Government acted in breach of the Purchase Agreements and related Ecuadorian laws by exporting the barrels obtained by overstating its domestic needs.

Seeking damages for interest and lost profits, TexPet filed seven cases against the Government for the breach of Purchase Agreements before the Ecuadorian courts, starting from the year 1991. Nonetheless, for well over a decade, its claims remained unanswered in Ecuadorian courts. In May 2006, TexPet initiated investor-state arbitration against Ecuador. TexPet contended that the egregious delays suffered in its cases and the undue control exerted over the judiciary by the Executive Branch breached the DOJ standard. In addition, it also claimed violation of the obligation under the BIT to provide effective means for asserting claims and enforcing rights.[29] For better understanding, a brief overview of the judicial instability existing in Ecuador at the time of the Chevron award is a must.

- In November 2004, National Congress of Ecuador handed over impeachment letter to six (6) judges of the Constitutional Court along with dismissing the entire Supreme Court. In addition to this, in April 2005, the President of Ecuador dismissed all newly-appointed judges of the Supreme Court. [30]

- Later on, even when the Ecuador congress nullified its action of dismissal of the Supreme Court judges, no

[29] Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, P.C.A. Case No. 34877, ¶ 2(8) (Dec. 1, 2008) (interim award).

[30] Sandra Edwards, *Outside Rule of Law: Ecuador's Courts in Crisis*, Washington Office on Latin America (Mar. 29, 2019, 08:04 AM), https://www.wola.org/sites/default/files/downloadable/Andes/Ecuador/past/ecuador_memo_april_1_2005.pdf.

reappointment of the former judges took place. This resulted in a state of judicial absence.

- In September 2007, the Constituent Assembly formed as a result of the referendum. This Constituent Assembly sacked the Congress and proclaimed absolute authority. The Assembly also claimed the power to remove and sanction members of the judiciary that '*violate its decision*'.[31]

- In February 2008, the President of the Supreme Court of Ecuador went on record to state: "*the rule of law is only a partial reality in Ecuador . . . we cannot deny it: the judicial and constitutional reality in our country is a partial reality; we are not fully living in a state of law*". [32]

In light of this, the tribunal first gave an ordinary interpretation of the obligations imposed by the "effective means" standard. It compared and found the standard to co-exist with the protection accorded by the DOJ standard.[33] While doing so, it also agreed with the observation made in *Duke Energy v. Ecuador* award i.e. the effectiveness (performance) of the mechanism is also to be checked.[34] After providing such general and widespread peculiarities of the standard, it turned to a treaty-specific approach and surprisingly found it to be a *lex specialis* standard. The tribunal added that the standard is not a mere restatement of the law on DOJ. The reasons allocated by the tribunal for conceiving it a separate and distinct treaty obligation were:

1. That Article II (7) in dealing with the effective means standard, does not explicitly refer to DOJ or customary international law. Absence of such reference, according

---

[31] The Carter Centre, *Final Report on Ecuador's Constituent Assembly Elections*, (Sep. 23, 2019, 09:23 AM), www.aceproject.org/regions-en/countries-and-territories/EC/reports/ecuadors-constituent-assembly-elections-2007-final.
[32] *Chevron*, *supra* note 2, ¶ 89.
[33] *Id* at 242.
[34] *Duke*, *supra* note 12, at 391.

to the tribunal, indicates the intent of the BIT drafters to differentiate between the prevailing threshold of DOJ [which forms part of FET standard] from the said standard.

2. That the origin and purpose, as has been explained by Kenneth Vandevelde, signifies the *lex specialis* nature of the standard.

The tribunal additionally observed that in comparison to DOJ, the effective means standard has a potentially less-demanding threshold. Keeping in mind the aforesaid considerations and the factual matrix involved, the tribunal concluded that an undue delay of 13 to 15 years by Ecuadorian courts was sufficient to breach the effective means threshold. While doing the same, the tribunal proceeded on certain assertions that result in paradoxical equations and in turn leave certain questions unanswered. Does breach of DOJ standard lead to simultaneous breach of effective means standard also? Why "reasonableness of the delay" is not factored in effective means evaluation? Why the requirement of "Exhaustion of Local Remedies" is not mandatory for breach of effective means standard?

## V. Flawed reasoning in creating a new standard

Though the analysis provided by the *Chevron* tribunal for creating a new treaty standard seems reasonable to a great extent, it lacks consideration of certain fundamental aspects which were germane while arriving at the conclusion.

### A. FALLACIOUS INTERPRETATION OF STATE'S INTENTION

One of the reasons that the tribunal cited for recognizing effective means [Article II (7)] as a separate treaty standard was its placement and wording in the US-Ecuador BIT. The standard was placed close to the obligation of providing Fair and Equitable Treatment (FET) that shall be in no case "less than that required

by international law".[35] Lack of similar in the effective means clause was the chief reason for the tribunal's interpretation.[36] It is astounding to see that without any allusion to preparatory work or circumstances of the conclusion of the treaty, as suggested by the Vienna Convention on the Laws of Treaties[37] (VCLT), the tribunal deciphered the intention of the contracting parties.

In order to justify its conclusion, it made reference to the opinion expressed by a US attorney advisor who himself was not actually involved in the negotiation of the concerned treaty but only had access to negotiating history of US BITs.[38] Although the opinions expressed by US attorneys cannot straightforwardly be presumed to be inaccurate, it, of course, does not justify holding a sovereign liable at an international forum and also the intention of incorporating such a clause by the contracting parties to the treaty. Ecuador never intended to accord such an interpretation to effective means clause as is evident from the state-to-state arbitration initiated by it to ascertain interpretation and application of paragraph 7 of Article II of the Treaty. Ecuador in its request for arbitration unequivocally stated its limited "intention to incorporate into the Treaty pre-existing obligations under the customary international law relating to the prohibition against DOJ"[39] and not "to assure that the framework or system provided is effective in particular cases".[40]

---

[35] U.S.-Ecuador B.I.T. art. II(3)(a).
[36] Courtney Kirkman, *Fair and Equitable Treatment: Methanex v United States and the Narrowing Scope of Nafta Article 1105*, 34 LAW & POL'Y. INT'L. BUS. 343, 345 (2002); Theodore Kill, *Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations'*, 106 MICH. L. REV. 853, 855-56 (2008).
[37] Vienna Convention on the Law of Treaties 1980. art. 32.
[38] Kenneth, *supra* note 17, Acknowledgement.
[39] Republic of Ecuador v. United States of America, P.C.A. Case No. 2012-5, ¶ 8 (Jun. 2011) (request for arbitration).
[40] *Id*.

Developing nations are more akin to interpret such clauses purely as an "open-ended invitations to deploy relevant Customary International Law or general principles of law, given, for example, emerging principles to promote due process, transparency, or accountability across a number of regimes, including those involving human rights."[41] They never intend to use such clauses in order to impose a separate and burdensome obligation on themselves, which they are aware of not being able to fulfil due to lack of resources and a developing economy. In such a situation, it is unreasonable to bring a prejudiced interpretation of effective means clause and impose it on a nation that is already struggling with its court congestion and backlogs.

### B. FORMULATION OF A FRUITLESS AND VAGUE DEFINITION MUDDLING WITH DOJ'S THRESHOLD

The standard propounded by the *Chevron* tribunal serves no effective purpose when it comes to protecting and promoting the interest of an investor as is evident from US's action of dropping it from the substantive part of its model BIT in 2004. If such was the case, was the tribunal justified in devising a new standard that is significantly easier to breach and the remedies available are starkly similar as for DOJ?

The manner of devising such a treaty standard also remains questionable owing to its extent of similarity with DOJ standard. Breach of both of these standards is informed by the same factors and therefore it becomes highly improbable to consider breach of one and not the other.

Further, the tribunal erred by vaguely defining "*reasonableness*" of a delay as the initial basis for evaluating the breach of the effective means clause. With already more than 40 BITs in force

[41] José E. Alvarez, *14th Annual Herbert Rubin and Justice Rose Luttan Rubin International Law Symposium: A Special Tribute to Andreas Lowenfeld: A Bit On Custom*, 42 N.Y.U.J. INT'L. L. & POL. 17, 32 (2009).

guaranteeing "*effective means of asserting claims and enforcing rights*", developing nations were not given proper notice to structure their backlog-stricken judiciary to enforce rights of foreign investors "effectively". This has resulted in forceful dumping of investment treaties[42] by myriad of developing nations, who are now looking for a new foreign investment policy framework. Even the investors are perplexed in understanding the extent of "adequate utilization" of local remedies before bringing a claim for breach of "effective means" clause. The non-ending and pre-existing debate[43] of exhaustion of local remedies for contending DOJ will now be elongated in finding the thin line of difference between "adequate" and "strict" utilization of remedies available in the host state.

## VI. White Industries- India Award: A Tale of Erroneous Adventurist Interpretation against a Developing State

As per the common perception, for the developing states, the BITs are nothing less than gold dust, however this is far from being true. This is because of the fact of the faulty and overt reading of the BIT text at the time of the dispute.[44] The idea of investor-state arbitration through BITs has been extended to such

[42] The Conversation, *Why developing countries are dumping investment treaties*, (Sep. 13, 2019, 09:35 AM), https://theconversation.com/why-developing-countries-are-dumping-investment-treaties-56448; Clint Peinhardt, *Withdrawing from Investment Treaties but Protecting Investment International Interactions*, (University of Durham and John Wiley & Sons, Ltd., 2017) 43, 6; Nihal Joseph, *Mixed messages to investors as India quietly terminates bilateral investment treaties with 58 countries*, H.S.F. Arbitration Notes (Aug. 15, 2019, 10:12 AM), https://hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/.

[43] P.L.C. Arbitration, *supra* note 3.

[44] Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY (OXFORD UNIVERSITY PRESS 2010).

avenues that the initial framers might not have intended.[45] The best example of the same is the interpretation and misapplication of *"effective means"* clause in the White Industries-India award. In 2015, as a consequence of the jolts by such an award, the Government of India served investment treaty termination notice to nearly 58 countries and sought to renegotiate the existing BITs with rest of the 25 nations.[46] In pre-context of the same, it becomes imperative to analyse the application and interpretation of *"effective means"* and how the same impacted the jurisprudence of investment protection especially in cases involving developing states.

### A. *White Industries Award*: Preface to the Misfate

Even the adherent supporters of investment arbitration cannot deny the fact that adjudication of investment claims is a very delicate mechanism.[47] A single episode of an adventurist arbitrator going beyond the laid down and well documented scope of his jurisdiction may be sufficient to generate a disruptive backlash.[48] Such adventurist awards are potent enough to influence other tribunals into following the same.[49] The onus on

---

[45] 65 C. PEINHARDT, CONTINGENT CREDIBILITY: THE REPUTATIONAL EFFECTS OF INVESTMENT TREATY DISPUTES ON FOREIGN DIRECT INVESTMENT 401-432 (INTERNATIONAL ORGANIZATION, 2009).

[46] Alison Ross, *India's termination of BITs to begin*, Global Arbitration Review (Mar. 29, 2019, 08:04 AM), https://globalarbitrationreview.com/article/1138510/indias-termination-of-bits-to-begin.

[47] Christoph H. Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, in TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES 129-152; *Interpreting Investment Treaties: Experiences and Examples*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 730, 746 (OXFORD UNIVERSITY PRESS 2009).

[48] Jan Paulsson, *Arbitration Without Privity*, I.C.S.I.D. REVIEW 10(2) FOREIGN INVESTMENT LAW JOURNAL 257 (1995); Fali Nariman, *Investment Arbitration under the Spotlight - What next for Asia* (Mar. 23, 2019, 04:02 PM), http://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1002&context=hsmith_lect.

[49] LACKLAND H. BLOOM, DO GREAT CASES MAKE BAD LAW? (1 ED. OXFORD UNIVERSITY PRESS 2014); Katherine Jonckheere, *Practical Implications from an*

arbitral tribunals to tread the road from interpretation to resolution with utmost care and caution becomes even more burdensome when the host state in the matter is a second world-developing nation.[50] One such backlash happened to be caused against India by the award made in the White Industries case in 2011. The award rendered by the investment tribunal was against India, wherein the developing country had to make a payment to the tune of 4.08 million Australian Dollars for undue delay in the enforcement of the award. To compound the burden on the host state, an additional sum amounting to 4.25 million Australian Dollars was made payable to the investor by way of interest. [51]

The White Industries award was accorded on account of non-fulfilment of the obligation on part of India to provide effective means for enforcing rights i.e. the commercial award in favour of White Industries. Even though the effective means obligation was not expressly provided for in the Australia-India BIT, the same was borrowed from the India-Kuwait BIT through invocation of the Most Favoured Nation clause.[52] The importation of such obligation resulted in lowering the threshold for breach of the DOJ standard, putting additional burden on the host state to facilitate the foreign investor with effective means to enforce rights. As a consequence, non-enforcement of the award rendered in favour of White Industries for a period of 9 years, due to lengthy domestic courts proceedings was considered sufficient to be violative of the effective means standard. [53]

### B. Erroneous Interpretation in *White Industries*

---

*Expansive Interpretation of Umbrella Clauses in International Investment Law*, SOUTH CAROLINA J. INT'L. LAW AND BUSINESS (2015).

[50] *A Law for Greed or a Law for Need? The Current State of the International Law on Foreign Investment*, 6 INT. ENV. AGR. 329-357 (2006); Merim Razbaeva, *State Control over Interpretation of Investment Treaties*, VALE COLUMBIA CENTRE ON SUSTAINABLE INTERNATIONAL INVESTMENT (2014).

[51] *White Industries, supra note* 3, ¶ 15.2.5, ¶ 16.1.1.

[52] *Id*, ¶ 11.2.9, ¶ 11.3.1.

[53] *Id*, ¶ 11.4.14.

On the face of it, the award seems to be a fair one wherein the investor got the just remedy from the developing state for non-enforcement despite being a New York Convention signatory.[54] However, upon review, the same award very well qualifies to be an adventurist award that suffers from infirmities.

1. *Unjust expansive interpretation*

*Firstly*, since its inception, the 'effective means' clause has been seen as a mere embodiment of the right to access to courts. The infirmity that plagues the award finds its genesis from the fact that even though there was a positive obligation on the state, the same were to merely have legislative framework in place and nothing else, as noted in the award in *Amto*.[55] Contrary to this, the tribunal in White Industries by an act of overarching interpretation crafted a standard that calls in for the ground level availability of the effective means clause. Such interpretation goes against the spirit and the intention for the inclusion of the effective means clause in the operative text of the BIT by the developing countries.[56] The intention of the states was limited to an obligation for providing such legislations and measures that enables access to court, no less no more![57]

2. *Exclusion of the national laws accordance*

[54] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. art. III; ALBERT JAN VAN DEN BERG, THE NEW YORK CONVENTION OF 1958: AN OVERVIEW, XXVIII (2003).
[55] *Amto, supra* note 10, ¶ 75; Annelise Karreman, *Time to Reassess Remedies for Delays Breaching 'Effective Means'*, I.C.S.I.D. REVIEW 30(1) FOREIGN INVESTMENT LAW JOURNAL 118-141 (2015).
[56] SD Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1523 (2004); Mahnaz Malik, *The Expanding Jurisdiction of Investment-State Tribunals: Lessons for Treaty Negotiators* (Apr. 19, 2019, 07:04 AM), https://www.iisd.org/pdf/2007/inv_expanding_jursidiction.pdf.
[57] Katherine, *supra* note 49; Investment Treaty News, *The White Industries Arbitration: Implications for India's Investment Treaty Program* (Oct. 14, 2019, 04:04 PM), https://www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/.

*Secondly*, in the International law jurisprudence, it is undisputed that the investment treaties are instruments that are governed by the VCLT i.e. in regards to the applicable rules of international law.[58] However, the same cannot mean that the international law has a superseding effect over the national laws of a state in regards to its own conduct.[59] Since in the present "*effective means*" clause there was due recognition of national laws in regards to determining the obligation, the tribunal was mandated to inquire into the conduct of the judiciary and the domestic framework of the country so as to ascertain the breach of the standard. However, in this case, such expansive interpretation was given on behest of being blindfolded to qualifier provided for in the effective means clause, i.e. *effective means of enforcing rights in accordance with the national laws* (emphasis provided). For ease of reference, Article 4(5) of the India-Kuwait BIT is reproduced below:

"*4(5) Each Contracting State shall <u>in accordance with its applicable laws and regulations</u> provide effective means of asserting claims and enforcing rights with respect to investments and ensure to investors of the other Contracting State the right of access to its courts of justice, administrative tribunals and agencies and all other bodies exercising adjudicatory authority, and the right to employ persons of their choice, for the purpose of the assertion of claims and the enforcement of rights with respect to their investments.*"

Such express wordings call in for an inquiry into national laws of India to ascertain if the actions of the host state were in consonance with the obligation under the investment treaty. The tribunal applied the standard of effective means provided for in *Chevron*, wherein the host country was held liable for not

---

[58] Makane Moïse Mbengue, *Rules of Interpretation (Article 32 of the Vienna Convention on the Law of Treaties)*, I.C.S.I.D. REVIEW 31(2) FOREIGN INVESTMENT LAW JOURNAL 388-412 (2016); J. ROMESH WEERAMANTRY, TREATY INTERPRETATION IN INVESTMENT ARBITRATION 212 (1 ED. O.U.P. OXFORD 2012).
[59] HEGE ELISABETH KJOS, THE PRIMARY APPLICABILITY OF NATIONAL LAW AND THE ROLE OF INTERNATIONAL LAW, (OXFORD SCHOLARSHIP ONLINE 2013); Fali Nariman (n 48) at 34.

enforcing the award for 9 years.[60] This was done on behest of the finding that the US-Ecuador investment treaty *"employs almost identical wording to that found in Article 4(5) of the India-Kuwait BIT"*.[61] The same is egregiously wrong since the effective means clause provided in the US-Ecuador BIT was very different from that in the India-Kuwait BIT. For reference, the US-Ecuador BIT clause read as:

*"II(7) Each party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorisations."*[62]

The difference between the two clauses is colossal, since the exclusion of such qualifier results in an absolute standard for check wherein national laws make no difference.[63]

3. *Chevron v. Ecuador, the undesired precedent*

*Thirdly*, reference and over reliance on the *Chevron* award and elevation of the same to a precedent was also grossly inappropriate. The same was on the count that the extremities as to the state of affairs in the Ecuador made it impossible to have access to courts.

As has been pointed out in the initial part of the article, the tribunal in the *Chevron* case was faced with a markedly different treaty and that too begging for application in an exceptional factual circumstances. The judicial absence coupled with the political instability that Ecuador was facing at that point of time led to the breach of effective means standard. In addition, as the effective means in the US-Ecuador BIT came without a qualifier, it enabled the tribunal to depart from the precedents and arrive at

[60] *Chevron*, *supra* note 2, ¶ 270.
[61] *White Industries*, *supra* note 3, ¶ 108.
[62] U.S.-Ecuador B.I.T. (1993), art. II(7).
[63] Sumeet Kachwaha, *The White Industries Australia Limited – India Bit Award: A Critical Assessment*, 29(2) L.C.I.A.J. 288 (2013); Nariman, *supra* note 48, at 34.

a conclusion that effective means can be checked against an *'objective international standard'*.[64] The lack of recognition of the national laws coupled with the extremities in the circumstances relating to the judicial system, provided for a cause to deviate from the set precedents in investment law.

Nothing remotely close to this happened in White Industries. In stark comparison, in the White Industries neither there were any extreme circumstances of judicial instability nor the language of the "effective means" clause was broad enough to include international standard of obligation. A mere delay in enforcement proceedings cannot be elevated to being violative of the effective means standard.[65] Rather it was the Indian judiciary that gave White industries enforcement case a new lease of life by going against the set precedential authorities.[66] For understanding the same, tracing the litigation history of White Industries for enforcement of award is a prerequisite.

- In November 2003, White Industries sought to challenge Coal India's setting aside application on the grounds of lack of jurisdiction. Calcutta High Court dismissed the petition on the grounds that Indian courts will have jurisdiction even over foreign-seated arbitration, unless there is an express ousting as to the application of the Indian Arbitration Act, 1996.[67] The same was decided on behest of the 2002 Supreme Court three-judge bench decision in *Bhatia International v. Bulk Trading S.A.* wherein the court propounded the above-mentioned reasoning.

---

[64] U.S.-Ecuador B.I.T. (1993). art. II(7).

[65] Sumeet, *supra* note 63, at 291; Nariman, *supra* note 48, at 34.

[66] Sumeet, *supra* note 63, at 291.

[67] *White Industries* (n 3), ¶ 3.2.48; Bhatia International v. Bulk Trading S.A., (2002) 4 S.C.C. 105; National Thermal Power Corporation v. Singer Company & Ors., (1992) 3 S.C.C. 551; Nirma Ltd. v. Lurgi Energie Und Entsorgung Gmbh, A.I.R. 2003 Guj. 145.

- Even though White Industries preferred an appeal against the Single Bench judgement, the Division Bench of the Calcutta High Court dismissed the same in May, 2004.[68] In July, 2004, White Industries preferred an appeal to the Supreme Court of India against the same.[69]

- While the matter was still pending before the Supreme Court, the position of law as propounded in *Bhatia International v. Bulk Trading S.A.*[70] was further reiterated and reaffirmed by the Indian Supreme Court in the division bench judgement of *Venture Global Engineering v. Satyam Computer Services Ltd.*[71] In the 2008 judgement, the bench held that the Indian courts had the jurisdiction to try a setting aside application concerning a foreign award on the basis of the domestic law.[72]

- In light of such developments, six-days later on 16 January 2008, when the White Industries appeal came up for hearing, to everyone's surprise, against the flow tide, the two-judge bench differed on the matter. The court the held the following:

*"In the midst of hearing of these appeals, learned counsel for the appellant has referred to the three-Judges Bench decision of this Court in Bhatia International Vs. Bulk Trading S.A. & Anr., (2002) 4 SCC 105. The said decision was followed in a recent decision of two Judges Bench in Venture Global Engineering Vs. Satyam Computer Services Ltd. & Anr. 2008 (1) Scale 214. My learned brother Hon'ble Mr. Justice Markandey Katju has reservation on the correctness of the said decisions in view of the interpretation*

[68] *White Industries, supra* note 3, ¶ 3.2.59.
[69] *Id*, ¶ 11.4.4.
[70] *Bhatia International, supra* note 67.
[71] Venture Global Engineering v. Satyam Computer Services Ltd., (2008) 4 S.C.C. 190.
[72] The Indian Arbitration and Conciliation Act 1996, §§ 34, 48-49.

*of Clause (2) of Section 2 of the Arbitration and Conciliation Act, 1996. My view is otherwise.*

*Place these appeals before Hon'ble CJI for listing them before any other Bench.* [73]

Such order is a fit enough reflection of the willingness of judiciary to ensure to meet the end of justice, in order to ensure that the investor had effective means of enforcing rights. The Supreme Court could have easily, by placing reliance on decision of *Venture Globa*l read with *Bhatia International*, dismissed White's appeal. However, the same was not done. Therefore, it cannot be said that this case had similar factual standing as that in *Chevron*. Moreover, since there was a reference made to a higher bench, White ought to have known that the process of constituting a larger Bench would take time. This is on two counts. *Firstly*, the Chief Justice of India was required to constitute a special three judge Bench for consideration of the matter which is time taking.[74] *Secondly and more importantly,* even if the three judges Bench gave the matter a green flag, the issue at hand would have to be again decided by five-judge Bench (Constitution Bench). But why? This is because the judgement in *Bhatia International v. Bulk Trading S.A.* was rendered by a three-judge bench, therefore, it would require a larger bench to decide in derogation from the same.

On 1 November 2011, the appeal preferred by White Industries came up for hearing before a Full Bench of the Supreme Court (3 judges). Upon consideration, the Court felt that the dispute warranted to be referred to a Constitution Bench i.e. 5 judges, and the same was done. In the present context, it is important that we

[73] Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Service, Inc., (2012) 9 S.C.C. 552, ¶ 1.
[74] Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and US Supreme Courts*, AMERICAN J. COMP. LAW (2013); 1 Suresh Kumar, *Appointment Of Judges In India: An Analysis*, IND. L.J. CRIME & CRIMINOLOGY.

don't lose the sight of the fact that even the judiciary is bound to follow a certain mechanism. [75]

## VII. The Road Ahead: The impact such an award can have on other developing jurisdictions like Nigeria and Bangladesh

The law and practice of arbitration is intricately tied to and dependent on the general mechanism of civil justice.[76] This is for multiple reasons, whether it be for pre-arbitral issues like reference to arbitration or post-arbitral issues like the enforcement of the award.[77] The latter finds due recognition in the New York Convention, 1958 that puts an obligation on the signatory states to enforce the award as early as possible.[78] Even though there exist such a positive obligation, majority of the developing states in Africa and South Asia still see a long arbitral award enforcement periods, ranging from 8-10 years.[79] The same is due to variety of reasons ranging from colossal backlogs to inefficient and inefficient judiciary. The application and

[75] Kim Economides, *Are Courts Slow? Exposing and Measuring the Invisible Determinants of Case Disposition Time*, UNIVERSITY OF OTAGO ECONOMICS DISCUSSION PAPERS NO. 1317 (2013); Matthieu Chemin, *Does the Quality of the Judiciary Shape Economic Activity? Evidence from India* (Mar. 29, 2019, 08:04 AM), www.sticerd.lse.ac.uk/dps/03122004/chemin.pdf.

[76] Andrew Barraclough, *Mandatory Rules of Law in International Commercial Arbitration*, 6 MELBOURNE J. INT'L. L. (2005); P Sathasivam, *Judicial Dialogue on the New York Convention*, ICCA CONFERENCE (Apr. 19, 2019, 03:04 AM), www.arbitration-icca.org/media/2/13916004665430/nyc_roadshow_speech_23rd_nov_chief_justice_sathasivam.pdf.

[77] Christoph Schreuer, *Interactions of International Tribunals and Domestic Courts in Investment Law in: Contemporary Issues in International Arbitration and Mediation*, 71 FORDHAM L. REV. 2010 (2010); 2 Arpan Kr Gupta, *A New Dawn For India- Reducing Court Intervention In Enforcement Of Foreign Awards*, I.J.A.L.

[78] Albert Jan, *supra* note 54.

[79] Gabrielle Kaufmann-Kohler, *Commercial Arbitration Before International Courts and Tribunals - Reviewing Abusive Conduct of Domestic Courts*, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW ANNUAL LECTURE ON INTERNATIONAL COMMERCIAL ARBITRATION (2011) (Mar. 24, 2019, 05:34 AM), www.doc.rero.ch/record/291085/files/arbint29-0153.pdf.

effectiveness of the New York Convention in such states have been subjected to a lot of criticism.[80] To add to the miseries of such states, such expansive interpretation of the "effective means" clause has resulted in states being under a constant danger of being sued before an investment tribunal.

The ruling by the tribunal in White Industries should be seen by such states as a timely warning. For a more robust understanding as to the magnitude of danger that looms over such developing states, the enforcement track record of a few developing states needs to be discussed. This paper specifically takes up the enforcement trends in Nigeria and Bangladesh, however the same is not restricted to the countries of African and Indian Sub-Continent.[81] Even the Latin American jurisdictions like Paraguay etc. also plague from the same kind of delay in enforcement.[82]

## A. ENFORCEMENT PROCESS IN NIGERIA: COON'S AGE

Nigeria, commonly referred to as the "Giant of Africa" has often been in the centre of criticism for delayed enforcement of arbitral awards. In certain cases, such delay can range from ten (10) to fifteen (15) years. The two cases that aptly highlight the delay that

[80] GEORGE BERMANN, RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, IN THE INTERPRETATION AND APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS (SPRINGER INTERNATIONAL PUBLISHING AG, 2017); Linda Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38 GA. J. INT'L. & COMP. L. (2009).

[81] Philip Odiase, *Enforcement of Commercial Arbitration Awards in Nigeria More Than Just a Dalliance*, 13(4) T.D.M. (2016) (Apr. 12, 2019, 10:44 AM), https://www.transnational-dispute-management.com/article.asp?key=2378; Nicholas Peacock, *Arbitrating in "Developing" Arbitral Jurisdictions: A Discussion of Common Themes and Challenges Based on Experiences in India and Indonesia*, 6 INT'L. ARB. L. REV (2010).

[82] Jose Antonio Rodiguez, *Interpretation and Application of the New York Convention in Paraguay*, in THE INTERPRETATION AND APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS 745 (SPRINGER INTERNATIONAL PUBLISHING AG, 2017).

an investor might be subjected to in Nigeria and forbear the wind of caution are discussed below.

*a. The Clifco Nigeria Ltd. Case: 11-year delay and still counting*

In *Nigerian National Petroleum Corporation Ltd. (NNPC) v. Clifco Nigeria Limited,*[83] (the *Clifco case*) the arbitral tribunal rendered an award in favour of Clifco Nigeria Limited and awarded cost against NNPC. The Clifo tale that concerns the enforcement of an award worth USD 340 million, will perfectly fits the illustration of the dismal state of affairs in Nigeria. The same act serves as a timely pretext and a wakeup call for Nigeria. The setting aside and enforcement timeline of the case is as follows:

- Being dissatisfied with the award, NNPC submitted a setting aside application before the Federal High Court Nigeria to restrict the enforcement of the award. The Federal High Court while deciding in merits of the application in affirmative set aside the award in December 2000. This was followed up with an order of the Federal High Court for non–enforcement on 31 October 2001.
- Clifco Ltd. dissatisfied with the outcome, took the recourse to the Court of Appeal. The Appellate Court partially set aside the award and decided the same in favour of Clifco Ltd. Displeased by the same; the respondents filed an appeal before the Supreme Court on 30 June 2003.
- In April 2011, Supreme Court dismissed the appeal of Nigerian Petroleum Corporation and upheld the partial as ordered by the Court of Appeals. The time period of 11 years was taken to merely the setting aside

[83] Nigerian National Petroleum Corporation Ltd (N.N.P.C.) v. Clifco Nigeria Limited, (2011) L.P.E.L.R.-2022 (SC).

proceedings, with the enforcement proceedings still pending.

- In November 2015, the English Courts enforced the award on grounds of "catastrophic" delay caused in enforcement of award in Nigeria.

The enforcement track record of the country reflects that enforcement of arbitral award can take up to 10 years and 15 years.[84] The courts in the present matter could have ensured that case be concluded sooner. Although the trial court set aside the award, the time taken was less than a year. While the Court of Appeal and the Supreme Court took two years and eight years respectively, to decide the same. Nigeria being a host state, might see itself being in the line of fire and defending a case for not providing *"effective means"* of asserting rights.

*b.* *The Vessel MV Naval Gent Case: 15-year delay*

In *the Vessel MV Naval Gent (Vessel MV) v. Associated Commodity International Ltd. (ACIL),* [85] the parties referred their dispute to arbitration seated in London pursuant to the dispute settlement between the parties. The Federal High Court put a stay on the proceedings initiated by the ACIL in 2000 until the final award is rendered.[86] The London seated arbitral tribunal passed an award pertaining the dispute referred in February 2004 and the same was registered as the judgement of the Federal High Court. Subsequent to the final award, ACIL filed an application for restoration of the initial suit that was stayed, which was objected

---

[84] Babatunde Ajibade, *Applicable procedural law for recognition and enforcement of arbitral awards*, GLOBAL ARBITRATION REVIEW (Mar. 29, 2019, 08:04 AM), https://globalarbitrationreview.com/jurisdiction/1004839/nigeria; Ngo-Martins Okonmah, *An Analysis of the Effective Means Standard as an alternative to securing enforcement of arbitral awards in Nigeria*, 11(2) CONST. L. INST'L (2016).

[85] The Vessel M.V. Naval Gent (Vessel M.V.) v. Associated Commodity International Ltd., (2015) L.P.E.L.R.-25973 (C.A.).

[86] *Id*.

by Vessel MV. The High Court deciding on the issue, *"whether the courts retain the jurisdiction to decide an issue on which an arbitral award is rendered"* held that it had the jurisdiction. The same put up for reconsideration before the Court of Appeal.[87] In November 2015, the court upheld that the High Court lacked jurisdiction in trying an issue on which an international award has been registered. In furtherance of the same, the appellate court ordered enforcement of the award and held that no setting aside proceedings can be initiated against the same.

In this case the Court of Appeals decided in favour of reducing the delay by not allowing re-initiation of the setting aside proceeding. However, one cannot be blind sighted to the amount of delay that occurred. Even though the same is a progressive award, the fact that the matter dragged on for 15 years before its deposal, is adequate to constitute the breach of *"effective means"* standard. Fifteen years is a lengthy time for a business dispute to linger on.

But should all such delay be accounted to the judiciary? The delay in enforcement is not limited to the initial recognition and enforcement proceedings, the same extends even after the court may have decided in favour or against the enforcement of the award. Even though the judiciary takes such proactive measures to curtail any further delay, such actions do not constitute for anything in the "*delay formula*" propounded in the White Industries case.[88] The question as to whether they should be held liable for the same should be decided on facts, but undoubtedly the Whites Industries case has tilted the balance in the favour of the investors.

### B. ENFORCEMENT PROCESS IN BANGLADESH: LACK OF INTENT

[87] *id*, ¶ 5; Ngo-Martins, *supra* note 84.
[88] *White Industries*, *supra* note 3.

The enforcement trend of foreign arbitral awards in a state is dependent on compound effect of several different factors.[89] The State's legal infrastructure, exposure to international commercial arbitration and grip of the judges relating to the practice of international arbitration form its core. Even though the New York Convention has received wide acceptance, South Asian states like Bangladesh and Pakistan are still grappling to ensure an effective enforcement atmosphere to the investors.[90] The same is for two reasons, as detailed below:

The current Bangladesh arbitration regime lacks the pro-active legislative push for enforcement. In absence of any special rules to enhance the mechanism concerning the execution of the foreign awards by the national courts, the pace of enforcement remains to be dismal.[91] The fall out of the same being that there is no time limit for disposition of the case. Unlike India that now includes a fast-track procedural regime,[92] Bangladesh is still to learn lessons from the White Industries episode. Contrary to the pro-active push, the enforcement regime requires the application of the antiquated general provisions of the CPC.[93] Such reliance

---

[89] Lindsay Oldenski, *What Do the Data Say about the Relationship between Investor-State Dispute Settlement Provisions and FDI?*, P.I.I.E. (Mar. 29, 2019, 09:04 AM), https://piie.com/blogs/trade-investment-policy-watch/what-do-data-say-about-relationship-between-investor-state; Catherine Amirfar, *The Current State and Future of International Arbitration: Regional Perspectives*, INTERNATIONAL BAR ASSOCIATION (2015) (Apr. 29, 2019, 11:04 AM) https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx.

[90] Rakiba Nabi, *Enforcement of foreign arbitral awards concerning commercial disputes in Bangladesh: A brief overview*, 24(4) HUMANOMICS 274-284 (2008).

[91] Choi Jin, *International Commercial Arbitration in South Asia: A Comparative Study*, (2012) KOREA LEGISLATION RESEARCH INSTITUTE (Mar. 29, 2019, 08:04 AM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2359220.

[92] The Arbitration and Conciliation (Amendment) Act, 2015. §§ 29A, 29B; SAMEER SATTAR, ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN BANGLADESH: THE LAW, ITS IMPLEMENTATION AND CHALLENGES, PRIVATE INTERNATIONAL LAW, SPRINGER, SINGAPORE (2017).

[93] Muhammad S Hossain, *Causes of Delay in Administration of Civil Justice: A Look for Way Out in Bangladesh Perspective*, 6 A.S.A. UNIVERSITY REVIEW 103, 107 (2012).

further worsens the matter since the enforcement proceedings of the foreign awards are carried on like any other domestic proceeding.

Such lack of specialised set of rules has resulted in precedents where the enforcement of award has been compromised due to extensive delay caused. Majority chunk of such delay is caused at the level of lower courts as they lack firm legislation. *Smith Co-Generation (BD) Pvt. Ltd.* v. *Power Department Bangladesh*,[94] marks the sorry state of enforcement mechanism concerning the foreign awards in Bangladesh, wherein the enforcement process took nearly 10 (ten) years. In 2000, the ICC arbitral tribunal gave three awards determining the liability of the Bangladesh Power Development, wherein it held the Board liable for breaches of contract. When *Smith Co-Generation* filed a suit for the execution of the said decree before the District Court, the PDB challenged the legality of the arbitral proceedings that culminated into the award. Owing to the snarling pace of the enforcement mechanism, the judiciary took ten years to uphold validity and enforceability of the award. The present-day Bangladeshi legal regime does not restrict parties opposing execution of an award from filing a parallel civil proceeding that are instituted with the sole aim of tactically delaying enforcement. The said concern about the potential misuse of the CPC in enforcement mechanism can be best expressed by what has been observed by a member of Bangladesh's judiciary.

"*In the execution stage, judgment-debtors take advantage of technicalities and adopt dilatory tactics and make application of tricks with intent to delay the execution. The entire judicial process in civil suit has been brought to disrepute by the manner and method of executing proceedings that protract over decades.*" [95]

---

[94] Smith Co-Generation (B.D.) Pvt. Ltd. v. Bangladesh Power Development Board, (2010)15 B.L.C. (H.C.D.) 704, ¶ 24.
[95] Hossain, *supra* note 93.

Such practice whereby the dilatory tactics in the enforcement regime are not curbed is a cause of great concern.[96]

## VIII. Conclusion: Effective Means obligation – a "Ticking Time-Bomb"

In the aftermath of the stellar arbitral awards in White Industries and Chevron, the seemingly and rarely deployed use of "effective means" standard has found new teeth. Owing to the said easier-to-breach standard, the investors are now catered with a more viable and far-reaching claim than what the customary DOJ clauses had to offer. While reality behind the ordeal investors suffer due to unnerving delays and judicial conduct in developing states cannot be questioned, the advantage brought to the investors by the expansive interpretation of the said clause far out-weighs the balance of convenience. The expansive reading of the "effective means" in Chevron, contrary to the founding intention, has resulted in transformation of the clause into a treacherous trap for the developing states. Consequently, in reality, owing to their scanty resourced and overburdened judiciary, developing states like India, Bangladesh, Nigeria, Ecuador etc. are to face the bane and burden of such an interpretation. Regrettably, such a subsequent reading of an ill-defined and unsubstantiated standard in White Industries by importation further compounds the problem and now hangs like a victorian investors sword over the developing states. Therefore, such arbitral awards, justifiably or not, have resulted in further compounding of the problems of the second world countries, raising their concern for the whole international investment arbitration regime

---

[96] Bangladesh International Arbitration Centre, *Statistics of case disposal*, (Oct. 15, 2019, 01:04 PM), https://www.biac.org.bd/statistics/; *Summary Report on Court Services Situation Analysis*, (2013) (Oct. 15, 2019, 01:04 PM), https://www.undp.org/content/dam/bangladesh/docs/Projects/JUST/Summary_Report_on%20Court%20Services%20Situation%20Analysis.pdf.

Vol. 11 Feb 2020

# INVESTOR-STATE DISPUTES IN INDIA'S ENERGY SECTOR: BALANCING FOREIGN INVESTMENTS WITH NATIONAL ENERGY SECURITY CONCERNS

*Abhishek Rana**

## Abstract

*Every host state seeking an investment in their energy sector offers favourable conditions to foreign investors through bilateral investment treaties (BITs), guaranteeing the investors protection from any action(s) that may harm their investment. Thus, a State creates its investment policies in such a way which maintain the balance between its investment policies and socio-economic concerns. This forces states take measures that may upset the investors, consequently leading to disputes. Such disputes affect the conditions and likelihood of future investments in the host state, occasionally triggering calls for reforms in the investment regimes. This paper studies the nature and kind of disputes arising in the energy sector, and how in the Indian context, such disputes have resulted in a change in the country's energy policies. The paper then scrutinizes old investment treaties and evaluates their success in addressing national energy security concerns. Lastly, it studies the implications of the new Indian model BIT on the energy sector and how it may help India achieve its long-term energy security plans.*

* The author is a Senior Research Fellow at the Forum for Trade Remedies and an International Economic Law Scholar from the Queen Mary University of London. The author would like to thank Ms Norah Gallagher & Ms Silke Goldberg, faculties at the Queen Mary University of London for their suggestions and guidance. The author is also grateful to Rishabh Meena for valuable research assistance. The responsibility for the information and views set out in this article lies entirely with the author. The author also reserves his right to depart from these views in the future.

## I. Introduction

With industrialisation progressing into the 21st century, issues such as energy supply and security assume paramount importance for the economic interests of developing countries (such as India). The traditional discourse surrounding energy security saw many governments scrambling to secure traditional energy resources, such as oil, coal, and natural gas.[1] However, at the turn of the new century, this discourse began gradually shifting to move away from fossil fuels with an emphasis on the increasing importance of adopting a low-carbon pathway amidst climate change concerns. Although these concerns have failed to wholly direct the energy sector away from fossil fuels,[2] the stalemate in international negotiations on climate change has led to increasing unilateral action directed at the inclusion of investment policies in the renewable energy sector. The discourse surrounding the Indian energy is similarly complicated, riddled with two-fold concerns of energy security and climate change.[3]

Investors in the international energy sector have long been demanding guarantees from the host state to avoid situations wherein the host state could unilaterally take measures that could negatively impact the investor's return on investment.[4] This demand of the investors under the investment treaties has been addressed by the international investment law regime, which has fundamentally transformed the legal relationship between the investors and the host states, especially in the energy sector, by bringing certainty and predictability; hence, protecting the investors against any arbitrary actions or breach of promise by the

---

[1] Vyoma Jha, *India's Twin Concerns over Energy Security and Climate Change: Revisiting India's Investment Treaties through a Sustainable Development Lens*, 109 TRADE, LAW AND DEVELOPMENT 109 (2013)

[2] Ann Florini and Navroz K. Dubash, *Introduction to the Special Issue: Governing Energy in a Fragmented World*, 2 GLOBAL POLICY 3 (2011)

[3] Jha, *supra* note 1.

[4] PETER D CAMERON, INTERNATIONAL ENERGY INVESTMENT LAW: THE PURSUIT OF STABILITY 1-500 (Oxford University Press 2010).

host States under the guise of protection of the rights of its citizens. However, the extent to which the international investment law regime can protect foreign investors in the energy sector from unilateral state measures remains uncertain. Therefore, understanding how arbitration can protect investors, whilst balancing the interests of host states to regulate their socio-economic concerns in the public interest is of paramount importance in today's global energy sector.[5]

It is essential to appreciate that India is currently operating in a dual position of being an investment destination, as well as an outward investor.[6] Therefore, its investment treaty commitments would have a direct effect on any energy-related regulatory action at home, as well as investment abroad. Conventionally, such investment commitments are codified in bilateral investment treaties (BITs). By signing BITs, Host states promise investors a certainty, good faith and non-arbitrariness in their behaviour and also offer investors avenues to take legal action against the State before an arbitral tribunal in case of non-compliances with these requirements[7] by invoking the Investor-State Dispute Settlement (ISDS) mechanism. However, there is a growing concern about the increased investor-state arbitrations that might occur, as most investment treaties confer upon foreign investors the right to

[5] Elizabeth Whitsitt and Nigel Bankes, *The Evolution of International Investment Law and Its Application to the Energy Sector*, 51 ALBERTA LAW REVIEW 203-234 (2013).

[6] United Nations, *World Investment Report-Global Value Chains: Investment and Trade for Development*, UNITED NATIONS, 1 (July., 2013), available at https://unctad.org/en/PublicationsLibrary/wir2013_en.pdf.

[7] Luke Eric Peterson, *Bilateral Investment Treaty and Development Policy Making*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, available at https://www.iisd.org/library/bilateral-investment-treaties-and-development-policy-making; *See* Mahnaz Malik, *The Legal Monster that lets Companies sue Countries*, THE GUARDIAN, November 4, 2011, available at https://www.theguardian.com/commentisfree/2011/nov/04/bilateral-investment-treaties.

subject host country regulations directly to international investment arbitration.[8]

ISDS cases in the energy sector are on the rise, causing the nexus between the energy sector and investment treaty arbitration to grow steadily. Close to one-third of all ISDS cases registered under the International Centre for Settlement of Investment Disputes (ICSID) originate from the energy sector.[9] This potentially poses a threat to the sovereign rule-making ability of host States as potential investor challenges the host State's energy-related policies. As the concerns surrounding investment treaty arbitration in the energy sector become more complex, there is an imperative need to explore the consequences of investment treaties for any energy-related regulatory action at the home state, as well as for Indian energy-related investment abroad.[10]

## II. Nature of Investor-State Disputes in the Energy Sector

Energy investments are long term commitments that require huge capital. These commitments through investment in the energy sector of the Host state are susceptible to the possibility that a host state can change the erstwhile rules of engagement once the investment has been made, but before the investor has earned the promised return on investment.[11] Therefore, the investors seek to secure a more favourable economic environment for their investments through the inclusion of stabilisation clauses in investment contracts and the domestic investment laws of host

[8] Jha, *supra* note 1.
[9] ICSID, *The ICSID Caseload – Statistics Issue 2013-2'*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, 1 (Jun. 30, 2013), available at https://icsid.worldbank.org/en/Documents/resources/2013-2.pdf.
[10] Jha, *supra* note 1.
[11] Anotole Boute, *The Potential Contribution of International Investment Protection Law to Combat Climate Change*, 27 JOURNAL OF ENERGY AND NATURAL RESOURCES LAW 333, 337 (2009).

states.[12] In addition, investors also seek to configure their investments in a way that capitalises on the protection offered by International Investment Agreements (IIAs) such as protection against expropriation, non-discrimination, et cetera.[13]

It is helpful to describe a few common types of disputes before we begin addressing the focal issues. There are primarily four types of disputes in the energy sector which are (i) disputes involving political and economic restructuring, (ii) demand of the government to get enhanced share in the investment, (iii) disputes due to change in the policies of the Host state as to environment of the energy sector, and (iv) the withdrawal or modification of the measure by the government.

*First*, with disputes involving a significant political and economic restructuring of the host state, the crisis may be isolated to one jurisdiction or a small group of jurisdictions, and, in other cases, the crisis may be more global.[14] In these types of disputes, the host state usually tries to justify its stance in accordance with the investment treaty in question (and clearly this nature of the dispute is contingent on the treaty language) claiming that it authorizes special measures in exceptional circumstances. Thus,

---

[12] Peter D Cameron, *Stability of Contract in the International Energy Industry*, 27 JOURNAL OF ENERGY AND NATURAL RESOURCES LAW 305 (2009).

[13] Nationality of an investor determines under which treaty his/her investment can be afforded a protection. *See Saluka Investments BV v The Czech Republic,* UNCITRAL (17 March 2006). Mostly investors choose an investment vehicle viz. an entity incorporated in such a nation state which has a favorable international investment agreement(s) with the country wherein the investment has been made i.e. host state.

[14] Several cases were filed against Greece and Belgium in year of 2012 due to the measure taken by these nations in order to tackle the ongoing recession and the worldwide financial and economic crisis as witnessed in the European Union (see e.g. *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v Kingdom of Belgium* (2012), Case No ARB/12/29 (ICSID); Luke Eric Peterson, *Investment Treaty Arbitration against Greece Looms after Foreign Bank Gives Notice of Dispute Due to "Discriminatory" Bail-out*, INVESTMENT ARBITRATION REPORTER, accessed on (Mar. 12, 2019, 11:00 AM), available at http://www.iareporter.com/articles/20130327.

the Host state proves that the actions are consistent with the treaty.[15]

Exceptionally, where there is no internal special measures clause, the state may argue that the concerned measures are justified with respect to the rules of international law on state responsibility, particularly within the rules dealing with necessity.[16] For instance, in *El Paso v. Argentina*[17], El Paso sued Argentina for the withdrawal of the guarantees and safeguards, which forms the basis of El Paso's investment in Argentina the electricity and hydrocarbons industries.

*Second*, another source of disputes between the two parties is the efforts of governments to demand an enhanced share of resource rents when there is an unexpected global increase in energy prices. For instance, governments in Central and South America, including Ecuador, Bolivia, and Venezuela, have all taken measures to enhance their share of energy rents.[18] To make these endeavours see the light of the day, the governments introduce new taxes, renegotiate existing agreements, revoke existing agreements, or change the tax treatment of goods supplied to the energy sector.[19]

*Third*, changes in the host state to the environment within which the energy industry operates can be another source of dispute. For example, an increase in the cost of doing business in some

---

[15] Whitsitt and Bankes, *supra* note 5.

[16] CMS Gas Transmission Company v. Argentine Republic (2007), ARB/01/8 (ICSID), Annulment Proceeding.

[17] El Paso Energy International Company v. Argentine Republic (ICSID Case No. ARB/03/15)

[18] "Windfall" tax was introduced in Ecuador on their incremental rents on petroleum. This award was given under Burlington Resources Inc v. Republic of Ecuador (2012), Case No ARB/08/5 (ICSID). See also Sergei Paushok, CISC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL, (28 April *2011);* City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petrdleos Del Ecuador (2007), Case No ARB/06/21 (ICSID)

[19] Whitsitt and Bankes, *supra* note 5.

cases may make it impossible to continue with the concerned operation.[20] For instance, Germany's decision to phase out nuclear energy can be cited as an example of the same.[21]

With the aim of promotion of renewable energy in the energy sector, the governments have attempted to incentivise and develop programs such as direct subsidies or feed-in tariff[22] that develop alternate sources of energy and new and innovative technologies like carbon capture and storage Feed-in-tariffs (FiT) policies are an important tool in driving the much needed investment in the renewable energy sector, especially in the form of 'local content' or 'domestic content' requirements, which makes it mandatory for the investor to source a certain percentage of materials from local suppliers in order to be eligible to receive the benefits of the policy. Typically, there have been two distinct trends in the kinds of disputes relating to FiT for renewable energy – first, disputes relating to the withdrawal or modification of the FiTs itself; second, disputes relating to the requirements of local content imposed on investors.[23]

*Fourth*, disputes can also arise where governments seek to withdraw or alter/modify the investment programs, especially in cases where host governments seek to include domestic performance requirements in order to foster the development of the 'green economy'. Disputes regarding eligibility for these programs may also arise.[24] The reasons governments cite for

---

[20] Ibid.
[21] Vattenfall AB and others v. Germany (2013), Case No ARB/12/12 (ICSID)
[22] IESO, *Feed-in Tariff Program*, INDEPENDENT ELECTRICITY SYSTEM OPERATOR, accessed on (Feb. 20, 2019, 02:24 PM), available at http://fit.powerauthority.on.ca/program-resources/faqs/general-information-about-fit-and-microfit-programs.
[23] Jha, *supra* note 1, at 109.
[24] Nigel Bankes, *Decarbonising the Eonomy and International Investment Law*, 30 JOURNAL OF ENERGY & NATURAL RESOURCES LAW 497 (2012). European Union and Japan challenged Ontario's FIT and micro-FIT programs at the WTO for discriminating and not according the same treatment to the foreign produced components of renewable energy (Panel Reports in *Canada - Certain Measures*

changing or withdrawing these types of programs are varied. In some instances, the programs prove more expensive than anticipated. Alternatively, such programs are criticised for being philanthropic either because the new technology has come to be seen as a product of the business, as usual, warranting no incentive or because the production costs for the new technology have fallen therefore reducing the need for incentive.[25]

## III. Rise in Investor-State Disputes under India's Investment Treaties

In order to attract foreign investment in India, India started entering into BITs in the mid-nineties by offering favourable conditions to the investors.[26] India adopted its first BIT in 1994, and since then it has signed 83 BITs.[27] Each BIT to which India is a party is distinct, yet all the BITs have common characteristics.[28] Indian BITs are unique in many respects. First,

---

*Affecting the Renewable Energy Generation Sector and Canada - Measures Relating to the Feed-In Tariff Program* WT/DS412/R, WT/DS426/R; Appellate Body Reports in *Canada - Certain Measures Affecting the Renewable Energy Generation Sector & Canada - Measures Relating to the Feed-In Tariff Program,* WT/DS412/AB/R, WT/DS426/AB/R. Discrimination has also been pointed out by the investors under the subsidy scheme of Ontario (Mesa Power Group, LLC v. Government of Canada, UNCITRAL (4 October 2011)).

[25] Arbitration initiated against the Government of Canada under *NAFTA* Chapter II as a result of changes to the development offshore wind projects in Ontario (Windstream Energy LLC v Government of Canada, UNCITRAL (28 January 2013)).

[26] Sherina Petit, Mathew Buckle and Daniel Jacobs, *India releases a new Model BIT*, NORTON ROSE FULBRIGHT, accessed on (Mar. 15, 2019, 10:00 AM), available at http://www.nortonrosefulbright.com/knowledge/publications/136918/india-releases-a-new-model-bit.

[27] Patnaik, *Deconstructing India's Model Bilateral Investment Treaty*, THE WIRE, September 16, 2016, available at https://thewire.in/economy/deconstructing-indias-model-bilateral-investment-treaty.

[28] Prateek Bagaria and Vyapak Desai, *Bilateral Investment Treaties and India*, NISHITH DESAI ASSOCIATES, accessed on (Mar. 12, 2019, 01:04 PM), available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Bilateral_Investment_Treaties_and_India.pdf.

India does not guarantee a 'right to make investments'.[29] Second, the Indian government keeps with itself the power to allow decisions of investment in various sectors. Third, Indian BITs require that investment be made according to the national laws of India.[30]

Indian investment treaties have never been in the limelight until recently. It was in 2012, many foreign investors threatened to sue the Indian government by invoking different provisions of various Indian BITs[31]: the cancellation of 2G licenses of their joint ventures caused Russian telecom company Sistema and Norwegian telecom company threaten to sue under the Bilateral Investment Promotion and Protection Agreement (BIPA) with Russia and the Comprehensive Economic Cooperation Agreement (CECA) with Singapore respectively; a UK hedge fund, the Children's Investment Fund Management is threatening to sue India over its policy to regulate the price of coal at home under the BIPA with Cyprus;[32] and the British telecom company Vodafone has also seeded a tax-related challenge under the BIPA with the Netherlands.[33]

Furthermore, in November 2011, an Australian firm, White Industries won the first-ever known investment treaty arbitration against India.[34] In the dispute between Coal India and White Industries, the latter raised objections against the inordinate

[29] Modak and Parvez Mirza, *Effective Remedies Provided to Investments and Trade Abroad*, ASTREA LEGAL ASSOCIATES LLP, accessed on (Mar. 10, 2019, 01:45 PM), available at https://astrealegal.com/effective-remedies-provided-to-indian-investments-and-trade-abroad.
[30] Jha, *supra* note 1, at 109.
[31] *Id* 109-149
[32] *Jha*, *supra* note 1.
[33] Sujay Melidudia, *Move to Rework Bilateral Treaties*, THE HINDU, July 11, 2016, available at https://www.thehindu.com/business/move-to-rework-bilateral-treaties/article3422322.ece.
[34] Prabhash Ranjan, *The White Industries Arbitration: Implications for India's Investment Treaty Program*, INVESTMENT TREATY NEWS, accessed on (Mar. 10, 2019, 04:00 PM), available at https://www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/.

delays on the part of Indian courts to enforce an arbitral award obtained by it against Coal India.[35] It was claimed that the delay violated the provisions on most favourable nation (MFN) treatment, fair and equitable treatment (FET), expropriation, and free transfer of funds under the India-Australia BIT.[36] The UNCITRAL tribunal rejected the claims relating to the violation of expropriation, FET, and free transfer of funds. However, it ruled that India violated the MFN provision of the India-Australia BIT.[37] The tribunal held that non-timely enforcement of the arbitral award by the local courts violated India's obligation to provide the investor with an "effective means of asserting claims and enforcing rights".[38] Furthermore, the tribunal relied on the broad MFN provision in the India-Australia BIT[39] and allowed White Industries to make use of the 'effective means' provision from the India-Kuwait BITs[40] even though the India-Australia BIT does not contain any provision of the similar nature.[41]

These cases, therefore, have contributed to doing away with the myth that a BIT can be invoked only against the actions of the government, i.e. the executive.[42] Professor Ranjan points out that actions of the judiciary, which is a sovereign function, could

---

[35] Jha, *supra* note 1.

[36] Ranjan, *supra* note 34.

[37] Santosh Tiwari, *Taking notice of investment treaties*, BUSINESS STANDARD, January 24, 2013, available at https://www.business-standard.com/article/opinion/santosh-tiwari-taking-notice-of-investment-treaties-112061400019_1.html.

[38] Jha, *supra* note 1.

[39] Under the India-Australia bilateral investment treaty (BIT), Article 4(2) of that BIT provides for the MFN provision wherein no less favourable treatment shall be granted to investments made by an investor from a contracting party when compared to the treatment granted to the investments or investors of any third country.

[40] Under the India-Kuwait bilateral investment treaty (BIT), Article 4(5) of that BIT mandates the contracting parties to provide the investors with effective means of claiming any right they have pertaining to their investment.

[41] Ranjan, *supra* note 34.

[42] Prabhash Ranjan, *Renegotiating a BIT*, THE INDIAN EXPRESS, July 17, 2012, available at http://www.indianexpress.com/news/renegotiating-a-bit/975397.

violate treaty obligations contained in a BIT as observed in the cases of Sistema's notice to the Government of India, as well as the White Industries arbitration.[43] Besides this, the former Attorney General of the United Kingdom, Lord Goldsmith has also stated that the courts are considered to be part of the State under BITs.[44] the sovereign actions of any organ of the State could be challenged under a BIT whether it is the executive, judiciary or legislature.[45]

## IV. Investor-State Disputes Shaping Indian Energy Policies

This section first looks into the traditional energy sector on which the Indian economy is heavily dependent for most of its energy supply and power generation, and it includes the coal-based energy, non-renewable energy.[46] It is argued that the cases of investment treaty arbitration against the government, involving Coal India (an Indian public sector company) could create a 'regulatory chill' and prevent the Indian government from legitimate regulatory action or policy-making to ensure greater energy security and affordable energy access to its 1.21 billion population.[47] Additionally, this section would also look at some relevant ISDS cases in the renewable energy sector, with special

[43] Ibid.

[44] Thomas K. Thomas, *India Cannot Sidestep Obligation under Bilateral Treaties*, THE HINDU BUSINESS LINE, March 12, 2018, available at https://www.thehindubusinessline.com/opinion/columns/thomas-k-thomas/india-cannot-sidestep-obligation-under-bilateral-treaties/article20482526.ece.

[45] Ranjan, *supra* note 42; See *United States of America v. Iran*, 24 May 1980, ICJ.

[46] Jha, *supra* note 1.

[47] The term regulatory chill can be best explained from the instances where the states fear to enact laws pertaining to environment in the prospect of losing competitive edge to other countries when it comes to providing favourable conditions to the foreign investment. *See* Kevin R. Gray, *Foreign Direct Investments and Environmental Impacts - Is The Debate Over?*, 11 RECIEL 307 (2003).

focus on their impact on the Indian regulatory approach towards decarbonization.[48]

### A. NON-RENEWABLE ENERGY SECTOR (EMPHASIS ON COAL)

In May 2012, the Children's Investment Fund (TCI), a UK-based hedge fund, issued a formal notice of a dispute and threatened to invoke arbitration against the Indian government under the India-Cyprus BIT[49] for violating its obligations on FET and expropriation under the treaty.[50] The Indian government sold off 10 per cent of Coal India Limited's (CIL) shares in 2010 through an initial public offering making TCI a minority shareholder after it acquired a 1.01 per cent stake in CIL. Following certain developments in Indian framework for energy regulation, TCI alleged that India's conduct "seriously impaired the business activities and operations of CIL" and is in conflict with the India-Cyprus BIT. TCI argued that CIL must be allowed to price and sell its coal supply under Fuel Supply Agreements (FSAs) at market prices as opposed to government-determined prices, which are significantly lower.[51]

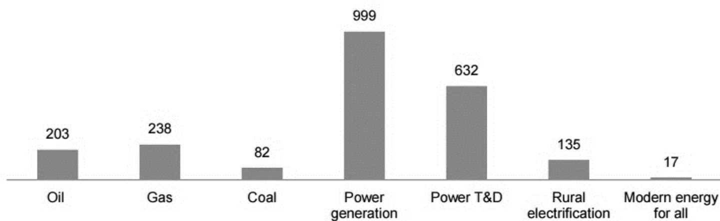
Moreover, a Partner at TCI is believed to have said that the "most effective way" to settle the dispute was "to go through the BIT" whereas challenging the Indian government through the local courts could take years and hence a notice of arbitration was served by TCI. Hence, the coal sector in India could prove to be an easy target for investor-State disputes, especially with the TCI

[48] Jha, *supra* note 1.
[49] Under the India-Cyprus bilateral investment treaty (BIT), Article 9 of that BIT states the provisions for dispute settlement between the investor and the contracting party.
[50] 'Letter from Children's Investment Fund Management (UK) LLP to the Union of India' on May 16, 2012
[51] Mark Tran, *UK Hedge Fund's India Tussle puts Unfair Bilateral Trade in Spotlight*, THE GUARDIAN, May 16, 2012, available at https://www.theguardian.com/global-development/poverty-matters/2012/may/16/uk-hedge-fund-india-bilateral-trade.

arbitration in place.[52] However, as per the information publicly available, no actual investment arbitration has started as of now. Moreover, most tribunals are likely to regard any measure affecting a foreign investor's interests as a breach of the provisions of the relevant investment treaty as they protect the investor's interests over the right of the host State to regulate.[53]

B. RENEWABLE ENERGY SECTOR

As per empirical studies, from 2006 to 2010, India's primary energy consumption increased at a CAGR of 8.3 percent from 381.4 million tonnes of oil equivalent (MTOE) to 524.2 MTOE.[54] It is further estimated that India would need a total investment of USD 2306 billion on energy supply infrastructure from 2011 to 2035, or an average USD 92 billion per year (see the graph below). This is a substantial amount and ensuring this scale of investment for the next two decades will be a challenge for India, making private investment in particular crucial.[55]




[56]

[52] Jha, *supra* note 1.
[53] Jha, *supra* note 1.
[54] FICCI and Ernst and Young, *India's Energy Security*, NATIONAL SEMINAR FOR ENERGY SECURITY, accessed on (Jun. 3, 2017), available at http://www.ey.com/Publication/vwLUAssets/Indias_energy_security/$FILE/India-s_energy_security.pdf.
[55] Ibid.
[56] Amos Bromhead, *World Energy Outlook 2011*, INTERNATIONAL ENERGY AGENCY, accessed on (Apr. 6, 2019), available at

In 2010, India heralded its National Solar Policy, the Jawaharlal Nehru National Solar Mission (JNNSM). The JNNSM aimed at deploying solar power across the country and laid the foundation for a clean energy future,[57] with development across the entire value chain. In order to develop domestic manufacturing capacity across value chains, the JNNSM introduced a local content requirement.[58]

The United States consequently requested the World Trade Organization (WTO) dispute settlement consultations with the Government of India concerning the issue of solar power developers to use Indian-made cells and modules in India's national solar mission.[59] US claimed that this local content requirement is a violation of Article III:4 of the General Agreement on Tariffs and Trade, 1994 along with the Agreement on Trade Related Investment Measures, i.e. national treatment principle which put US investors at a disadvantageous position.

However, India's argument has been that the local content requirements do not flout the WTO rules. It is evidenced by the Government of India recently announcing a plan for 75 per cent requirement of local content in Phase II projects under the JNNSM.[60] India maintains that the power produced under the

---

https://www.ief.org/_resources/files/events/2nd-iea-ief-opec-symposium-on-energy-outlooks/world-energy-outlook-2011.pdf.

[57] Indian Government, *Jawaharlal Nehru National Solar Mission: Guidelines for Selection of New Grid Connected Solar Power Projects*, MINISTRY OF RENEWABLE ENERGY, accessed on (Mar. 4, 2017), available at https://mnre.gov.in/sites/default/files/uploads/jnnsm_gridconnected_25072010.pdf.

[58] Ibid.

[59] United States Government, *United States Challenges India's Restrictions on U.S. Solar Exports*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, accessed on (Mar. 4, 2017), available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2013/february/us-challenges-india-restrictions-solar.

[60] Siddhartha S., *Solar Mission-II projects to have 75% local content*, THE HINDU BUSINESS LINE, June 13, 2013, available at https://www.thehindubusinessline.com/todays-paper/tp-economy/solar-missionii-projects-to-have-75-local-content/article4808076.ece.

mission will be bought by the public sector enterprise NTPC, which amounts to government procurement. Moreover, India has not signed the Government Procurement Agreement under the WTO, forming the premise behind India's reason that it is not under any obligation to follow the rules prescribed by it.[61] In April 2016, however, India lost its appeal at the World Trade Organization, as it upheld an earlier ruling that found India's National Solar Policy mandating local content requirement is inconsistent with its obligations under the WTO Agreement. The Appellate Body recommended India to bring the measure in compliance with its obligation under the WTO Agreement.[62]

## V. Review of India's Investment Treaties Concerning Energy Security

It is not clear as to which provisions of the BIT will the investors be relying upon to bring their claims against India or on what stage the existing investor-state disputes are at due to lack information that is available publicly. Nevertheless, India needs to remain attentive to the latest developments in ISDS cases while regulating its domestic energy sector, and negotiating its plans to sign more BITs.[63] The assumption that BITs help attract overseas investors is a questionable one in the light of the experiences faced by countries such as China and Brazil. Neither the restrictive terms in China's investment treaties nor Brazil's failure to ratify BITs has dissuaded foreign investors from entering the

---

[61] Amiti Sen, *Domestic Sourcing for Solar Mission no violation of WTO Rules*, THE ECONOMIC TIMES, April 09, 2012, available at https://economictimes.indiatimes.com/news/economy/policy/domestic-sourcing-for-solar-mission-no-violation-of-wto-rules/articleshow/12590597.cms?from=mdr.; Amiti Sen, *India worded over WTO's verdict on Ontano solar case*, THE HINDU BUSINESS LINE, May 19, 2013, available at https://www.thehindubusinessline.com/economy/India-worried-over-WTO%E2%80%99s-verdict-on-Ontario-solar-case/article20615849.ece.

[62] Miles, *India loses WTO appeal in U.S. solar dispute*, REUTERS, September 16, 2016, available at http://www.reuters.com/article/us-india-usa-solar-id.

[63] Jha, *supra* note 1, at 128.

country.[64] Recent developments in energy-related ISDS cases, both in India and the rest of the world, have made it amply clear that the existing BITs could potentially constrain India's autonomy in carrying out these regulations.[65]

Thus, India needs to concentrate on renegotiating its investment treaty provisions and narrowing the scope of its provisions in accordance with its developmental priorities.[66] Although some reports suggest India's plans to exclude arbitration clauses from future BITs,[67] it is argued that it would not be a wise idea for India to completely exclude the ISDS clause from its treaties. The problem with BITs is not necessarily a result of the ISDS provisions; rather, it results from the broad substantive protections offered within the treaty.[68]

FDI from India increased from $13.2 billion in 2010 to $14.8 billion in 2011.[69] This and the recent investment trends bear the testimony of the fact that India is fast becoming an exporter of capital. Henceforth, a move to remove ISDS clauses from investment treaties could jeopardise the interests of Indian investments abroad, which has exponentially increased over the last five years.[70]

---

[64] Vidya Ram, *Investment deals that BITe*, THE HINDU BUSINESS LINE, April 22, 2012, available at http://www.thehindubusinessline.com/opinion/investment-deals-thatbite/article3342641.ece.

[65] Jha, *supra* note 1, at 128.

[66] Ranjan, *supra* note 42.

[67] Sanjeet Malik, *India is planning to exclude arbitration clauses from BITs*, BUSINESS TODAY, May 27, 2012, available at https://www.businesstoday.in/magazine/columns/india-planning-to-exclude-arbitration-clauses-from-bits/story/24684.html; Eun-joo, *India plans to abolish ISD clause in FTAs*, BILATERALS, accessed on (Mar. 6, 2019, 2:50 PM), available at https://www.bilaterals.org/?india-plans-to-abolish-isd-clause

[68] Ranjan, *supra* note 42.

[69] United Nations, *World Investment Report – Towards a New Generation of Investment Policy*, UNITED NATIONS, accessed on (March. 4, 2019), available at https://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf.

[70] Prabhash Ranjan, *More than a BIT of a problem*, THE FINANCIAL EXPRESS, April 27, 2013, available at https://www.financialexpress.com/archive/column-more-than-a-bit-of-a-problem/1108228/.

## VI. Other Landmark ISDS Cases involving India and their Implications on Investment in Energy Sector

### A. AUSTRALIA WHITE INDUSTRIES[71]

The far-reaching consequences of this case have altered the scene of international arbitration in India. In this case, India was held liable for damages for judicial delays of over nine years in enforcing an ICC Award between White Industries Australia Ltd. and an Indian Government company, namely, Coal India.[72] The reason for the arbitration was the delay by Indian courts in the enforcement of the award which deprived the Australian investor of '*effective means of asserting claims and enforcing rights*'– an obligation contained in the Kuwait-India BIT, which the Tribunal held the Australian investor could take advantage of.[73]

In this case, White industries was an Australian mining company who entered into a contract with Coal India essential for the supply of equipment as well as the development of coal mine. This contract was governed by Indian law and contained an arbitration clause requiring disputes to be settled as per the ICC Arbitration Rules. Disputes arose between the parties and were referred to arbitration in London resulting in an award dated 27 May 2002 in White Industries favour.[74] Henceforth, on 6th September 2002, Coal India applied to the High Court of Calcutta

[71] *White Industries Australia Limited v. The Republic of India,* Final Award on 30 Nov 2011, UNCITRAL, available at https://www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/ accessed on Feb 25 2019

[72] Award in this matter of UNCITRAL arbitration was made under the Agreement between the Government of Australia and the Government of Republic of India on the promotion and protection of investment (Treaty).

[73] Sumeet Kachwaha, *The White Industries Australia Limited – India Bit Award: A Critical Assessment*, 29 ARBITRATION INTERNATIONAL 275 (2013); Emily Blanshard, Briana Young and Joanne Greenaway, *India liable under BIT for extensive judicial delays*, HERBERT SMITH FREEHILLS, accessed on (Nov. 23, 2019, 07:52 AM), available at https://hsfnotes.com/arbitration/2012/03/01/india-liable-under-bit-for-extensive-judicial-delays/.

[74] Kachwaha, *supra* note 73, at 276.

to have the ICC Award set aside,[75] while White Industries were unaware of this appeal and they had moved to the High Court of Delhi for the enforcement of the award.[76]

White Industries objected to these efforts and filed a petition challenging the jurisdiction of that Court to admit and listen to a set-aside request.

On 17 May 2003, a Judge of the Calcutta High Court ruled that the Court had jurisdiction over the set-aside proceedings. This was followed by an appeal by White Industries, wherein the panel of the same Court ruled the following year that the Indian courts could consider a setting-aside of the ICC award. The judgement of 7th May 2004, did not rule on the merits of the set-aside application.

White Industries took the matter to arbitration on the grounds that the inordinate delay in Indian courts to enforce the arbitration award violates the India-Australia BIT.[77] White Industries argued that the delay violated the provisions relating to fair and equitable treatment (FET), expropriation, MFN treatment, and free transfer of funds.[78] Although the tribunal dismissed the White Industries allegation related violation of FET and expropriation; it ruled that India violated MFN provisions of the India-Australia BIT, and awarded White Industries 4 million Australian dollars.[79]

---

[75] Section 34 of the Indian Arbitration and Conciliation Act, 1996 which is applicable to the arbitrations having their seat in India.

[76] Section 48 of the Indian Arbitration and Conciliation Act, 1996 Act which provides for the enforcement of foreign awards as under the New York Convention.

[77] *White Industries Australia Limited v Republic of India*, *supra* note 71, paras 11.2.2 – 11.2.8.

[78] Prabhash Ranjan, *The White Industries Arbitration: Implications for India's Investment Treaty Program*, INVESTMENT TREATY NEWS, April 13, 2012, available at https://www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/.

[79] India Council of Arbitration, *International Conference on Arbitration in the Era of Globalization*, Federation of Indian Chambers of Commerce & Industry

This case is worth noting as now the new model BIT of India has taken this case into consideration and made amendments to exclude the MFN clause.[80] This is an extreme step and may discourage investment,[81] even more so for the energy sector as has been discussed in the article in the later topic.

### B. DABHOL POWER PROJECT IN MAHARASHTRA UNDER INDIA-MAURITIUS BIT[82]

The Dabhol dispute is the largest, most complicated investment dispute in recent Indian history under the subject of international investment law. It has also impacted the FDI dispute settlement procedures.

Dabhol Power Company (DPC) was incorporated in India to administer and operate the Dabhol Power Plant. The Dabhol Power Plant came into the formation through the collective resource utilisation of GE, Bechtel, and Enron. GE was responsible for supplying the gas turbines to the plant, and Bechtel would serve as the general contractor responsible for the construction of the power plant, whilst Enron would manage the project through their entity, i.e. Enron International.

This project was developed with the combined efforts of Enron (having the majority of investment with 65 per cent of shares in

FEDERATION OF INDIAN CHAMBERS OF COMMERCE & INDUSTRY, accessed on (Mar. 23, 2019), available at http://ficci.in/spdocument/20707/arbitration-Background-Paper.pdf.

[80] Prabhash Ranjan and Pushkar Anand, *'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, 38 NORTHERWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS 24 (2017).

[81] Ranjan, *supra* note 78.

[82] V. Inbavijayan and Kirthi Jayakumar, *Arbitration and Investment-Initial Focus*, 2 INDIAN JOURNAL OF ARBITRATION LAW 33-54 (2013).

this project), Bechtel[83] and General Electric (GE)[84] (each held a 10 percent stake in this USD 3 Billion Dabhol Power Plant.

Accordingly, OPIC entered into political risk insurance contracts with each of the parties, to provide coverage for their equity stakes and loans against political violence, incontrovertibility and expropriation.[85] Under the provisions of the agreement signed between the parties, if the Government of India was found to be breaching its obligation, then they would have to compensate GE and Bechtel with a compensation worth 57.1 million dollars, as it created an obligation for the Indian Government to pay OPIC that sum, free from the interference caused by the injunction on arbitrations issued by the Indian courts.

Once the project started, it became the object of controversy as the energy purchase price was allegedly considerably higher than that of other power producers. These companies brought in claims under the India-Mauritius BIT, alleging that their interests in the power plant had been expropriated by the Indian Government. Dabhol Power Company immediately exercised its right to international arbitration, and the arbitration proceeding commenced in London against the state government for breach of its contractual commitments. The state government, in response to that, challenged the very jurisdiction of that arbitral tribunal; however, it was maintained that the arbitral tribunal had the jurisdiction to hear this matter.

Therefore, the Maharashtra Electricity State Board (MESB) was found in violation of a multitude of its obligations under the

---

[83] Engineering company from America with headquarters in San Francisco, United States

[84] Multinational conglomerate corporation from America with headquarters in Connecticut, United States

[85] Request for Arbitration under the Incentive Agreement between the government of United States of America and the Government of India (India v US) at 9 (2004) available at https://www.opic.gov/insurance/cliams/awards/documents/GOI110804.pdf

Power Purchase Agreement in the OPIC arbitration. These obligations were counter-guaranteed by the Indian government, making the Indian national government responsible for reimbursement to GE and Bechtel.[86] Thus, GE and Bechtel recovered their costs from OPIC under their political risk insurance policy because MESB had breached its obligations under the power purchase agreement. The Government of India was thereby obliged under the Investment Incentive Agreement to reimburse OPIC for the money awarded to GE and Bechtel.

Hence, the OPIC-GE/Bechtel proceeding is one classic example of how arbitration agreements with a non-Indian venue can allow damaged parties to recover their losses from disputes arising in India in an expeditious manner.

### C. CAIRN INDIA[87]

In this case, Cairn Energy Plc. Of the United Kingdom gave indemnity to Cairn India Ltd. Plc. against levy of any tax for past deeds. It included the two-year-old tax demand of 20,495 crore rupees. Cairn India did not deduct and withheld the tax on the capital gain it made from Cairn Energy Plc. and hence Cairn India was fined Cairn Energy claimed 900 million dollars from the Indian government for 'losses' caused to it by the actions of Indian government as part of a 1.6 billion dollar tax dispute.

Consequently, India's Income Tax (IT) department attached Cairn Energy's 10 per cent shareholding in Cairn India provisionally. The controlling stake in Cairn India was sold by Cairn Plc. for 8.7 billion dollars to Vedanta Group. The value of

[86] Preeti Kundra, *Looking Beyond the Dabhol Debacle: Examining its Causes and Understanding its Lessons*, 41 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 907-935 (2008).

[87] Press Trust of India, *Cairn India has indemnity from Cairn Energy on tax demand: Anil Agarwal*, LIVEMINT, accessed on (Apr. 2, 2017, 09:04 AM), available at https://www.livemint.com/Companies/zehaj3WD2BbehwV1bR85TK/Cairn-India-has-indemnity-from-Cairn-Energy-on-tax-demand-A.html.

a 10 per cent stake was 1 billion dollars at the time. Cairn Energy wanted to sell this off to finance its different corporate investments.

Consequently, Cairn Energy initiated international arbitration against the Indian government seeking to 'protect its legal position and shareholder interests' under the U.K.-India Bilateral Investment Treaty (BIT). An arbitration tribunal with 3 arbitrators was appointed, and the arbitration proceedings commenced in January 2016. It has been presented in the recent annual report of Cairn Energy that the tribunal is currently working on the award as all the prior procedures are over.[88] It has also been argued that the "administrative expense towards Indian tax arbitration rose to 22.9 million dollars (about Rs 158.4 crore) in 2018 from 8.1 million dollars (about Rs 56 crore) in 2017".[89]

## VII. India's New Model BIT and its Implications

Since India came into the fray of bilateral investment treaties[90] at a very later stage compared to the rest of the countries globally, India signed its first BIT in 1994 with England. Till now, India has signed over 83[91] BIT's with many countries out of which 74 are in force. During that time, there was no model BIT[92] which was being followed or which was adopted in our nation. However, in 2003, India adopted its first model BIT, which was said to lay the pavement for further negotiations with foreign countries. This is not the only development on a multilateral level

---

[88] Press Trust of India, *Cairn Energy's legal cost for fighting retro tax demand nearly triples*, THE ECONOMIC TIMES, April 08, 2019, available at https://economictimes.indiatimes.com/industry/energy/oil-gas/cairn-energys-legal-cost-for-fighting-retro-tax-demand-nearly-triples/articleshow/68762615.cms?from=mdr.

[89] Ibid.

[90] Bilateral Investment Treaties are at times also referred to as Bilateral Investment Promotion and Protection Agreements (BIPAs) by the finance ministry of India, available at http://finmin.nic.in/bipa/bipa_index.asp.

[91] Gourab Banerji, *GAR Investment Treaty Know-How, India*, (Adwaita Sharma, George Pothan and Sriharsha Peechara, 2015)

[92] India 2003 Model BIT, http://www.italaw.com/investment-treaties.

as India is in the midst of negotiating several Free Trade Agreements with countries such as Indonesia, Mauritius, Australia, New Zealand et cetera.[93]

India also had only marginal involvement with Investment Treaty Arbitration (ITA), which refers to the dispute resolution mechanism available under BITs.[94] During this period, India was involved in only one ITA dispute, and even this dispute did not result in an ITA award (there are, however, a few non-ITA arbitral awards).[95]

India's efforts to attract and safeguard foreign investments while protecting the public interest will be keenly watched in the midst of reforms in international investment agreements.[96] The country's model bilateral investment treaty provides the framework for new negotiations with trading partners such as the US. Furthermore, India is going to use the model treaty to renegotiate existing treaties, including with several European countries.[97]

Released in 2015, a few provisions in the model treaty have drawn attention from trade partners. A closer look at this treaty is clearly necessary as it will be instrumental in shaping the investor-state

---

[93] Ministry of Commerce and Industry, *India's Current Engagements in RTAs*, GOVERNMENT OF INDIA, accessed on (Mar. 5, 2019), available at http://commerce.nic.in/trade/international_ta_current.asp.

[94] Raju and Prabhash Ranjan, *BIT of a problem down under*, THE INDIAN EXPRESS, October 17, 2011, available at http://archive.indianexpress.com/news/bit-of-a-problemdownunder/860705/.

[95] Capital India Power Mauritius I v. Maharastra Power Dev. Corp., Case No. 12913/MS, (ICC Int'l Ct. Arb. 2005), available at https://jusmundi.com/en/document/decision/en-capital-india-power-mauritius-i-and-energy-enterprises-mauritius-company-v-maharashtra-power-development-corporation-limited-maharashtra-state-electricity-board-and-the-state-of-maharashtra-award-wednesday-27th-april-2005

[96] Patnaik, *supra* note 27.

[97] Prabhash Ranjan, Harsha Vardhana, Kevin James Ramandeep Singh, *India's Model Bilateral Investment Treaty: Is India Too Risk Averse?*, BROOKINGS INDIA, 1 (Sept. 3, 2009), available at https://www.brookings.edu/wp-content/uploads/2018/08/India%E2%80%99s-Model-Bilateral-Investment-Treaty-2018.pdf.

disputes in the future.[98] The new Model BIT of India has excluded taxation measures from the scope of the treaty, and any tax-related decision is not open to review by any arbitration tribunal, [99] to prevent the consequences that India faced in *Cairn* dispute.[100] This is again not a final BIT, and it is open to negotiations; however, such text in the model BIT gives implication to the investor to consider a Government's stance on an issue.[101] Exclusion of such taxation matters from the scope of BIT is again sure to have a negative impact on the investments in India, and the same may also be seen in the energy sector.

There have been concerns regarding India's model treaty and its seemingly protectionist approach. For instance, the Model BIT contains the enterprise-based definition of investor.[102] It is mandatory under the model BIT to exhaust remedies at the domestic court for five years before initiating investment arbitration.[103] Further, the Model BIT excludes from the purview the matters on government procurement, subsidies, compulsory licenses in the intellectual property rights and taxation.[104] However, the recent decisions, including the verdict in the *Devas* dispute, are also strengthening positions of both investors and the

[98] Government of India, *Model Text for the Indian Bilateral Investment Treaty*, GOVERNMENT OF INDIA, accessed on (January 5, 2019, 10:00 AM), available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=133411.

[99] Government of India, *Model Text for the Indian Bilateral Investment Treaty*, GOVERNMENT OF INDIA, accessed on (Mar. 4, 2017, 10:33 AM), available at https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.

[100] Sumathi Chandrashekaran and Smriti Parsheera, *Why New BIT May Not Work*, THE HINDU BUSINESS LINE, May 25, 2016, available at https://www.thehindubusinessline.com/opinion/columns/why-the-new-bit-may-not-work/article8645025.ece.

[101] Ran Chakrabarti and Trisha Raychaudhuri, *India: BITS And Pieces - India's Bilateral Investment Treaty Revisited*, MONDAQ, March 30, 2016, available at http://www.mondaq.com/india/x/477612/international+trade+investment/BITS+And+Pieces+Indias+Bilateral+Investment+Treaty+Revisited.

[102] Model BIT, art 1.4.

[103] Model BIT, art 15.

[104] Model BIT, art 2.6.

government.[105] (In the Devas dispute, the government cancelled an awarded contract, when irregularities were found. The investor's challenge of the government's decision was accepted by the tribunal.)

According to UNCTAD, which keeps an account of the number of disputes, a total of 17 known investor-state dispute settlement (ISDS) cases were filed against India by the end of 2015.[106] Out of these seven are pending, nine were settled, and India lost one case (excluding the recent Devas ruling). India was one of the top 15 most frequent respondent states in 2015 (i.e. sued most often). Currently, there are about three cases where India is the home state of claimants. Since arbitrations can be kept confidential under certain circumstances, the actual total number of disputes filed against countries could be higher than the facts suggest.

In this complex environment of domestic and international realities, how India will negotiate its investment treaties is quite essential. There is also an interest in what the new model BIT has in its bag, not just for India, but even for the Global South in pushing boundaries in investment agreements especially seeking foreign investment for the energy security.

## VIII. Conclusion

After examining India's energy demands and investments under the energy sector, it is clear that India has its unique energy security concerns. Based on the past investor-state disputes, unclear provisions under India's investment treaties, and analysis of the new model BIT of India, it is quite challenging to ascertain whether India would be able to keep up the flow of foreign investment under its energy sector.

---

[105] Prabhash Ranjan, *Comparing Investment Provisions in India's FTAs with India's Stand Alone BITs-Contributing to the Evolution of New Indian BIT Practice*, 16 THE JOURNAL OF WORLD INVESTMENT AND TRADE 899-930 (2015).
[106] Patnaik, *supra* note 27.

It is important to make the Indian BIT regime more balanced with equal rights to both the state and the foreign investors. There are specific provisions in the BIT which remain to be without any proper definition and arbitrary giving the interpretative discretion to both the investors and the investment-state dispute settlement tribunals.

Nevertheless, the author believes that a few steps in the right direction would undoubtedly help India in attracting more investors in the energy sector and ensuring the fulfilment of their energy security concerns. Some of these recommended steps involve the inclusion of ISDS clauses in the BITs; more transparent and comprehensive provisions under the investment agreements; extending the necessary protections to the foreign investors; providing favourable conditions for the foreign investment; and trying to minimise the investor-disputes.

Vol. 11 Feb 2020

# THE CHANGING STANCE OF THE INDIAN JUDICIARY TOWARDS DOMESTIC ARBITRATIONS WITH A FOREIGN SEAT

*Ananya Verma**

## Abstract

*The principle of party autonomy upon which the Arbitration and Conciliation Act, 1996 is founded, allows parties the freedom to choose their seat of arbitration. The seat of arbitration determines the supervisory jurisdiction of courts during the arbitration proceedings. While the freedom to choose the seat of arbitration is unfettered for the International commercial arbitrations, as defined under the statute, the same does not apply for two or more Indian parties. The Indian courts have restricted domestic parties from choosing a foreign seat of arbitration, as that would allegedly allow domestic parties to circumvent the substantive Indian laws and thereby, derogate from the same. Thus, as a matter of public policy, domestic parties have often been disentitled from choosing a foreign seat of arbitration. In doing so, not only the courts have conflated the law of the seat with the substantive law of the arbitration agreement but have also put an unjustifiable restriction on autonomy of the domestic parties choosing a foreign seat of arbitration. However, this position so adopted by the courts, seems to be changing as was seen in the recent Delhi High Court judgment of GMR Energy Limited v. Doosan Power Systems India. This paper discusses the contentious issue of restricting domestic parties from choosing a foreign seat of arbitration on public policy grounds, using various case laws, including the latest Delhi High court judgment. The paper contrasts the Indian legal regime with the English, on domestic parties choosing a foreign seat of arbitration, to suggest some features of the English Arbitration Act that could be borrowed by its Indian counterpart. Given the wide*

* The author is a student at Jindal Global Law School, O.P. Jindal Global University, Sonipat.

*scale cross-border investments in India, it is important to understand such restrictions and promote the principle of party autonomy, under the Indian Arbitration regime, in order to facilitate the international community invest and arbitrate in India.*

## I. INTRODUCTION:

The Arbitration and Conciliation Act, 1996 [the **"Act"**] has been subjected to various interpretations by the Indian judiciary throughout the development of the Indian Arbitration regime. These changing interpretations have been instrumental attempts in making India an arbitration friendly destination within the international arbitration landscape. These interpretations that have mostly been initiated by the judiciary's interpretive acts[1] have subsequently been incorporated into the Act vide legislative amendments.[2] Although there have been many such instances[3], this paper seeks to trace the trajectory of different interpretations resorted to by the Indian judiciary to resolve the contentious issue of prohibition on two or more Indian parties choosing a foreign seat of arbitration.

The foundational hypothesis of this paper is based on the recent change brought about by the Indian judiciary, allowing two or more Indian parties the freedom to elect to arbitrate outside of India.[4] Contrary to its earlier stand, there seems to be a change in the judiciary's approach to lifting the categorical ban that once prevented two or more Indian parties from choosing a foreign seat of arbitration.[5] The latest judgment by the Delhi High court needs to be appreciated given the time and the context in which it is delivered. The judgment clearly comes out in an atmosphere

---

[1] ONGC v. Saw Pipes, (2003) 5 S.C.C. 705.

[2] The Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Acts of Parliament, 2015 (India).

[3] *Id*.

[4] GMR Energy Limited v. Doosan Power Systems India, (2017 SCC OnLine Del 11625).

[5] TDM Infrastructures v. U E Development India Pvt. Ltd., (2008) 14 S.C.C. 271.

where the Indian economy is seeking foreign investment and the most suitable method for dispute resolution in large-scale, cross-border financial transactions is arbitration itself. This change in approach by the judiciary is a welcome development, considering the trends in dispute resolution and India's commercial environment. However, such a development is not without flaws (refer to Part IV of the paper).

The paper is divided into five parts. While Part I is utilized to explain the concept of seat of arbitration and "domestic arbitration" as understood in India, Part II discusses the earlier interpretation as was adopted by the Indian judiciary that prevented the Indian parties from choosing a foreign seat of arbitration. It also delves into the "public policy" rationale that has been largely quoted as the rationale for such a prohibition. Part III of the paper discusses the emerging interpretation that allows the Indian parties to have a foreign seat of arbitration, which seems to be informed not only by the prevalent International standards for arbitration but also several earlier rulings of the Indian judiciary. An attempt has also been made to bring forth the issues that might arise in the light of this pro-arbitration judgment. Lastly, Part IV, discusses the position of Indian Law in contrast to the position in the United Kingdom ["**UK**"]. The fourth part seeks to provide an insight into the provisions of the English Arbitration Act and its stand on the issue of domestic parties choosing to arbitrate outside of the UK. The last part also contemplates incorporating of certain concepts, provisions and schemes from the English Arbitration Act into its Indian counterpart.

## II. PART I

### A. LAWS APPLICABLE TO THE ARBITRATION AGREEMENT: IMPLICATION OF THE LAW OF THE SEAT

An arbitration clause is usually incorporated under a commercial contract, or as a stand-alone agreement after a dispute arises[6]. However, the arbitration agreement is always severable and is independent of the main contract within which it is contained.[7] An arbitration agreement involves a complex interplay of different laws that determine the procedural and substantive aspects of arbitration. Typically, an arbitration agreement will deal with – law governing the arbitration agreement (*lex arbitri*), the law governing the contract/substantive law, procedural/curial laws, rules of conflict of laws, and the law governing the enforcement of awards.[8]

While the law governing the contract determines the rights and obligations of the parties under the main agreement, *lex arbitri,* determines the conduct of arbitration and the proceedings of the arbitral tribunal, whereby matters such as arbitrability of the subject matter of the dispute, intervention by the courts, collection of evidence and grant of interim measures, are governed.[9]

The concept of the seat of arbitration is intertwined with the *lex arbitri.* The territorial link between the seat of arbitration and the governing law of arbitration is now a well settled position in the International arbitration regime.[10] The seat basically ensures supervisory jurisdiction of the municipal or domestic courts of the seat over the arbitration proceedings. Moreover, choosing a seat provides an anchor for the arbitration proceedings, whereby the parties can take recourse to the domestic courts of the seat for issues such as – interim injunctions, collection of evidence

---

[6] MICHAEL L. MOFFITT AND ANDREA K. SCHNEIDER, DISPUTE RESOLUTION-EXAMPLES AND EXPLANATIONS*,* 141, 152*,* (Wolters Kluwer 2008).
[7]NIGEL BLACKABY, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 16, 159 (6th ed, Oxford 2015).
[8] *Id.*, 157.
[9] *Id.*, 168-170.
[10] *Id.*, 172

etc.[11] The seat provides the external aspects for the conduct of arbitration along with certain internal aspects, that come under the *lex arbitri as* matters related to commencement of proceedings, appointment of arbitrators, etc.[12] While the external aspects include the procedure and rules regarding seeking interim reliefs, mechanisms of enforcement of awards, etc; the internal aspects include the manner of conduct of the arbitration proceedings, the number of arbitrators appointed, the procedure for appointing arbitrators etc.

B. "SEAT" UNDER THE ARBITRATION AND CONCILIATION ACT, 1996

Although the seat of arbitration is an essential element of arbitration, one of the many problems with the Act is, its lack of any reference to the seat of arbitration. The Act, while divided into four parts (only the first two are relevant for our purposes), makes no mention of "seat". However, there is mention of "place" of arbitration under section 2(2) and 20 of the Act, which has been interpreted as "seat" of arbitration by the judiciary .

The first reference to "Seat" that falls under section 2(2) of Part I of the Act, determines the scope of Part I of the Act and establishes that Part I applies when the "place" of arbitration is in India. When the same is read using the interpretive tool of *expressio unius est exclusio alterius* (express inclusion of one means exclusion of another), it becomes clear that section 2(2) restricts the application of Part I of the Act to arbitration seated in India and thus, impliedly excludes arbitrations seated outside India from the purview of Part I. This implied exclusion of Part I in relation to

[11] Badrinath Srinivasan, *Arbitration and the Supreme Court: A Tale Of Discordance Between The Text And Judicial Determination*, 4 NUJS L. Rev. 639 (2011) (Feb. 22, 2019, 11:43 AM) http://nujslawreview.org/2016/12/03/arbitration-and-the-supreme-court-a-tale-of-discordance-between-the-text-and-judicial-determination/.
[12] Ibid, 170.

arbitrations seated outside India, was only appreciated and applied by the Supreme Court in *Union of India* v. *Reliance.*[13]

However, way before *Reliance*, the Supreme Court in its much-criticized judgment of *Bhatia International* v. *Interbulk Trading SA*[14], read section 2(2) of the Act, to be wide enough to make Part I of the Act applicable to arbitrations seated not only within but also outside India. In this case, one of the parties being Indian filed for interim relief under section 9 of the Act, while the other party contended that applicability of Part I would be ousted as the *place* of arbitration was outside India. The court held that since section 2(2) does not make the application of Part I of the Act exclusive to domestically seated arbitrations by using words such as "only"[15], the applicability of Part I, can be extended to arbitrations seated outside of India. The rationale behind such an extra-territorial application of Part I was to ensure that the Indian parties arbitrating outside of India are not without any remedy. [16]Thus, the court ruled that Part I will apply unless and until it is either expressly or impliedly excluded. However, the court never explained what would amount to implied exclusion, until *Reliance.*

The same judgment was followed in several Supreme Court judgments, such as in *Venture Global* v. *Satyam Computers*[17] to extend the jurisdiction of the Indian Courts where it did not originally lie[18]. The trend continued until *Bharat Aluminium Company* v. *Kaiser Aluminium Technical Services Inc.*[19] wherein the Supreme Court did not only overrule the decision under *Bhatia*

---

[13] Union of India v. Reliance Industries Ltd, (2015) 10 S.C.C. 213 (hereinafter *Reliance*).

[14] Bhatia International v. Interbulk Trading SA, (2002) 4 S.C.C. 105 (hereinafter *Bhatia International*).

[15] As is under the UNCITRAL Model Law on International Commercial Arbitration, 1985.

[16] Bhatia International v. Interbulk Trading SA, (2002) 4 S.C.C. 105.

[17] Venture Global v. Satyam Computers, (2008) 4 S.C.C. 190.

[18] Ibid.

[19] Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc., (2012) 9 S.C.C. 552 (hereinafter *BALCO*).

*International*, but also rejuvenated the distinction between venue and seat which was blurred under *Bhatia International*. The Court clarified that in context of section 2(2), 20(1) and 20(2), "place" was to be interpreted to mean "seat", while in the context of section 20(3), it would mean "venue". The court more significantly restricted the applicability of Part I of the Act and said that it would *not* be applicable to foreign seated arbitrations. The court also did away with the demand under *Bhatia International* to impliedly/expressly exclude Part I, to make it inapplicable.

While *BALCO* clarified that the applicability of Part I is restricted only to arbitrations seated in India, the Supreme Court in *Reliance*[20], reinstated the same and held that parties can impliedly exclude applicability of Part I by choosing a foreign seat of arbitration, and a foreign governing law. Therefore, choosing a seat of arbitration entitles the parties to arbitrate their dispute freely under the supervisory jurisdiction of the courts of the seat so chosen.

These judgments are conclusive evidence of the central role that the seat plays under the Act, whereby the seat determines the jurisdiction of the Indian courts. Given such a significant role that the seat of arbitration plays, the categorical ban on two Indian parties seeking to arbitrate their dispute in a foreign seat (a prohibition apparently solely based on the parties' nationality) presents itself as arbitrary and contrary to the spirit of the Act. Any preference to a seat outside India, essentially entails exclusion of Part I of the Act.[21] Thus, opting for a seat outside India, excludes Indian Courts from having such exclusive jurisdiction over the arbitral proceedings and awards.

The refusal by the courts to refer foreign seated arbitrations of Indian parties to their agreed foreign seat, acts as a deterrent for the parties to choose a foreign seat of arbitration. However,

---

[20] Reliance, 2015 10 S.C.C. 213.
[21] BALCO, 2012 9 S.C.C. 552.

several considerations go into choosing a seat of arbitration such as, the prevailing law of arbitration at the seat of arbitration, the legitimate scope of intervention by national courts of the place of arbitration, arbitrability of the subject matter and enforcement of awards.[22] There are certain jurisdictions which provide for friendly arbitration laws by minimizing Court's intervention and some which encourage the interventionist approach of the Courts.[23] Therefore, parties to an arbitration agreement, often make an informed decision in choosing their seat of arbitration.

By denial of reference to the seat of arbitration in foreign seated arbitration between Indian parties[24], the Courts do not only trample upon the autonomy of the parties but also overlook the convenience of the parties. Hence, by necessarily subjecting them to Part I, they defeat the intention of the parties to exclude applicability of the same.

### C. DOMESTIC ARBITRATION AND INTERNATIONAL COMMERCIAL ARBITRATION

As the prohibition imposed on the Indian parties seeking to arbitrate outside India seems based only on nationality, it is important to understand the reasons underlying such a ban. It is noteworthy that the Act makes distinction based on the nationalities of the parties that are signatory to the arbitration agreement. While the arbitration agreement involving any "foreign element" automatically falls under section 2(1) (f) of the Act and becomes "international commercial arbitration", those

---

[22] KWATRA G K, ARBITRATION AND ALTERNATE DISPUTE RESOLUTION, 98 & 135 (2008).

[23] Duncan Speller and Dharshini Prasad, *The Choice of a Foreign Seat In Domestic Disputes – An Opportunity For One More Step Forward In India'S Journey To Establish Itself As An Arbitration Friendly Jurisdiction?,* 6 IJAL 43 (2018) (Feb. 22, 2019, 01:07 PM), http://ijal.in/sites/default/files/IJAL%20Volume%206_Issue%202_Duncan%20Speller%20&%20Dharshini%20Prasad.pdf.

[24] The Arbitration and Conciliation Act, 1996, §45.

arbitrations only involving native/domestic/Indian parties, are not defined anywhere.

Hence, domestic arbitrations are understood through inferences drawn from the definition of "International Commercial Arbitration". The Supreme Court of India in *TDM Infrastructures* v. *U E Development India Pvt. Ltd.*[25], while distinguishing between 'International Commercial Arbitration" and Domestic Arbitration held that where all the parties to an arbitration agreement are either resident or domiciled in India, such would be a "domestic arbitration".[26] The single judge's obiter notes that "*Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country".* (refer to PART III below)

The reason for such an understanding based on the nationality of the party also stems from the definition of "International Commercial Arbitration" that involves a necessary presence of a foreign element for an arbitration to be termed as "International". The importance of this "foreign element" for an arbitration to be International Commercial Arbitration has been recognised by the Indian courts in *TDM, Sasan Power Limited* v. *North American Coal Corporation India Pvt. Ltd.*[27] and recently in *GMR* v. *Doosan.*[28] Thus, the understanding of domestic arbitrations is tainted with this definition as provided under the Act.[29]

However, another interpretation of Domestic Arbitration is to read section 2(2) with 2(7) of the Act, to understand the meaning of "domestic arbitration".[30] While 2(2) defines the scope of the

---

[25] TDM Infrastructures v. U E Development India Pvt.. Ltd., (2008) 14 S.C.C. 271 (hereinafter *TDM*).
[26] *Id.*
[27] Sasan Power Limited v. North American Coal Corporation India Pvt. Ltd., (2016) 10 S.C.C. 813.
[28] GMR Energy Limited vs Doosan Power Systems India, (2017 S.C.C. OnLine Del 11625) (hereinafter *GMR).*
[29]Arbitration and conciliation Act, 1996 §2(1)(f).
[30] INDU MALHOTRA, O P MALHOTRA ON THE LAW AND PRACTICE OF ARBITRATION AND CONCILIATION (3rd ed, Thomson Routers 2014).

applicability of Part I of the Act, 2(7) defines an award made under Part I of the Act as "domestic award". By reading these two provisions conjointly one gets the understanding that domestic arbitrations would be those that are held in India and whose award is rendered in India. Thus, such an interpretation should be supported given that the Act is a seat-centric one. Thus, the application of the Act should be based on the seat so chosen rather than the nationalities of the parties, which seems to have been the approach adopted prior to *GMR*.[31]

Hence, there exists a conflict in the interpretation of "domestic arbitrations" wherein one interpretation determines it based on the nationality of the parties whereas the other identifies domestic arbitrations as those that are seated in India.

To resolve this issue, the Law Commission of India, in its 176th report, had suggested the inclusion of a definition for what constitutes Domestic Arbitration within section 2 of the Act. It was recommended that this definition include, "International commercial arbitration, where the place of arbitration is in India"[32] within itself. Thus, on acceptance of such a suggestion, the prevalent understanding of domestic arbitrations on the grounds of nationality, would have changed permanently.

It is important to settle the issue of meaning of "domestic arbitration" as although the Act is seat-centric, often the obiter from *TDM* is invoked and nationality of the parties is deployed by the Indian courts to subject foreign seated arbitrations between two/more Indian parties, to Part I of the Act. While for foreign-seated international commercial arbitrations, the Indian Courts readily make a mandatory reference of the dispute to the seat of arbitration under section 45 of the Act, however, for

---

[31] GMR, 2017 S.C.C. OnLine Del 11625.

[32] Law Commission of India, One Hundred and Seventy Sixth Report on the Arbitration and Conciliation (Amendment) Bill, 2001 (Ministry of Law and Justice).

foreign-seated "domestic arbitrations" such mandatory reference is often denied. Often the grounds for such denial is upholding the "public policy" by preventing Indian parties from derogating from Indian law. Such reasoning resonates with the obiter of *TDM.* Such "public policy" considerations often disregard the autonomy of the parties which goes against the cornerstone of the Arbitration Act. (refer PART IV below).

## III. PART II

In India, the foreign seated Domestic Arbitration i.e., arbitration involving only Indian parties with a foreign seat of arbitration, often suffer from erosion of the much-revered principle of party autonomy[33] although the same principle is encompassed within the scheme of the Act, as held by the Supreme Court of India in *SVG Molasses Co. B.V* v. *Mysore Mercantile Co. Ltd.*[34] Clearly, this bar imposed by the Indian courts upon the domestic parties despite their having an express agreement to the effect of having a foreign seat of arbitration and/or a foreign governing law, goes against such principle of party autonomy.[35] The restraint on the autonomy of the domestic parties to choose a foreign seat, is imposed on grounds of public policy whereby the Indian parties are not to undermine the Indian laws by making their arbitration proceedings subject to foreign laws.

The implication of choosing a foreign seat is not only loss of jurisdiction of the Indian Courts over the Indian parties choosing a foreign seat but the same could also entail that the governing law of the agreement might also change to that of the seat. Which is what, the courts have thus far held to be opposed to the public policy. However, the courts have failed to account for the difference between the substantive law that's applicable and the

[33] Aadhar Mercantile v. Shri Jagdamba Agro Exports (2015) S.C.C. OnLine Bom 7752; Sasan Power Limited v. North American Coal Corporation India Pvt. Ltd (2016) 10 S.C.C. 813.
[34] SVG Molasses Co. B.V vs Mysore Mercantile Co. Ltd 2007 9 (SCALE) 89.
[35] *Supra* note 33.

law of the seat. While the former is usually different than the latter, in the absence of substantive law being explicitly recognised, the presumption follows that the law of the seat is the substantive law so applicable. However, this is only a rebuttable presumption.[36] This presumption is based on the test of "closest and most intimate connection" that the law of the seat has with the substantive law as opposed to other laws that become applicable in an arbitral proceeding.[37]

## A. THE MISTAKEN USE OF OBITER TO SUBJECT PARTIES TO PART I OF THE ACT

The trend of denying such right to the Indian parties began with the controversial obiter given in the judgment of *TDM*. Although the contention in the case was concerned with the appointment of arbitrators in cases of arbitrations seated within and outside India under section 11 of the Act, nonetheless the single judge bench opined that:

"*Section 28 of the 1996 Act is imperative in character. The intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country.*"[38]

Although this obiter has often been referred by the Indian Courts[39], it is pertinent to mark that these observations were made by the court strictly to determine the court's jurisdiction under section 11 of the Act, as clearly mentioned in the judgment itself. Moreover, the applicability of section 28 of the Act to such

[36] Alastair Henderson, *Lex Arbitri, Procedural Law And The Seat Of Arbitration: Unravelling The Laws Of The Arbitration Process,* 26 SAcLJ 886-910 (Feb. 21, 2019, 12:30 PM) https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/335/Citation/JournalsOnlinePDF.

[37] Centrotrade Minerals & Metal Inc. v. Hindustan Copper Limited., (2017) 2 S.C.C. 228.

[38] TDM, (2008) 14 S.C.C. 271.

[39] *Supra* note 33.

matters, is erroneous, as the very first line of the section itself reads, "*where the place of arbitration is situate in India*"[40] [sic] i.e., it is exclusively applicable to arbitrations seated in India. Thus, the bearing of such an obiter and the section itself on domestic parties with a foreign seat of arbitration is almost nil. However, there are several examples wherein the same obiter and the section have been utilized to prevent domestic parties from having a foreign-seated arbitration.

One such example is the case of *Aadhar Mercantile* v. *Shri Jagdamba Agro Exports*[41] where the seat of arbitration was undecided, and could either be India or Singapore, but the English law was certainly the governing law of the arbitration agreement. The court took it as intention of the parties to not exclude India as the seat of arbitration, yet it failed to acknowledge the choice of governing law as another determinant of intention of the parties to exclude applicability of Part I of the Act, as ruled in *Reliance.*[42]. Therefore, in 2015, the Bombay High court, in the light of the obiter in *TDM*, held that Indian parties derogating from Indian law, would be against the public policy of India. Here, the implied exclusion of Part I of the Act, as held by the court in *Reliance,* was clearly not upheld.

### B. THE EVASIVE ATTITUDE OF THE SUPREME COURT ON THE ISSUE; AND THE RESULTANT EFFECT

Although the issue of Indian parties choosing to arbitrate outside of India has arisen at several instances, it is only at a very limited number of times that the Indian Judiciary has taken the issue head on. The reluctance of the Indian Supreme Court to decide upon this disputed issue became apparent in the case of *Sasan Power*

[40] Arbitration and Conciliation Act, 1996 § 28(1).
[41] Aadhar Mercantile v. Shri Jagdamba Agro Exports (2015) S.C.C. OnLine Bom 7752.
[42] Reliance, 2015 10 S.C.C. 213

*Limited* v. *North American Coal Corporation India Pvt. Ltd.*[43] ("**Sasan**")

A full judge-bench of the Supreme Court, in 2016, evaded the issue of arbitration between domestic parties with a foreign-seat of arbitration, by including a "foreign element" to the arbitration agreement. While originally the arbitration agreement was between the appellant and an American Company (NAC), all the rights and obligations of the NAC were assigned to its Indian subsidiary NACC (the respondent), under the assignment and assumption agreement. The appellant contended the invoking of the arbitration clause by the respondent company, NACC was against the public policy of India. The appellant relying upon the obiter dicta of *TDM,* asserted that two Indian parties cannot have a foreign seat of arbitration in derogation of the Indian laws. The Supreme Court, by making the NAC a third party to the agreement, introduced a foreign element, whereby the nature of arbitration changed from domestic to International commercial arbitration, thusly, allowing for foreign seated arbitration. To understand the lacunae in the Supreme Court judgment, it is important to appreciate the Madhya Pradesh High Court's judgment on *Sasan*[44], discussed below.

The High Court of Madhya Pradesh, exercising its original jurisdiction in the same case ruled in favour of the respondent and allowed for the foreign seated arbitration between the two Indian parties, much like the Supreme Court, but on entirely different grounds. The High Court, unlike the Supreme Court, did not brush aside the main issue, but addressed the issue with full vigour, and ruled that two Indian parties *can* have a foreign seat of arbitration, and none of the provisions in the Indian laws would bar Indian parties to choose their seat of arbitration. The

---

[43] Sasan Power Limited v. North American Coal Corporation India Pvt. Ltd (2016) 10 S.C.C. 813.

[44] *Id.*

High Court also duly noted the misapplication of the *TDM* obiter. Apart from making this significant observation, the court also remarked that the objective of the Arbitration Act itself is to minimize the Court's interference in arbitral proceedings. Therefore, the interventionist approach of the court in matters concerning arbitration between two Indian parties, seems to go against the objectives of the Act. Most importantly, the High Court referred to the first case on the issue, called the *Atlas Export Industries* v. *Kotak & Company*[45] **("Atlas")** in deciding the issue.

The Supreme Court of India in *Atlas* had held that arbitration between two Indian parties with a foreign seat of arbitration was not opposed to the public policy of India. That is, by excluding Part I of the Act, the Indian parties were not derogating from Indian law in their choosing of a foreign seat. A two-judge bench of the apex court in this case, where the parties were Indian, but with a foreign seated arbitration (in Hong Kong) decreed that,

*"The case is clearly covered by exception (1) to section 28 of the Indian Contract Act…..Merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement."*[46]

Thus, the court clarified that such is not against the public policy of India and in a reasoned judgment, upheld the principle of party autonomy which is the cornerstone of arbitration.

Curiously, the *Atlas* judgment has not been referred anywhere else for the said issue. It was only in the case of *Sasan,* that this case was brought to the court's attention. The appellant in the High Court, raised the objection that the judgement fell under the Arbitration and conciliation Act, 1940, and was thus irrelevant for deciding the case at hand. However, the respondents, convincingly chalked out numerous similarities between the 1940

[45] Atlas Export Industries v. Kotak & Company (1999) 7 S.C.C. 61.
[46] *Id.*

and 1996 Acts, and the High Court observed that the Act's predecessor was not that different to make *Atlas a* bad law. Nonetheless the Supreme Court, by introducing a "foreign element", failed to put a rest to this much disputed issue. Hence, by evading the issue, the court retained the authority to subject domestic parties to Part I of the Act, despite their having an agreed foreign seat of arbitration. In order to understand the earlier approach of the court to subject domestic parties to Part I of the Act, it is important to appreciate the much-cited rationale of "public policy".

### C. THE PUBLIC POLICY ARGUMENT

Hence, the Indian judiciary had cultivated the practice of disallowing for arbitration between Indian parties to be seated abroad, on grounds of public policy. However, it is important to note that this ground of upholding the public policy by preventing derogation of Indian laws by Indian parties, is not that strong an argument to cite.

It is noteworthy that "Public policy" finds its mention only in section 34 and 48 of the Act, which are concerned with enforcement of awards. Public policy is thus a ground to challenge the enforcement of an award (domestic or foreign) and not categorical statutory prohibition on the Indian parties from opting a foreign seat of arbitration. Interpreting choice of a foreign seat, as a derogation from the Indian laws and thus, against public policy of India, is therefore, a judicial construction that warrants change.

Further, the public policy grounds have been invoked by the courts under section 28 of the Act for disallowing Indian parties from derogation from Indian "substantive" laws by choosing a foreign seat of arbitration (see Aand B). There are two observations that must be made here to debunk the misapplication of public policy rationale. Firstly, it is important to note that in addition to falling under Part I of the Act, section 28

explicitly clarifies the scope of its application as being restricted to situations "where the *place* of arbitration is *situate* in India.[47] Secondly, it is essential to understand the conflating of the concepts of "substantive law applicable to arbitration" and the law of the seat.

By imposing the prohibition on the Indian parties from choosing a foreign seat of arbitration on grounds that such would lead to derogation from Indian laws, indicates confusion in understanding of these two distinct yet often interrelated concepts.[48] This confusion was also seen on other occasions where the substantive law was taken to mean the law of seat for the purposes of exclusion of Part I of the Act.[49]

While choosing a foreign substantive law would indeed amount to derogating from the Indian law, merely choosing a foreign seat does not lead to derogation as the substantive law applicable to the arbitration agreement would still be different. However, in the absence of any explicit mention of the applicable substantive law, the same can be inferred to the same as the law of seat (see paragraph before A).

Perhaps the omission by the parties of not specifically mentioning the same has led the courts to conflate these two separate concepts. Nonetheless, such an error on part of the courts has only needlessly fuelled the blanket prohibition on Indian parties to arbitrate outside of India, wherein such an averment that such

---

[47] Arbitration and Conciliation Act, 1996 §28(1)(a).

[48] Duncan Speller and Dharshini Prasad, *The Choice of a Foreign Seat In Domestic Disputes – An Opportunity For One More Step Forward In India'S Journey To Establish Itself As An Arbitration Friendly Jurisdiction?* 6 IJAL 43 (2018) (Feb. 22, 2019, 01:07 PM), http://ijal.in/sites/default/files/IJAL%20Volume%206_Issue%202_Duncan%20Speller%20&%20Dharshini%20Prasad.pdf.

[49] Videocon Industries Limited v. Union of India and Anr. (2011 6 SCC 161).

choices of domestic parties are against public policy, only resulted in making their arbitration agreements invalid.[50]

Moreover, it is clear as the court in *Atlas* remarked, contracting for a foreign seat of arbitration by domestic parties, would be covered under the exception to section 28 of the Contract Act. Under this exception, the parties are allowed to restrict the enforcement of the rights of their counterpart by the usual means of approaching the court, when there exists an arbitration agreement to the effect. The court in *Atlas* also held that choosing a foreign seat would not be in derogation of the Indian laws and thus, would not be against public policy. Therefore, when the law itself allows for such recourse, the imposition categorically on the domestic parties on the grounds of derogating from Indian laws, seems baseless and arbitrary.

Therefore, the practice of the Indian courts barring the Indian parties from arbitrating outside India, seemed without any foundation. The judiciary, by subjecting Indian parties to Part I of the Act, retained its authority over the Indian parties even at the cost of overriding their decision.

The curtailing of party autonomy in arbitration involving domestic parties, by the judiciary was because of the dreaded implications of the Indian parties choosing a foreign seat of arbitration, which implies loss of judicial supervision over Indian parties by the national courts of India and because of the mistaken understanding and application of the doctrinal concepts of "seat" and substantive laws applicable to arbitration.

A similar approach has been adopted by the courts in US and in China. While US has a statutory provision to the effect, china wants to retain the judicial sovereignty over its nationals and thus subjects them to their national arbitration legislation.[51] However,

---

[50] Indian Contract Act, 1872 §23.

[51] Duncan Speller and Dharshini Prasad, *The Choice of a Foreign Seat In Domestic Disputes – An Opportunity For One More Step Forward In India's*

India seems to be moving progressively towards an approach that is much more internationally accepted.

## IV. PART III

### A. THE PRO-ARBITRATION APPROACH TO THE ISSUE

Although there have been judgments such as *Atlas* that have given pro-arbitration decisions in favour of the Indian parties choosing a foreign seat of arbitration, the significance of *GMR v. Doosan*[52] is particularly important to recognise and appreciate. This is because while the judgment in *Atlas* is a Supreme court judgment, it is based on the Arbitration and Conciliation Act of 1940, whereas the GMR judgment albeit only a Delhi High court judgment is nonetheless, the latest law on the subject.

In this case, four different parties were involved. While Doosan Power Systems India Private Limited (Doosan) had signed various memorandums of understanding (MoUs) with GMR Energy Limited, it had signed corporate guarantee agreements with GMR Infrastructure Limited and GMR Chhattisgarh Energy Limited. Moreover, Doosan had entered into various EPC agreements with GMR Chhattisgarh Energy Limited.

The MoUs and the corporate guarantee contained the arbitration clause that said that the arbitration proceedings were to be conducted as per the SIAC (Singapore International Arbitration centre) rules and the place for arbitration was to be Singapore. Doosan, invoking these arbitration agreements sent notice of arbitration to the three companies of the GMR group. SIAC

*Journey To Establish Itself As An Arbitration Friendly Jurisdiction?* 6 IJAL 43 (2018) (Feb. 22, 2019, 01:07 PM), http://ijal.in/sites/default/files/IJAL%20Volume%206_Issue%202_Duncan%20Speller%20&%20Dharshini%20Prasad.pdf.

[52] GMR, (2017 SCC OnLine Del 11625).

under its institutional arbitration rules proceeded to appoint the arbitrator to resolve the dispute among the parties.

However, GMR Energy Limited instituted the present suit seeking anti-arbitration injunction against Doosan, alleging that (i) Doosan cannot proceed with the arbitration with Singapore as the seat of arbitration as all the parties to arbitration were Indian, therefore, Part I of the Act would be applicable and (ii) GMR Energy limited is not a party to any agreement that contains such an arbitration clause and thus cannot be subjected to the same.

Although the greater part of the judgment covers the second issue of alter ego and whether a non-signatory can be made party to the arbitration agreement, the Court clarified that Doosan and GMR, despite their Indian nationalities, could arbitrate in Singapore, which was the chosen seat of arbitration. While the issue of alter ego has already been taken care of[53], this judgment marks another progressive step of allowing Indian parties to choose a foreign seat of arbitration.

The Court in giving this judgment, remarked the centrality of section 11 of the Act in *TDM* and observed that the distinction between International Commercial Arbitration and arbitration between two parties of Indian nationality, in that case was specifically for the purposes of section 11 of the Act. Therefore, the court ruled that the same cannot be utilized for other purposes, such as for determining whether the Indian parties can choose a foreign seat of Arbitration.

More significantly, the court while deciding this issue relied on *Atlas*[54] and *Sasan*[55] to conclude that two Indian parties can choose to arbitrate outside of India. The court reaffirmed that the same would not be in contravention of the public policy as it would not

---

[53]Chloro Controls India (P) Ltd. v. SevernTrent Water Purification Inc., (2013) 1 S.C.C. 641.

[54] *Supra* note 45.

[55] *Supra* note 43.

be in derogation of the Indian laws. The court reemphasizing the exclusion of Part I by implication when a foreign seat of arbitration is chosen said that any subsequent award in relation to the same would fall under Part II of the Act for its enforcement.

### B. IMPLICATIONS OF GMR AND THE WAY AHEAD

Although this judgment is in conformity with the international standards, wherein all successful arbitration regimes allow their domestic parties to arbitrate in a foreign seat of arbitration, it can lead to potential loss of domestic arbitrations within India, as now the Indian parties have the mandate to choose a foreign seat of arbitration.

The judgment might prove to be more detrimental for India than beneficial as one of the factors for seeing the pro-arbitration attitude of a country could also be the confidence of its populace in its arbitration regime. Although this is a progressive change according to the international standards, the increased reference to arbitration with a foreign seat of arbitration by the Indian parties could lead to the inference of disillusionment of the domestic parties in their own arbitration regime. Thus, the implication of this decision could also create a pitfall in the success story of Indian arbitration regime.

Further, this is only a High Court judgment, backed by an old apex court case law. The possibility that *GMR* might meet the same fate as that of *Atlas,* wherein it would not be a bad law, but nonetheless left unutilized, is something that cannot and should not be discarded. Therefore, the urgent need of the hour is to have an authoritative decision by the apex court on the matter that would settle this contentious issue once and for all. Until then, the fate of *GMR* can only be decided when another case of this sort arises.

## V. PART IV

## A. THE ARBITRATION ACT (OF ENGLAND), 1996:

It is essential to have a comparison of India with a foreign jurisdiction in order to borrow some features from such a regime to ours and to put the reasoning of the Indian judiciary behind such a prohibition on Indian parties arbitrating outside India in perspective.

The law governing arbitration in the UK is the English Arbitration Act, 1996 ("**English Act**") whose scheme, language, logical organisation and clarity makes the cardinal principles of "party autonomy" and "judicial non-intervention" easily realisable.[56]

It is noteworthy that the English Arbitration Act, under its Part I, provides for a definition of the seat of arbitration which is defined as "the juridical seat of the arbitration" under section 3 of the Act. One of the instances where the English Act explicitly upholds the party autonomy is under this section wherein the parties are granted full discretion to determine their seat of arbitration.[57] Although the concept of the seat is pivotal to English arbitration law, the adoption of delocalized arbitrations, whereby the parties would not be bound by the procedural laws of the law of the seat, seems to be gaining strong foothold in the English arbitration regime.[58]

The prevalent position of confusion among these doctrinal concepts persist in the Indian courts because of the ambiguity and absence of any guidance in relation to meaning or implications of choosing a "*seat*". Perhaps the Indian position on barring the

---

[56] ENID A MARSHALL, GILL: THE LAW OF ARBITRATION, 3 (4th ed, Sweet and Maxwell 2001).

[57] lakunle Olatawura, *Delocalized Arbitration Under The English Arbitration Act 1996: An Evolution Or A Revolution?* 30 Syracuse J. Int'l L. & Com, 49 (2003) (Apr. 10, 2019, 09:30 PM) https://heinonline.org/HOL/Page?handle=hein.journals/sjilc30&div=8&g_sent=1&casa_token=&collection=journals.

[58] *Id.*

Indian parties from choosing a foreign seat of arbitration would not have been so, had the legislation clearly laid down these basic tenets of arbitration whereby the misplaced application of case laws and provisions would have easily been avoided. It is the cogent structure, brevity of language and clarity of policy underpinnings within the English Act[59], that the Indian legislature needs to borrow and implement in the Indian arbitration regime. Doing so, would not only lead to removal of inconsistent case laws based on various contradictory interpretations but it could also attract many to choose India as a seat for their arbitral proceedings, instilling faith in the Indian arbitration regime

Under Part II, the English Act, defines "domestic arbitration agreements" as those where none of the parties are a foreign entity *and* under which the seat of arbitration is in the UK.[60] The understanding of international arbitration is thus based on the inference that in any arbitration, if either of these two requirements are lacking, the arbitration would be an International arbitration. Although this seems like the approach of understanding international and domestic arbitrations under the Indian counterpart and does create a distinction between domestic and international arbitration, the difference of course comes in the phraseology of the definition of domestic arbitration[61].

Clearly, the definition is two-fold whereby not only the requirement for an arbitration to a domestic one is limited to the parties' nationality but the same extends to the seat being within the UK, which is absent from the Indian legislation and common law understanding of domestic arbitration. This observation is

[59] Thomas E. Carbonneau, *A Comment On United Kingdom Arbitration Act* , 22 Tulane Maritime Law Journal 131 (1997) (Apr. 10, 2019, 10:30 PM) https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1307&context=fac_works.

[60] The Arbitration and Conciliation Act (of England), 1996 §85.

[61] The Arbitration and Conciliation Act (of England) 1996 § 85(2),§85(3).

only ironic because the Indian legislation (Act) happens to be seat-centric.

Although the English Act seems to be granting same level of autonomy to parties involved in international and domestic arbitration, it is important to note that section 85 to 87, that deal with domestic arbitration agreements were never enforced and are still ineffective.[62] This is to maintain parity between international and domestic arbitrations. For instance, in domestic matters the courts in England had the discretion to grant stay of court proceedings if any party sought to evade their arbitral obligations or in international arbitration cases, some subject matters under the Consumer Arbitration Act, could not be arbitrated by domestic arbitrations and could only be settled by international arbitrations.[63] Thus, to strike a balance between the two forms, the explicit difference as provided for between these two kinds of arbitrations, under the earlier legislations, was abolished.

In the case of *Phillip Alexander Securities and Future's limited* v. *Bamberger*[64]*,* where the dispute arose under the Consumer Arbitration Agreements Act, 1988, the Court of Appeal found that the distinction between the domestic arbitrations and international ones was inconsistent with the purpose of the EC treaty obligation of the UK wherein all member states were to be treated equally. It was the claim of the German party to the arbitration agreement (counterpart being English) that had this

[62] ENID A MARSHALL, GILL: THE LAW OF ARBITRATION, 2 (4th ed, Sweet and Maxwell 2001).
[63] Jonathan Hill, *Some Private International Law Aspects Of The Arbitration Act 1996,* 46 International and Comparative Law Quarterly 274 (1997) (Mar 21, 2019, 11:09 AM) https://www.cambridge.org/core/services/aop-cambridge-core/content/view/9DE5BDF78B7833115252BA0FA85184E7/S0020589300060449a.pdf/some_private_international_law_aspects_of_the_arbitration_act_1996.pdf.
[64] Phillip Alexander Securities and Future's limited v. Bamberger [1996] CLC 1757.

been a domestic arbitration, the agreement would have been rendered unenforceable and this was their justification for approaching the court rather than resorting to arbitration in the face of a dispute.[65] Thus, had the distinction continued, there would have been serious undermining of English arbitration whereby every domestic arbitration in relation to the Consumer Arbitration Agreements Act, 1988, would have always preferred court proceedings or arbitration even when there existed an arbitration agreement, depending on their whims.

Therefore, the provisions that differentiate between the domestic and international arbitrations were never enforced. Thus, the general provisions automatically became applicable to domestic and international arbitrations alike.

The lesson for India here is the importance given to party autonomy which has resulted in abolishing the distinction between international and domestic arbitrations. The Indian position of prohibiting the Indian parties from choosing a foreign seat of arbitration, as elaborated above (see Part II and III) stems from wanting to subject domestic parties to the supervisory jurisdiction of the national/municipal courts, which as the English example shows is rather an unjustified imposition on the parties. It is logically and philosophically inconsistent with the fundamental principle of party autonomy, which should be upheld by Indian arbitration regime at all costs, if India wants to be recognised as a pro-arbitration regime in International arbitration.

Hence, there exists no difference between the domestic and international arbitration in the law of arbitration of England.

In relation to the central role of party autonomy under the English Act, it is essential to point out that this primary principle that has been so carefully preserved and practiced in English

---

[65] *Id.*

arbitration regime is not absolutely unfettered. Although the English Act does not interfere with the exercise of the rights of the parties to determine the applicable laws to their arbitral proceedings, yet it retains the power of intervention when there is a matter of general public importance, wherein it is pertinent that the court should determine such a question despite the parties having agreed to settle the same through arbitration.[66] Such matters usually come to light at the enforcement stage and can lead to invalidating an arbitral award if such award is found to be against the "public policy". Although such ground of public policy is also available under the Indian law whilst challenging the arbitrability of an award, the distinction comes in the scope and application of this ground.

The public policy ground in England is often invoked when the enforcement of an award is challenged[67], whereby if there's a "serious irregularity" i.e., substantial injustice that might result as a consequence of enforcing the said award, the courts would set that award aside, send the award back to the tribunal for reconsideration or declare the arbitration award to be not binding.[68]

It is to be noted that the public policy grounds of refusal to enforce an award are merely exceptions that require proof that if recognition and enforcement is made it would be contrary to the interest of public at large.[69]

In the case of *Soleimany* v. *Soleimany*[70], the Court of Appeal refused to enforce the foreign award on grounds that it was made based

[66] *Id.*
[67] The Arbitration Act 1996 (of England), §68.
[68] Veena Anusornsena, *Arbitrability And Public Policy In Regard To The Recognition And Enforcement Of Arbitral Award In International Arbitration: The United States, Europe, Africa, Middle East And Asia,* Theses and Dissertation (Golden Gate University School of Law 2012).
[69] *Id.*
[70] Soleimany v. Soleimany (1998) 3 WLR 811 (C.A.).

on a contract that was illegal in England. Under this agreement the parties were the son and father who were both British (domestic parties). Broadly, the trade they were engaged in involved smuggling and later the arbitration proceedings arose in such a context. The English court ruled that the award was unenforceable on grounds of illegality and was thus contrary to public policy.

This case is peculiar and important for this discussion as while the court only ruled upon the invalidity of the award because of non-arbitrability of the subject matter, there is uncertainty as to how the courts would have reacted if they had considered the issue that the arbitration was between two domestic parties with a foreign seat and award.[71]

Thus, the scope of invoking the public policy grounds is narrow and restricted to situations that strictly lead to harming the public interest.[72] In contrast to this, the understanding of public policy in India, is a rather expansive concept that the judiciary has only widened[73] through its various interpretations and usage of the phrase.

Perhaps reading the prohibition into the public policy ground is prima facie justiciable given the broad interpretation afforded to the same. However, it is the logical, legal and doctrinal justification that is clearly lacking when Indian parties are barred from choosing a foreign seat of arbitration based on their convenience, merely on the grounds that the supervisory role of the Indian judiciary should not be disturbed.

## VI. CONCLUSION

---

[71] JULIAN D AND OTHERS, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, 724-725. (Kluwer law International 2003).

[72] Sulbha Rai, *How Do or Should Arbitrators Deal with Domestic Public Policy or Regulatory Issues. Does It Affect Arbitrability?* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1433799.

[73] ONGC v. Saw Pipes, (2003) 5 SCC 705.

The principle of autonomy is of paramount importance in arbitration. Not only is this only an internationally acclaimed principle but the Arbitration and conciliation Act, 1996, also works on the principle of autonomy of the parties as is specified under its objectives. Therefore, the imposition on the Indian parties to not choose a foreign seat of arbitration, seems only contrary to this foundational aspect of arbitration. This is especially problematic when there exist no real grounds for such an imposition. Moreover, the fact that other jurisdictions such as the UK provide lesser interventionist approach towards arbitration, only make them more attractive destinations for arbitration rather than India. Thus, the Indian arbitration regime should allow the parties to choose their seat for arbitration, regardless of their nationality and implications of the same on the authority of the municipal courts.

Vol. 11 Feb 2020

# A TAKE ON THE GROWING CHALLENGE OF REPEAT APPOINTMENTS OF ARBITRATORS

*Apoorba Biswas* & Rishabh Mishra**

## Abstract

*In recent times, the face of adjudication in commercial disputes has changed with the introduction of alternative modes of dispute resolution. Arbitration has become favorable to businesses owing to its timely disposal of matters and various other benefits. An arbitrator is held in the same pedestal with a judge. Therefore, this paper attempts to ignite a serious discussion on conflict of interest issues that usually arise in an arbitration proceeding. Undoubtedly, the appointment of arbitrator plays a pivotal role in order to safeguard the integrity of the proceedings. The paper focuses majorly upon the practice of repeat appointments of the arbitrator. The paper analyses the provisions of domestic as well as the international standards which sets forth parameters to objectively identify the bias or prejudice, which an arbitrator may carry with him in specific matters. With this premise, the significant issue raised in the paper is the effectiveness of these legal remedies. Have they become merely a matter of procedural formality or are followed in true letter and spirit? In this regard, the author has analysed a recent judgment of the Bombay High Court to draw a comparison from other jurisdictions. The paper also discusses the feasibility of disclosures done by the arbitrators in the current Indian practices. It is clearly outlined that the disclosure norms are on the verge of becoming mere redundant formalities, if serious steps are not taken. The duty of the arbitrator to stand above prejudice cannot be emphasized enough to maintain the sanctity of an arbitration proceeding. In this paper, procedural as well as substantive changes in the current Indian legal framework is*

* The author is a legal associate at Lakshmikumaran & Sridharan Attorneys.

* The author is a legal practitioner.

***recommended with a special emphasis supplied to observe adherence to the international standards.***

## I. INTRODUCTION

The Cour de Cassation, France, in a judgement long back in 1972, *Consorty Ury* v. *S. A. Das Galeries Lafayette*[1], complacently stated,

"*an independent mind is indispensable in the exercise of the judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator*"

Quoting this premise in the judgement of *Voestalpine Schienen GmbH* v. *DMRC Limited*[2] *("**Voestalpine Schienen**"),* the Hon'ble Supreme Court of India, observed that "*20. The independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings and the rule against bias is one of the fundamental principles of natural justice which applies to all judicial and quasi-judicial proceedings……Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties…*"

It may be noted that the terms "independence" and "impartiality" though used inter-changeably, are not synonyms. The Court in Voestalpine Schienen case went on to discuss the distinction between independence and impartiality. It says that "*22. Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partially will more likely surface during the arbitration proceedings.*"

[1] 13-4-1972, JCP, Pt. II, No. 17189 (1972).
[2] (2017) 4 SCC 665.

However, a paradigm shift from hallmarking the significance of independence and impartiality of arbitrators can be seen in recent years, where recently in the case of HRD Corporation v. GAIL India Limited[3] *("**HRD Corporation**")*, the Hon'ble Supreme Court, ironically, dismissed an appeal which challenged the appointment of an arbitrator. The Apex Court observed that merely because the arbitrator gave a legal opinion in one instance to one of the parties, in a different subject matter , will not make him ineligible from appointment under the Arbitration and Conciliation Act, 1996 ("**Arbitration Act/the Act**") as amended by the Arbitration and Conciliation (Amendment) Act, 2015 ("**Amendment Act**").

The court also noted the difference between the Fifth and Seventh Schedules to the Act which, were freshly introduced under the Amendment Act, which was substantially influenced by International Bar Association Guidelines on Conflicts of Interest in International Arbitration, 2014 ("**IBA Guidelines**").[4] The apex court observed that vide the Amendment Act, a *dichotomy* is made between the persons who become "ineligible" under Seventh Schedule of the Arbitration Act, to be appointed as arbitrators and on the other hand, persons about whom justifiable doubts exist as to their independence or impartiality under the grounds stated in the Fifth Schedule of the Act. More significant distinction between the two Schedules lies in the fact that in case of ineligibility under Seventh Schedule, an application can be filed under Section 14(2) of the Act to the courts to decide on the termination of arbitrators' mandate and as opposed to this, when the grounds stated in the Fifth Schedule is disclosed, such doubts of impartiality have to be determined by the Arbitral Tribunal under Section 13 of the Act. Indeed, *HRD Corporation* confirms that it is not a cake walk to prove a judge's lack of impartiality and

[3] (2018) 12 SCC 471.
[4] *See* ¶23 *supra* note 2; ¶ 14 *supra* note 3.

independence. However, it declared the fact that India stands ready and open to adapting international standards in arbitration proceedings, whether domestic or otherwise.

Bias is the conspicuous ultimate caprice that humans by nature possess. Eventually, this bias creeps into our decision-making and conduct. It is critical to the integrity of any adjudication mechanism that the adjudicator is both impartial and seen to be impartial. No relaxation can be afforded in an arbitration process as well. Arbitrators must stand above such propensity in order to preserve the parties' faith in them. Owing to its necessity and significance in an adjudication mechanism, there are certain legal requirements prescribed in national statutes across the globe to make the system of adjudication more transparent and believable for the general public. Further, the UNCITRAL Model Law on International Commercial Arbitration ["**UNCITRAL Arbitration Model Law**"] has determined impartiality and independence as fundamental criterion to challenge the appointment of an arbitrator.[5] For any arbitration process, the impartiality and independence is a cardinal necessity recognized in almost all jurisdictions. That said, can an arbitrator truly be independent and impartial when she has been re-appointed by one of the parties?

Some critics have argued that arbitrators usually favor their appointing party in a self-interest effort to increase the likelihood of future appointments.[6] This matter needs more attention and sensitivity around international as well as domestic arbitrations. Highest ethical standards must be attached to the conduct of arbitrators from the stage of appointment to the passing of an arbitral award. The failure to fully understand and address the

[5] *See*, Article 12, Grounds for challenge, Chapter III- Composition of Arbitral Tribunal, UNCITRAL Model Law on International Commercial Arbitration, UN document A/40/17, annex I).

[6] Catherine Rogers, *The Politics of International Investment Arbitration,* 12 Santa Clara J. Int'l L 223, 226 (2014).

issue of repeat appointments may be owing to various reasons. There may be less research and discussion about the same, or because the practice has become so widespread that it is latently going unnoticed without anyone paying heed towards it. The mandate of making disclosures may be faulty and have merely become a routine process. Another factor may simply be that the appointments are going unreported/falsely reported, hence circumventing the law.

It is also worth noting here that the theory of party autonomy has acquired much acceptance vide the UNCITRAL Arbitration Model Law and even the Indian Arbitration Act has inherently granted flexibility of party autonomy. The Indian judiciary has also time and again reiterated the validity of this theory as discussed in the *Bharat Aluminium Co. (BALCO)* v. *Kaiser Aluminimum Technical Service Inc.,*[7] wherein the parties were free to decide the neutral place of arbitration and the courts at such places would have supervisory jurisdiction over the arbitration. More recently, the apex court in the case of *BGS SGS SOMA JV* v. *NHPC*[8] has put much emphasis on the intention of the parties when designating the venue of arbitration, which shall mean to depict the "seat" of arbitration, unless expressed contrary. Therefore, the component of party autonomy is omnipresent in every aspect of arbitration but where should a line be drawn to maintain the sanctity of the arbitration proceedings. It attracts importance and discussion, when the theory of part autonomy questions the fundamental premise of conducting impartial and independent arbitration when parties take unto their peril to appoint as arbitrator, whosoever they wish. Can the law be permitted to be made too permissive so as to allow the parties to evade the fundamental principles and make appointments at their whims and fancies.

[7] (2012) 9 SCC 552.
[8] Civil Appeal 9307/9308/9309 of 2019.

## II. What is Repeat Appointment?

In loose terms, repeat appointment may simply mean appointment of one arbitrator in multiple arbitration processes. But if we dig deeper into the possible definition of repeat appointments for our purpose here, it can be divided into two categories. First, the appointment of an arbitrator repeatedly by the same party or counsel in multiple matters irrespective of the subject matter. And second, the appointment of an arbitrator for a subject matter on which she has previously given a legal opinion on or adjudicated either with the involvement of the same parties or other parties. For the second classification, a subdivision is where the arbitrator has previously given an award/opinion to the same appointing party or another party.

There may be more possible categories of repeat appointments coming into knowledge when an in-depth research is undertaken by analyzing and witnessing practical instances.

## III. IBA Guidelines on Repeat Appointments:

IBA Guidelines[9] was adopted by the resolution of IBA Council on 23rd October 2014. The IBA Guidelines have gained wide acceptance within the international arbitration community. As per the Report on the reception of the IBA Arbitration Soft Law Products[10], arbitrators commonly use the IBA Guidelines when making decisions about prospective appointments and disclosures. Likewise, parties and their counsel frequently consider the Guidelines in assessing the impartiality and independence of arbitrators. Arbitral institutions and courts also often consult the IBA Guidelines in considering challenges to

---

[9] See IBA Guidelines on Conflict of interest in International Arbitration 2014, ISBN: 978-0-948711-36-7.

[10] Report on the reception of the IBA arbitration soft law products dated September 2016, IBA Arbitration Guidelines and Rules Subcommittee, International Bar Association.

arbitrators.[11] That said, in the absence of a specific reference, the IBA Guidelines are not binding in the course of appointing or challenging arbitrators. The IBA Guidelines do not bind the court, but they can be of assistance and it is valuable and appropriate to examine them least as a check.[12] It supplies a guiding hand to the stakeholders involved in the arbitration and though not authoritative, is taken seriously in the arbitration arena. In India, the 246th Law Commission Report[13] ["**Commission**"] proposed incorporation of the Fifth Schedule which draws its color from the IBA Guidelines to determine circumstances raising justifiable doubts about the impartiality or independence of the arbitrator.

The Supreme Court of Colombia in the case of *Tampico Beverages Inc.* v. *Productos Naturales de la Sabana S. A. Alqueria*[14] turned an eye towards the IBA Guidelines when it was served with the question wherein the arbitrator failed to disclose that he/she had served as counsel in a case where the current counsel engaged by the party was the arbitrator. The Colombian Supreme Court acknowledged that this instance does violate the domestic law of Colombia but as per international public policy represented by the IBA Guidelines, such non-disclosure does not demonstrate lack of independence or impartiality on the part of the arbitrator.

The IBA Guidelines have categorized 3 lists[15] viz., Orange, Green and Red List which is further classified as waivable Red List and

---

[11] Margaret Moses, The Role of the IBA Guidelines on Conflicts of Interest in Arbitrator Challenges, Kluwer Arbitration Blog, (Oct. 7, 2019, 4:05 PM), available at http://arbitrationblog.kluwerarbitration.com/2017/11/23/role-iba-guidelines-conflicts-interest-arbitrator-challenges/.

[12] W Ltd. v. M SDN BHD, (2016) EWHC 422 (Comm).

[13] D.O. No.6(3)238/2012-LC(LS) dated 5th August 2014, Law Commission of India, Report No. 246, Amendments to the Arbitration and Conciliation Act, 1996, Government of India.

[14] SC9909-2017: Case No – 11001-02-03-000-2014-01927-00.

[15] *See* also Part II: Practical Application of the General Standards Red List, Orange List and Green List of the IBA Guidelines on Conflict of interest in International Arbitration 2014, ISBN: 978-0-948711-36-7.

non-waivable Red List [collectively referred to as "**the Lists"**] to address situations that may create justifiable doubts or conflict in respect of a prospective arbitrator. The Lists are designed and given color as per their seriousness and disclosure requirements. The Lists are meant to be non-exhaustive; mainly because one cannot devise an objective and straight-jacketed formula to cover all possible situations where an arbitrator may be conflicted.

The Red List consists of waivable and non-waivable components. The non-waivable Red List details specific situations which may give rise to justifiable doubts as to the arbitrator's impartiality and independence. The non-waivable Red List is influenced by the common law principle of *Nemo judex in causa sua* and is based on the close relationship or association of the arbitrator with the parties and institutions involved, the counsel of the subject matter of the arbitration proceedings. If circumstances envisaged under the non-waivable Red List exist, any waiver by a party or any agreement to have such a person serve as an arbitrator, shall be regarded as invalid.[16] The test put forth is an objective one from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances.[17] The waivable Red List, as the name suggests, can be waived by the parties by expressly stating their willingness to appoint that person despite the existence of a conflict. This list covers situations that are serious but not that severe. Hence, the parties are given choice to make the best decision for their matter. Here, the party autonomy and the desire to have only impartial and independent arbitrators must be balanced. Persons with a serious conflict of interest as identified in the waivable Red List may serve as arbitrators only if

[16] Part – I: General Standards Regarding Impartiality, Independence and Disclosure, IBA Guidelines, ¶ 4(b).

[17] Explanation (b) to General Standard (2) Conflicts of interest, Part – I: General Standards Regarding Impartiality, Independence and Disclosure, IBA Guidelines.

the parties make fully informed and explicit waivers.[18] The Green List on the other hand, lists down situations where no conflict of interest will exist from an objective point of view, hence there are no disclosure requirements to be met by the arbitrator.

The List for authors' purpose of discussion in this paper is the Orange List. The Orange list specifies situations which may give rise to justifiable doubts about the impartiality or independence of the arbitrator and as a consequence, the arbitrator is obliged to disclose such situations. Clause 3.1.3 reads as follows:

*"The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties."*

An exception is where it may be a practice or custom to appoint arbitrators from a specialized pool of arbitrators like in matters of maritime, sports or commodities arbitration, no disclosure of the fact that the arbitrator in the past 3 years has been appointed as arbitrator on two or more such occasions by one of parties, is needed.[19] The reason for such exception may be because some areas of law are so intricate and technical that not every person will be able to come to an informed decision and hence an experienced person in that regard will be best suited. This exception is significant, but a check must be kept for minimizing abuse. Will any or all matters may be considered technical even if they are remotely technical? Will matters of cheque bouncing or debt recovery also be deemed to require a specialized pool of arbitrators? Where does this end? We shall see an answer for it in the discussion below.

## IV. Position in India

[18] Explanation (c) to General Standard (4) Waiver by the Parties, Part – I: General Standards Regarding Impartiality, Independence and Disclosure, IBA Guidelines.

[19] *See* ¶ 3.1.3, IBA Guidelines on Conflict of interest in International Arbitration 2014, ISBN: 978-0-948711-36-7.

The Arbitration Act, as amended in 2016, has substantially incorporated the recommendations made by the Commission. The Commission recommended that arbitrators be required to make prior disclosures of all possible conflicts which may prejudice the underlying arbitration. The Commission also recommend that the Fifth Schedule will serve as a "guide" to determine the existence of any justifiable doubts about the independence and impartiality of the proposed arbitrator Further, in regard to the Seventh Schedule, the proposed arbitrator shall become "ineligible" and *de jure* be deemed to be unable to perform he functions of an arbitrator. The Commission's recommendation of the Fifth and Seventh Schedules are almost entirely inspired from the IBA Guidelines.[20]Most of the recommendations given by the Commission were welcomed and put into force by way of the Amendments.

On specific issues of repeat appointment of arbitrators in various forms and manner, be it on the subject-matter or parties involved, Indian courts have given various judicial pronouncements which are discussed below. Prior to the 2015 Amendments, in *BSNL* v. *Motorola India Private Limited*[21]*,* the Apex Court observed that the officer of the Appellants (CGM, Kerela circle) had already taken a decision that the appellants were right in imposing the liquidated damages upon the respondent (the very issue in dispute). Therefore, such officers, cannot become an arbitrator in the present case as it would not satisfy the test of impartiality and independence as required under Section 12.

In one instance[22], where one of the parties went on to appoint the arbitrator as consultant in his organization, the Supreme Court

---

[20] *See* ¶ 59 and Note to the Amendment of Section 12, Chapter – III D.O. No.6(3)238/2012-LC(LS) dated 5th August 2014, Law Commission of India, Report No. 246, Amendments to the Arbitration and Conciliation Act, 1996, Government of India.
[21] (2009) 2 SCC 337.
[22] V. K. Dewan & Co. v. Delhi Jal Board (2010) 15 SCC 717.

held that the appellant had reasonable grounds for entertaining a feeling that the arbitrator might be biased against it whether true or not in fact.

Pursuant to the Amendments, Section 12 of the Act makes it mandatory for every proposed arbitrator to make disclosures in accordance with the Sixth Schedule the existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts about his independence or impartiality. Disclosure does not imply the existence of a conflict of interest; nor should it by itself result either in a disqualification of the arbitrator, or in a presumption regarding disqualification.[23] The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively – that is, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances – there are justifiable doubts as to the arbitrator's impartiality or independence. If the conclusion is that there are no justifiable doubts, the arbitrator can act.[24]

### A. DISCLOSURE REQUIREMENT

The disclosure requirement as per Sixth Schedule of the Act requires the arbitrator to disclose the following details:

*(a) Name*

*(b) Contact details*

*(c) Prior experience (including experience with arbitrations)*

*(d) Number of ongoing arbitrations*

*(e) Circumstances disclosing any past or present relationship with or interest in any of the parties or in relation to the subject-matter in*

[23] Sociedad General de Aguas de Barcelona S. A. v. Argentina, ICISID Case No. ARB/03/17.

[24] Part II: Practical Application of the General Standards; Para 4, IBA Guidelines on Conflict of interest in International Arbitration 2014, ISBN: 978-0-948711-36-7.

*dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to your independence or impartiality (list out)*

(*f*) *Circumstances which are likely to affect your ability to devote sufficient time to the arbitration and in particular your ability to finish the entire arbitration within twelve months (list out)*

Under Section 12(1) of the Act, the appointed arbitrator must disclose, in writing, to the parties, the particulars and details of the existence of any relation/interest in any party or in relation to the subject matter in dispute, which are likely to give rise to justifiable doubts as to his independence or impartiality and is likely to affect his ability to devote sufficient time and complete the arbitration within the prescribed time.[25]

Section 12(2) imposes a continuous obligation of disclosure on the arbitrator as and when circumstances demand. Section 12(3) enumerates the conditions upon which an arbitrator may be challenged.[26] Section 12(4) states that a party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made. Lastly, Section 12(5) provides for 'ineligibility' in appointment when a proposed arbitrator shares a relationship, with the parties or counsel or the subject matter of the dispute, falling within the Seventh Schedule. But the proviso to Section 12(5) states that the parties may, subsequent to the disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing.

---

[25] Arbitration and Conciliation Act, 1996, Section 12(1)(b) specifies "12 (Twelve) months".

[26] Arbitration and Conciliation Act, 1996, Section 12(3) An arbitrator may be challenged only if—

(*a*) circumstances exist that give rise to justifiable doubts as to his independence or impartiality; or

(*b*) he does not possess the qualifications agreed to by the parties

The apex court in the HRD Corporation case, has observed that "*11. Under Section 12, it is clear that when a person is approached in connection with his possible appointment as an arbitrator, he has to make a disclosure in writing, in which he must state the existence of any direct or indirect present or past relationship or interest in any of the parties or in relation to the subject-matter in dispute, which is likely to give justifiable doubts as to disclose whether he can devote sufficient time to the arbitration, in particular be able to complete the entire arbitration within a period of 12 months. Such disclosure is to be made in a form specified in the Fifth Schedule being a guide in determining whether such circumstances exist…*"

The Fifth Schedule enumerates certain relationships, the existence of which may give rise to justifiable doubts as to the independence and impartiality of an arbitrator. The scope and difference between the Fifth and Seventh Schedules were precisely demarcated by the Supreme Court in *HRD Corporation*.[27] The apex court observed that vide Section 12(5) read with the Seventh Schedule of the Act, if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. The proposed arbitrator become ineligible to proceed further therefore an application may be filed under Section 14(2) to the Court to decide on the termination of the arbitrator's mandate. On the other hand, if the challenge to the appointment of an arbitrator is based on the ground(s) specified under Fifth Schedule of the Act, such doubts as to the independence or impartiality have to be determined as a matter of fact in the facts if the particular challenge by the Arbitral Tribunal under Section 13 of the Act. If the arbitral tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator, the arbitral tribunal shall continue with the proceedings and make an award. It is only after the award is made that the party may make an application to set aside the award under Section 34 of the Act.

[27] (2018) 12 SCC 471.

The issue of repeat appointments of the arbitrators has also been dealt with in the Fifth Schedule. The Fifth Schedule lists 34 grounds which may raise justifiable doubts about the independence and impartiality of the arbitrator. In particular, Entry 22 covers an "*arbitrator [who] has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.*".

### B. RECENT JUDGMENTS AFTER *HRD CORPORATION*

In *Sawarmal Gadodia* v. *Tata Capital Financial Services Limited,*[28] the Bombay High Court was required to decide a challenge to five awards passed by the sole arbitrator who was appointed by the Respondent. The High Court found that the aforesaid sole arbitrator had been previously appointed as an arbitrator in 252 matters where the Respondent was a party. The High Court also found that the Respondent has time and again appointed same arbitrators in more than 100 matters and up to 2278 matters.[29] While the Respondent had been paying the Arbitrator a fixed fee of Rs. 1000/- for each arbitration through its advocates, the Petitioner was directed in the impugned awards to an amount of Rs. 5000/- towards arbitrator's fees.

The High Court stated that the disclosure filed by the arbitrator under Section 12 of the Act was incorrectly done by hiding the true numbers and stating that he was part of only 'approximately 8' ongoing arbitration proceedings. The court very literally applied the provision under Section 12 along with the grounds specified in the Fifth Schedule in determining whether the circumstances exist, which gives rise to justifiable doubts about the independence or impartiality of the arbitrator.

[28] 2019 (4) ABR 652.

[29] *Ibid*,¶ 6.7.

Relying on entry 22 from the Fifth Schedule, the High Court observed[30] as follows:

"*It is therefore clear beyond any doubt, that if an arbitrator has been appointed within the past three years as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties, he is bound to disclose this fact in his disclosure, because the same constitutes a ground giving rise to justifiable doubts as to the independence or impartiality of the arbitrator*".

The Respondent attempted to direct the High Court's attention to Explanation 3 to the Fifth Schedule, which reads as follows:

*Explanation 3. — For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.*

The arbitrator too, had sought to shelter himself under the explanation above. He stated in his disclosure under the head "*prior experience (including experience with arbitrations)*" that "*Due to the nature of the claims/disputes and most of the matters are conducted ex-parte due to absence of Respondent/s. Therefore, it is the common practice amongst the banks and financial institutions to draw arbitrators from a specialized pool.*" *(emphasis supplied)* The High Court rightly pointed out that the matter in hand was not of such nature which necessitates drawing of arbitrators from specialized pool. In fact, the matter is of a simple dispute of loan default.

In light of the above findings and observations, the High Court concluded that the irregularities in the disclosure was not acceptable. Every proposed arbitrator is supposed to specify in the disclosure the exact number of the ongoing arbitrations before him, and not an 'approximate number'. An arbitrator is bound to make the necessary disclosure in the event of him

[30] *Ibid*, ¶ 7.

having been appointed as an arbitrator on two or more occasions by one of the parties, within the past three years. The High Court did not pass any adverse directions against the guilty since the Respondent provided an undertaking on affidavit to ensure that such appointments are not repeated by the Respondent.

The High Court's judgement in *Sawarlal* will far reaching ramifications on an array of disputes where respondents have adopted the practice of re-appointing the same arbitrator(s). Such practices are more prevalent in sectors which face a very high volume of recurrent disputes, such as financing transaction. The High Court has rightly emphasized on the continuous duty of the arbitrators to disclose any potential information which may jeopardize the arbitration.

That said, it is worrisome that the Arbitration Act remains completely silent on the implications, penal or otherwise, where a party or arbitrator are in such gross breach of their respective duties and obligations under the Arbitration Act. The Act does not prescribe any specific interlocutory remedy against a biased arbitrator during the course of the proceedings and the parties have to wait till the award is passed. However, the judgement did rightly stress upon the arbitrator's duty of disclosure which has to be done in a true, precise and strict fashion. It should not be taken as a mere procedural hassle to be done casually. The information given in the disclosure substantiates that the arbitration proceedings will not be biased, which enables the parties to rightly determine if any justifiable doubts of impartiality exist against the arbitration tribunal.

The whole fundamental premise of the arbitration rests upon an unbiased and impartial arbitrator. These duties protect the legitimacy of the arbitration tribunal and ultimately the arbitration award. Conversely, if ethical standards are not taken with due magnitude the whole system will collapse and lose its essence and credibility.

Slowly and steadily the arbitral mode of dispute settlement is making an entry into the Indian adjudication system, and practices like this will in no time make it redundant and corrupt. It's not anyway implied that such problems and misuse exists in India only, but are indeed prevalent in other jurisdictions. This is one of the reasons why the IBA Guidelines provides a list of instances which may possibly be referred to determine the position of arbitrator in an international arbitration.

## V. Position in other jurisdictions

The IBA Guidelines have been taken in high regard in various other jurisdictions as well. (unnecessary). In *Cofely Ltd. V. Anthony Bingham and Knowles*[31], one Mr. Bingham was appointed as a sole arbitrator in a commercial dispute. It appears that one of the parties to the arbitration had been appointing him repeatedly in several such matters. The counterparty, Cofely Limited, sought removal of the arbitrator pursuant to section 24(1)(a) of the UK Arbitration Act, 1996 which reads as follows:

*"**Section 21. Power of court to remove arbitrator.***

*(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds:*

*(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;*

*…"*

*(Emphasis Supplied)*

[31] (2016) EWHC 240 (Comm).

The counterparty also relied on Entries 3.1.3[32] and 3.1.5[33] of the Orange list of the Guidelines. The United Kingdom High Court of Justice court did not hesitate to borrow from the IBA Guidelines in order to discuss the eligibility of the arbitrator. It was also put on record that 25% of the arbitrator's income over the past three years was derived from cases involving the appointing party. Further, it was also submitted that the appointing party has been influencing appointments by putting across the lists of potential appointees or blacklisted appointees. The court took note of the figures put forth wherein it was shown that over the last three years 18% of the arbitrator's appointments and 25% of his income is derived from cases involving the appointing party and further the blacklisting of arbitrators is also a matter of significance because the arbitrator's conduct may lead him to fall out of favour and be placed on the blacklist and that shall be important for anyone whose appointments and income are dependent on such appointing party. Therefore, the court held that the arbitrator shall be removed on grounds of existence of apparent bias.

But contrary stands have been taken in some later judgements. In the case of *Halliburton Company v. Chubb Bermuda Insurance Ltd.*[34], wherein an arbitrator was appointed for deciding the issue on fire insurance liability claim in relation to BP Oil Spill in the Gulf of Mexico on 20th April 2010. The arbitrator disclosed that he had been previously appointed by one of the parties (Chubb) involved in the arbitration. Meanwhile, Chubb appointed him as an arbitrator in other arbitration matter involving insurance liability claim. This fact was not disclosed to Halliburton and when the same came to the knowledge of Halliburton, they reminded the

[32] The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.
[33] The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration involving one of the parties, or an affiliate of one of the parties.
[34] (2018) EWCA Civ 817.

arbitrator of his continuing obligation of disclosure. To this, the arbitrator stated that the said duty did not occur to him at the time of the appointment. The UK Court of Appeal referred to the IBA Guidelines for repeated appointments and put emphasis on the significance of making disclosures of facts and circumstances, which would lead a fair-minded and informed observer aware of the facts, to conclude that there was a real possibility of biasness, but went on to hold that the non-disclosure was mere "innocent oversight"[35] and if such non-disclosed facts does not give rise to justifiable doubts as to the arbitrator's impartiality cannot justify an inference of apparent bias. However, the arbitrator in the present case could have disclosed the appointments, as a matter of good practice. The court observed that mere fact that an arbitrator accepts overlapping appointments concerning the same subject matter involving a common party does not in itself give rise to an appearance of bias.

It is evident that IBA Guidelines has earned its place in International Commercial Arbitration. However, a question may be raised on two distinct judicial approach that is being taken by the courts. The first approach places heavy reliance on the Guidelines but on the other hand, it is merely used as a guide, a point of reference and a means of simply reinforcing judicial reasoning.

In the case of *Universal Compression* v. *Bolivarian Republic of Venezuela*[36], the tribunal rejected the challenge based on repeat appointment by the same party or law firm, noting that there were no objective facts to suggest that her independence or impartiality would be manifestly impacted by the multiple appointments. The tribunal went on to say that her appointment to more than 20 cases indicate that she is not dependent economically or otherwise upon the respondents for her appointments in these cases. Does

[35] (2018) EWCA Civ 817 ¶ 91.
[36] ICSID Case No ARB/10/09 dated 20th May 2011.

this case show that if an arbitrator has become dependent upon appointment by his appointer, an arbitrator's ability to judge independently can be questioned? In the case of *OPIC Karimum Corporation v. Bolivarian Republic of Venezuela*[37] ["***OPIC Corporation***"], the court while deciding on the claim of financial dependence of the arbitrator upon the appointing party, observed that the arbitrator in question had independent income sources unrelated to the fees derived from his appointment in the arbitration in question. The party should have established such dependence by adducing significant and cogent evidence to substantiate the arbitrator's dependence on the income earned from the present arbitration. It can be safely inferred here that a complete financial dependability may certainly raise serious doubts about the ability of the arbitrator to act impartial and the same can be a relevant factor to be considered while judging his disability. Financial connectivity should be precisely balanced by the courts when deciding the challenge to any appointment of an arbitrator. For decision-makers cannot be impartial if they stand to gain from the very decision taken by them.[38]

It is interesting to note that the courts have given opposing views in relation to the multiple appointment of arbitrator. In this regard, the case of *Tidewater Inc. v. Bolivarian Republic of Venezuela*[39] ["**Tidewater Inc.**"] can be discussed. In Tidewater Inc., the challenge to the arbitrator's appointment was made based on the ground of multiple appointment of the arbitrator by the same party. The arbitrators in Tidewater Inc. observed that multiple appointments as arbitrator by the same party in unrelated cases are a neutral factor in considerations relevant to a challenge. On the other hand, the arbitrators in the case of OPIC Corporation while dealing with the similar issue of multiple appointment of

---

[37] ICSID Case No ARB/10/14 dated 5th May 2011.

[38] See City of Tshwane Metropolitan Municipality vs. Link Africa (Pty) Ltd and others, (2015) ZACC 29, ¶71.

[39] ICSID Case No ARB/10/5 dated 23rd December 2010

arbitrator, dismissed the view of the Tidewater Inc. and observed that "*47….multiple appointments as arbitrator by a party or its counsel constitute a consideration that must be carefully considered in the context of a challenge…..multiple appointments of an arbitrator are an objective indication of the view of the [arties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case.*", and went on to rule that multiple appointments of an arbitrator by a party or its counsel is a factor which may lead to the conclusion that it is manifest that the arbitrator cannot be relied upon to exercise independent judgement.

The above quoted judgements indicate that there exist multiple views in different jurisdictions when dealing with the question of repeat appointments of arbitrator. However, the fact of existence of financial connectivity cannot be ignored without merit, as observed by Flaux J in the case of A v. B[40] that the fact that an arbitrator is regularly appointed or nominated by the same party/legal representative may be relevant to the issue of apparent bias, particularly if it raises questions of material financial dependence. With growing global commercialization, there is an urgent need to streamline these varied opinions and bring them into parity with international standards and especially in the matters of international commercial arbitration. As already stated, the use of the IBA Guidelines to decide these issues can go a long way in coming to a consensus.

## VI. Recommendations

In light of the above discussion, for the purpose of disclosers and declarations made in form prescribed under Sixth Schedule of the Act, it can be argued that the requirements under Sixth Schedule are inadequate and unclear. The disclosure of prior experience should undoubtedly cover the overall experience of the arbitrator.

---

[40] *See* (2011) 2 Lloyds Rep 591, ¶ 62.

There seems to be no problem with this clause. Further, the next clause (d) covers the number of ongoing arbitrations, which shall mean to cover all the arbitration matters that the arbitrator is involved in as on date. The use of words like "approximately", "around" and similar should be strictly avoided. This disclosure could have been more specific by giving an exact figure of ongoing matters with the same parties and a figure of ongoing matters with other parties/matters because such declaration will determine the dependency of an arbitrator upon any of the party. This can be viewed from another perspective as well, say, if the proposed arbitrator is not much involved with any other arbitration at the time of appointment, or say is practically without any work in hand, he/she may give favorable judgements to land more matters with the existing party and keep the engine running.

The next clause (e) is the crucial one, this is where the arbitrator is obliged to disclose of any past or present engagement or involvement with the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his/her independence or impartiality. These engagements may be of varied nature and degree. This is where the test of objectivity wherein the analysis shall be made from a fair-minded and informed observer approach and the same shall be applied and accordingly the declarations should be made.

The nature of involvement for our purpose here may be classified into two categories,

(i) Based on subject matter; and

(ii) Based on relation to the party or counsel of the party or the appointing Institution involved.

### A. SUBJECT MATTER

This may give rise to various events of an arbitrators' involvement such as a previous opinion disseminated/published on the

subject-matter, a previous order/ruling, a legal opinion given on the matter and so on and so forth. This however will depend on facts and circumstances of individual cases. In the case of *Urbaser SA* v. *The Argentine Republic*[41], the challenge to the appointment of the appointed arbitrator was made on the ground that the arbitrator's publications as a legal scholar on two questions were relevant to the arbitration and therefore vide the opinions expressed in the said publications, the arbitrator had prejudged the essential element of the conflict. Dismissing the claim of the Argentina Republic, the arbitral members held that that scholarly opinions expressed by the arbitrator in his publications will not hamper the ability of the arbitrator to take full account of the facts, circumstances and arguments presented by the parties in the present proceedings and accordingly decide the matter. It was further observed that if this challenge be accepted that nearly all arbitrators who have ever expressed an opinion on an item specific to certain issue would be at risk of a challenge which ultimately may paralyze the whole process.

On a contrasting note, in the case of *Perenco Ecuador Limited* v. *Republic of Ecuador and Petroecuador*[42], wherein the challenge was made on the ground of opinions expressed in an interview by the arbitrator, the Permanent Court of Arbitration observed that from the point of view of a reasonable third person having knowledge of the relevant facts, the comments made by the arbitrator in an interview constitute circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence, even though he has not prejudged the issue.

Therefore, what follows from the above discussion is clear, that there is no set legal position identified or a straight-jacket formula adopted by courts in various jurisdictions to determine the connectivity of the arbitrator with the subject matter of the

---

[41] ICSID Case No. ARB/07/26 dated 12th August 2010.

[42] PCA Case No. IR-2009/1 dated 8th December 2009.

dispute. It can only be determined based on the facts and circumstances arising in particular situation by adopting the "third-person" test.

B. RELATION TO THE PARTY/COUNSEL OF THE PARTY

To determine such interest and involvement is indeed not easy, but a fair minded and informed observer approach shall be taken to determine the independence and impartiality of an arbitrator. The England and Wales Court of Appeal (Civil Division) in the case of *Halliburton Company* v. *Chubb Bermuda Insurance Limited*[43], wherein a challenge to the appointment of an arbitrator was made on the grounds of taking appointment in same or overlapping subject matter involving a common party, the court interpreted Section 24(1)(a) of the UK Arbitration Act, 1996 which empowers the court to remove an arbitrator if circumstances exist that give rise to justifiable doubts as to his impartiality, and observed the following

"*39. Section 24 has been held to reflect the common law test for apparent bias, namely whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*

*40. This is an objective test and is not be confused with the approach of the person who has brought the complaint. It involves taking a balanced and detached approach, having taken the trouble to be informed of all matters that are relevant…*"

The relation to the party/counsel of the party may be sub-classified into two classes, (a) personal nature or (b) financial nature. Any other similar involvement may be incidental or ancillary to these sub-categories. The personal relation of the arbitrator shall straight forward be culminated making the

[43] (2018) 1 WLR 3361 : (2018) EWCA Civ 817 (Pending Appeal).

arbitrator ineligible. But a financial relationship may not directly make an arbitrator ineligible.[44]

Professionals practicing in the same field usually work together in different positions on different circumstances. Will all or any of those financial relationships affect the independence of an arbitration? To bring out answers to these questions, courts may have to broadly interpret the provisions of Fifth and Seventh Schedule and attempt to carve out all such possibilities that may tamper the sanctity of an arbitral proceeding; perhaps in the same manner as the Bombay High Court in Sawarmal Gadodia.

## VII. Conclusion

The whole discussion above can be concluded with the words of Solomon J, in *Liebenberg and Others* v. *Brakpan Liquor Licensing Board and Another*.[45]

"*Every person who undertakes to administer justice, whether he is a legal officer or is only for the occasion engaged in the work of deciding the rights of others, is disqualified if he has a bias which interferes with his impartiality, or if there are circumstances affecting him that might reasonably create a suspicion that he is not impartial…. The impartiality after which the courts strain may often in practice be unrealized without detection, but the idea cannot be abandoned without irreparable injury to the standard hitherto applied in the administration of justice…*"

From the above discussions, it is evident that the disclosure requirements by the arbitrator cannot be undermined and must be taken as a priority to determine the legitimacy of the arbitration tribunal. A supreme duty rests upon the shoulder of an arbitrator who must abide by certain ethical standards while dispensing his duty, from the time of disclosure up till making of an arbitral award. The arbitration proceeding shall not suffer from any bias

---

[44] OPIC Karimum Corporation v. Bolivarian Republic of Venezuela, ICSID Case No ARB/10/14 dated 5th May 2011.

[45] 1994 WLD 52 (Liebenberg) at 54-5.

and prejudice which may hamper a party's right to justice. Based on the above analysis, it is hereby recommended that the legislature should take steps to fill the vacuum in arbitration law, including consequences of duty of breach, interim remedy during the proceedings etc. The question that arises here is should the arbitrator be held personally liable for any disparities in the disclosure done by him?

The referred judgement delivered by the Bombay High Court is a welcoming move and may help to highlight the seriousness and sensitivity attached to the issue. The reiterated reference to IBA guidelines brings India in consonance with International Standards be it in domestic or international arbitration. As far as disclosure requirements are concerned, it should be taken seriously by the arbitrators and as well as the parties. It may seem like a procedural practice, but it may affect a judicial process substantively. False or untrue disclosures may alter the course of an arbitral proceedings negatively and obstruct dispensation of justice. The duty to preserve the sanctity of a judicial proceeding shall be the supreme duty of an adjudicator. The law should not fall short of remedy to an individual.

Vol. 11 Feb 2020

# JUDICIAL APPROACH IN APPLYING THE ARBITRATION AND CONCILIATION ACT, 1996 TO INVESTMENT DISPUTES

*Harsh Singh & Shubhangi Agarwal**

**Abstract**

*The Arbitration and Conciliation Act, 1996 is primarily based on the UNCITRAL Model Law on International Commercial Arbitration. However, the problem which arises is that commercial arbitration is not the only kind of arbitration that Indian Parties indulge in. India has entered into several International Investment Agreements (IIAs), in the form of multi-lateral or bilateral investment treaties, with different countries, which makes it essential for India to have a proper legal framework so that it can properly honour its treaty obligations. Policymakers were indifferent to the difference between commercial and investment arbitration because of which there is a complete lacuna in the existing statute to deal with investment disputes. There are stages when the national Courts of a country have an important role to play in assisting arbitrations but in the absence of specific laws to deal with the subject matter, there will always be inconsistency in giving decisions. This paper seeks to identify the existing challenges to investment arbitration in India by closely reviewing in detail the judicial stand pertaining to the same.*

## I. Introduction

Investors from one country (Home State) invest in another country (Host State) if there exists a multilateral or bilateral investment treaty that is signed by sovereign nations for the protection and promotion of investment in their respective

* The authors are students at Dr. Ram Manohar Lohiya National Law University, Lucknow.

territories. It can be said that the dispute resolution clause or the arbitration clause of such investment treaties is a standing offer to arbitrate which can be accepted by any foreign investor in case of non-protection of its investment as per the treaty standards. It is to be noted that commercial arbitrations form part of private law that solves disputes between citizens while investment arbitration is a hybrid law of international law that deals with disputes between a Host State and any private foreign investor.[1]

When a dispute arises between a foreign investor and the Host State, the foreign investor (or the Host State in very rare circumstances) can initiate arbitration against the other party if permitted under the relevant dispute settlement provisions in the subject BIT. Sometimes, Parties connected with the arbitration proceedings under a BIT approach the State Courts to seek a variety of reliefs, such as an anti-arbitration injunction, and enforcement of a BIT award amongst others. In Indian jurisprudence, a common debate while seeking anti-arbitration injunctions or lodging enforcement proceedings relates to whether the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"][2] would apply to such arbitrations. Courts in India have provided varied interpretations on this issue. While one faction argues that BIT arbitral awards would come under the ambit of foreign arbitral awards as defined under Part II of the Arbitration Act, the other faction refutes this argument by stating that the Arbitration Act applies only to commercial arbitrations, and BIT arbitration is not 'commercial arbitration' in the strict sense.

## II. Ambit of "Commercial" Relationship

[1] 22 STEPHAN W. SCHILL, INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (Stephan W. Schill ed., Oxford University Press 2010).

[2] S. R. Subramanian, *BITs and Pieces in International Investment Law: Enforcement of Investment Treaty Arbitration Awards in the Non-ICSID States: The Case of India,* 14 THE JOURNAL OF WORLD INVESTMENT & TRADE 198 (2013).

The Arbitration Act defines the term "foreign award" in Sections 44 and 53. Interestingly, the definition restricts the applicability of the Arbitration Act to only *commercial relationships*. The issue is that the term *commercial* has not been defined in the Arbitration Act, however, some inference can be drawn from the UNCITRAL Model Law which does provide for a definition. Model Law states that:

"*The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.*"

To see whether this definition of commercial encompasses disputes arising from a BIT relationship, we need to analyse the set-up of investment arbitration. Investment arbitration arises out of a relationship between the State and an investor and is governed by Public International Law, which is quite different from a commercial set up. BITs are entered into by the States in their sovereign capacity and there is an obligation on the States to give due regard to the terms of the Treaty. However, the definition of the term 'investment' which finds it place in the India Model Bilateral Investment Promotion and Protection Agreement (BIPA) is in itself very broad. The Model Treaty defines 'investment' as: "*every kind of asset established or acquired and specifically includes "movable and immovable property as well as other rights such as mortgages, liens or pledges; (ii) shares in and stock and debentures of a company and any other similar forms of participation in a company; (iii) rights to money or to any performance under contract having a financial value; (iv) intellectual property rights, in accordance with the relevant laws of the respective Contracting Party; (v) business concessions conferred by law or under*

*contract, including concessions to search for and extract oil and other minerals.*" Considering this broad definition of 'investment', it might be possible to read it into the definition of 'commercial', given the absence of a clear and unambiguous interpretation of the Court. If investment awards can be squeezed into the ambit of commercial relationship and be seen to arise out of them, they can be construed as foreign awards under Section 44 and Section 53 of the Arbitration Act and thereby, the applicability of the Arbitration Act to investment arbitration proceedings can be justified to some extent.

## III. Judicial Approach

### A. *Board of Trustees of Port of Kolkata* v. *Loius Dreyfus Armaturs*[3]

This was the first time in India that a domestic Court had given its decision on a BIT claim. In this case, Louis Dreyfus Armaturs SAS, a French company, held 49% shareholding of Asia Private Limited (ALBA), an Indian company. Haldia Bulk Terminals (HBT) was given a contract by the Kolkata Port Trust (KPT) for the operation and management of certain berths in the Haldia Dock Complex. HBT was, in turn, a subsidiary of ALBA and therefore, the investment in the project was indirectly made by Dreyfus.

The contract between KPT and HBT had an arbitration clause for the settlement of disputes. Over the time, disputes arose between KPT and HBT and HBT invoked the arbitration clause in the contract and commenced proceedings against KPT (Commercial Arbitration). This arbitration was seated in India and was also being governed by Indian law. However, while the proceedings of the arbitration were pending, Dreyfus sent a notice of arbitration to the Union government, State of West Bengal and KPT under Art. 9 of the India-France BIT

[3] Board of Trustees of Port of Kolkata v. Loius Dreyfus Armaturs, 2014 SCC OnLine Cal 17695.

(Investment Arbitration). It was alleged by Dreyfus that the Union government, State of West Bengal and KPT have failed to accord full protection and security to HBT personnel and have deliberately tried to obstruct the working of the project in a normal and efficient manner, which has subsequently crippled the entire investment. Dreyfus had claimed the violation of certain substantive provisions of the BIT like failure to provide fair and equitable treatment, failure to give full protection and security and indirectly expropriating the investment. In response to this, KPT filed for an anti-arbitration injunction restraining Dreyfus from proceeding with the BIT arbitration.

KPT gave a two-pronged argument in requesting for an anti-arbitration injunction. Firstly, it stated that Dreyfus did not fulfil the criteria of a valid investor and that the scope of the present dispute is not covered under the BIT; Secondly, it stated that KPT cannot be a party to the investment arbitration proceedings because it is not a party to the arbitration clause in the BIT. It relied on the English case of *City of London* v. *Sancheti*[4], wherein it was stated that under certain circumstances States are made responsible for the action of its local authorities, but that does not make the local authority a party to the arbitration agreement. India can be held liable for the actions of KPT but KPT in no way can be made a party to the arbitration clause under the India-France BIT.

Dreyfus objected to the Court's jurisdiction in granting an anti-arbitration injunction on the grounds that as per Sec. 5 of the Arbitration and Conciliation Act, 1996, no judicial authority should intervene in the arbitration process except as provided by Part I. It stated that courts should adopt a non-interventionist approach and should avoid bringing the arbitration proceedings to a stand-still. The Act does not allow a civil Court to pass any anti-arbitration injunction. Therefore, it argued, that the arbitral

[4] City of London v. Sancheti, [2008] EWCA Civ 1238.

tribunal constituted under the BIT shall have exclusive jurisdiction to deal with matters pertaining to the scope and validity of the BIT.

After hearing both the sides, the Court decided that it had jurisdiction over the present dispute. Sec. 5 was considered to be a general provision and not a mandatory one which would remain applicable on both domestic and foreign seated arbitrations. It further relied upon Sec. 45 of the Arbitration Act to assume jurisdiction. However, it stated that issues relating to arbitrability and jurisdiction should be left for the arbitral tribunal and the supervisory foreign Courts to decide unless there are demonstrable facts that the continuance of foreign arbitration would cause grave injustice. In cases of injustice, domestic Courts will have the power to intervene and assume jurisdiction. Courts need to keep in mind that if there exists a valid arbitration agreement then the parties have to be referred to arbitration for the resolution of their disputes. Injunctions can be granted if the Court is satisfied that the arbitration agreement is null and void, inoperative or if the proceedings might be vexatious or oppressive.

**Analysis**

The Single Judge bench of the Calcutta High Court took a progressive step by giving out a pro-arbitration ruling. However, since it is a single judge decision, it may possibly undergo further interpretations. It acted as a protector of investment treaty arbitrations against attempts by state instrumentalities to sabotage the entire process under false pretexts. Crucially, it assumed that the Arbitration Act is applicable to investment treaty arbitrations as well. It used Section 45 to grant an injunction which is used for commercial arbitrations only. The injunction issued by the Calcutta High Court in favour of only KPT should not be regarded as an anti-arbitration injunction given by a domestic Court against BIT proceedings but rather shows its maturity

towards understanding international arbitration. It highlights that making India party to an investment arbitration is sufficient and state instrumentalities are not necessary to be included. This is also a welcome clarification as it helps both parties from undue financial burden. It had faith in the tribunal's power to decide on matters of jurisdiction and only ordered that a wrong party should not be made a respondent in the case.

B. *Union of India* v. *Vodafone Group Plc*[5]

The Hon'ble Supreme Court of India ruled in favour of Vodafone in its 2007 Hutch-Essar acquisition case and quashed the tax demands of the government.[6] The aftermath of this case resulted in the retrospective tax amendment by the Union government, which imposed a tax of Rs. 11,000 crores on Vodafone. This forced the Vodafone International Holdings BV to invoke the India-Netherland BIT in 2017 to challenge the retrospective tax amendment. Vodafone Group Plc initiated a second arbitration against India based on the India-United Kingdom (UK) BIT while the first arbitration under the India-Netherlands BIT was pending. A suit was filed by the Indian government before the Delhi High Court for grant of an anti-arbitration injunction against the second investment treaty arbitration initiated under the India-UK BIT. It was contended that the initiation of two separate treaty-based arbitration based on the same claim and in relation to the same subject matter, by entities which were a part of the same group of companies is an abuse of process and should not be allowed. An interim order was issued by the Delhi High Court where it stated that numerous arbitrations based on the same government action cannot be initiated under different investment treaties and curtailed Vodafone's action in respect to the second arbitration under the India-UK BIT.

[5] Union of India v. Vodafone Group Plc, 2018 SCC OnLine Del 8842.
[6] Vodafone International Holdings B.V. v. Union of India, (2012) 6 SCC 613.

Things, however, took a turn after that. After a while, the interim order restraining Vodafone from the second arbitration was vacated and the Delhi High Court applied the principle of *Kompetenz-Kompetenz* and directed the Parties to appoint an arbitral tribunal under the India-UK BIT for the final disposal of issues relating to abuse of process. The Court gave a very reasoned judgment because it was, in a way, overruling the previous judgment of Calcutta High Court.[7] It stated that the Arbitration Act will not apply in the present case because the dispute at hand is not a commercial one.

In addition to that, the court took the position that there is no absolute restraint on national Court's jurisdiction in investment treaty arbitration for non ICSID signatory countries like India. Art. 26 of the ICSID Convention completely negates the jurisdiction of national Courts but non-signatories are not bound by this and have the power to seek interference of Courts for deciding jurisdictional issues. In the current case, the investment was made in the territory of India, economic interests were held in India and even the business was carried out in India, and therefore, the Court will have jurisdiction *in personam*. It also differentiated between the nature of commercial and investment disputes. The former is based on private relationship between individuals while the latter relies on state assurances, which would be governed by international law and not domestic law.

It clarified that multiple claims in the same vertical chain are not per se an abuse of process and went on to state that even when national Courts have jurisdiction over BIT arbitration, they should exercise a reasonable amount of self-restraint while dealing with such cases and grant injunctions only under very '*compelling circumstances*', and only when the Court has been approached in good faith and when there is no alternative

[7] Board of Trustees of Port of Kolkata v. Loius Dreyfus Armaturs, 2014 SCC OnLine Cal 17695.

efficacious remedy available. Non-interference in BIT arbitrations is advisable because in the absence of a designated seat or curial law, the inherent powers of the Courts are unknown.

**Analysis**

Having placed its reliance in the widely acknowledged *Kompetenz-Kompetenz* principle, the Delhi High Court gave a pro-arbitration stand and harboured the way for all future BIT based arbitrations. It established the jurisdiction of national Courts in treaty-based arbitrations relying on Sec. 9 of the Civil Procedure Code instead of following the footsteps of Calcutta High Court in the *Board of Trustees* case. However, if we look at the jurisdictions of Singapore and UK, they have applied their domestic arbitration statutes in the cases of *Sanum Investments* v. *Laos*[8] and *Ecuador* v. *Occidental Exploration*[9] respectively in treating investment disputes. Therefore, the ambiguity in the applicability of the Arbitration Act on investment disputes still persists because of the absence of a solid legal principle for its interpretation.

C. *Union of India* v. *Khaitan Holdings (Mauritius) Limited*[10]

Khaitan Holdings (Mauritius) Limited was a Mauritian entity that had investments in an Indian entity called Loop Telecom (Loop). The Union government gave Loop a license of 21 Unified Access Services (UAS/2G License) in 2008. However, in respect of the corruption scandal surrounding the allotment of licenses in the 2G case, the Hon'ble Supreme Court cancelled the 2G license in the CPIL case in 2012.[11]

---

[8] Sanum Investments Ltd. v. Government of the Lao People's Democratic Republic, [2016] 5 SLR 536.
[9] Republic of Ecuador v. Occidental Exploration and Production Co., [2007] EWCA Civ 656.
[10] Union of India v. Khaitan Holdings (Mauritius) Limited, 2019 SCC OnLine Del 6755.
[11] Centre for Public Interest Litigation v. Union of India, (2015) 13 SCC 425.

Loop's request for the refund of license fees was denied by the Telecom Disputes Settlement and Appellate Tribunal (TDSAT). On account of such actions, Capital Global Ltd. and Kaif Investments, which held substantial interests in Loop, invoked Art. 8.1 of the India-Mauritius BIT and sent a notice to India for the settlement of disputes. In the year 2013, Khaitan Holdings merged with Kaif Investments and issued a notice of arbitration to India under Art. 8.2 of the India-Mauritius BIT. Khaitan Holdings claimed that since they have 26.95% equity in Loop, they are entitled for compensation for the cancellation of the 2G license. This was followed by the nomination of the arbitrators by both the Parties. However, issues arose on the nationality of Ishwari Khaitan and Kiran Khaitan, who were the beneficial owners of Khaitan Holdings and it was being contended that this was an abuse of treaty process since both of them are Indian citizens and cannot be taken as foreign investors for the purposes of BIT. They were even charged with criminal conspiracy for securing the license. Another façade was brought to light that alleged Khaitan for just being the front, and the real person behind it was the promoter of the Essar Group of Companies i.e., Ravikant Ruia. In December 2017, the Special Judge of CBI acquitted the accused of all charges. The Permanent Court of Arbitration (PCA) scheduled the first meeting on 28$^{th}$ January, 2019, however, the Union government on 27$^{th}$ January, 2019 filed various suits against Khaitan Holdings, Ishwari and Kiran Khaitan, Ravikant Ruia and Loop seeking reliefs, including a restraint on arbitral proceedings commenced under the BIT.

The Union government raised objections based on nationality of the foreign investor. Since, it was controlled by Indians, the criterion of valid investor was not satisfied under the India-Mauritius BIT. In reply to the government's contention, Khaitan Holdings pleaded before the Court that issues pertaining to a valid investor should be decided by the arbitral tribunal by interpreting

the BIT, and does not come within the jurisdiction of national Courts of India.

An issue that came to the surface for the first time was whether the actions of the judiciary, which is independent from the legislature and the executive, would constitute a treaty violation that can be attributable to the State as per the ILC Draft Code on the Responsibility of States for Internationally Wrongful Acts. The Court held that judiciary is indeed an organ of the State as per Art. 4 of the ILC Draft Code and its actions could constitute treaty violations that are attributable to the State.

It relied on the earlier Vodafone judgment[12] and stated that national Courts have jurisdiction in matters of investment treaty arbitration even if it was a separate specie of arbitration outside the purview of the Arbitration and Conciliation Act, 1996. In the said case, the Court assumed jurisdiction under Sec. 20 of the Civil Procedure Code which gives power to a Civil Court to have jurisdiction in matters where the defendant resides within the Court's local limits. As in this case, the investment was made in India by residents of India, it was well within the powers of the Court to deal with the matter. However, on the contrary, it also stated that BITs are a self-contained legislation and are majorly governed by international law, therefore, its applicability is not subject to adjudication under local laws. Therefore, interference by national Courts on issues of a valid investor as per the BIT would defeat the entire purpose of investment treaty arbitrations. The Court also referred to Art. 21 of UNCITRAL Rules which states that the arbitral tribunal shall have the power to rule on its own jurisdiction. To understand the view of the Court, it is pertinent to refer to the following lines stated by Justice Pratibha Singh:

[12] Union of India v. Vodafone Group Plc, 2018 SCC OnLine Del 8842.

"*The continuation of the arbitral proceedings under the BIT, at this stage, may per se not be contrary to public policy. It is a principle of public policy that the government has to honour its commitments including bilateral ones. The representations made by any State under either a bilateral or multilateral treaty is what holds the community of nations together. The adherence to treaties is therefore not just a contractual stipulation but a solemn commitment by a sovereign nation. Thus, the continuation of arbitral proceedings is the rule and not the exception.*"

The Court decided not to interfere with BIT proceedings and ruled that anti-arbitration injunctions should only be given in rare and compelling circumstances. The Courts have time and again showed that they do not intend on sabotaging BIT arbitrations.

**Analysis**

The Courts have comfortably started assuming jurisdiction in investment disputes, and therefore, it becomes important to point out that any Order made by them is not binding on the foreign arbitral tribunal. This raises questions regarding the applicability of conflict of laws rules and it consequently, also poses problems at the enforcement stage of arbitral awards. Investment treaty arbitrations have application of public international law while national courts must operate in the domain of municipal laws, therefore, the interplay between both these areas is fundamentally unclear. It is also elemental to observe that Courts have not used the Arbitration Act to assume jurisdiction but have rather relied on CPC for the same. So, the ambiguity in the applicability of the Arbitration Act still persists and this will give rise to impediments in the long run for the investment arbitration framework.

## IV. Conclusion

The investment treaty arbitration scenario took a complete turn after the *White Industries* case[13] initiated under the India-Australia

[13] White Industries Australia Limited v. The Republic of India, Final Award, IIC 529 (2011).

BIT. It highlighted the existing loopholes and statutory lacunae in Indian law in relation to the BIT arbitration. India needs to comply with its obligations under IIAs by observing the principle of *pacta sunt servanda* as enumerated under Art. 26 of the Vienna Convention on the Law of Treaties, 1969. Art. 26 states that "*every treaty in force is binding upon the parties to it and must be performed by them in good faith*". Moreover, Art. 51 of the Indian Constitution provides that the State must respect international law and treaty obligations and encourage the settlement of disputes by arbitration. In spite of such obligations, India is not reciprocating as it should.

The progressive and non-interventionist approach of India is commendable in these cases because if India seeks foreign investment in its territory, it will have to relax its interference in disputes arising from the same. However, all the judgments given in respect to investment arbitration are only of different High Courts and no Supreme Court judgment has touched this issue because of which, no solid interpretation can be inferred. India is party to multiple bilateral investment treaties and therefore, it is necessary that it provides an exclusive legal framework for BIT arbitration where investors are able to enforce foreign arbitral awards without having to go through long drawn complex litigations. It is time that Indian policymakers understand the standing difference between commercial and investment arbitration. Their indifference is evident from the ministry reports on amendment of the Arbitration Act, which only talk about commercial awards and did not even once mention foreign investment awards. There is a dire need for legislative action in this sphere, either in form of a separate code or in the form of certain crucial amendments to the existing Arbitration Act for more clarity. Investors should approach the Indian Parliament and seek the amendment of the foreign award definitions given in Sections 44 and 53 of the Arbitration and Conciliation Act, 1996, and make them to expressly include investment arbitral

awards within the scope of foreign awards. Only when these necessary steps have been taken, can investor confidence be firmly established in the Indian legal system.

Vol. 11 Feb 2020

# *JAYESH H. PANDYA* V. *SUBHTEX INDIA LTD* : SUPREME COURT'S TROUBLING DECISION ON WAIVER OF RIGHT TO OBJECT

*Parimal Kashyap* & Rahul Kanoujia**

## CASE COMMENT

## I. Introduction

In August 2019, the Supreme Court (hereinafter 'the Court') pronounced a decision concerning termination of an arbitrator's mandate.[1] It was the case of the petitioner (or 'defendant') that the arbitrator had failed to comply with the time-limit stipulated in the arbitration agreement for rendering the award and hence, in absence of an extension, the arbitrator had become *functus officio*.[2] In response, the respondent (or 'claimant') argued that the petitioner had failed to object to the contractual requirement without undue delay and thus, waiving its right to object as per Section 4 of the Arbitration and Conciliation Act, 1996 (hereinafter '1996 Act'). The Court came to the conclusion that the defendant had not waived its right to object and ultimately, terminated the mandate of the arbitrator. Through this case comment, the authors analyse the Court ruling. In light of the established jurisprudence on contractual interpretation and waiver of right to object in arbitration, the authors argue that the approach adopted by the Supreme Court in *Jayesh H. Pandya* v. *Subhtex India Ltd* lends a helping hand to obstructive behaviour in arbitration.

* The author is a student at Dr. Ram Manohar Lohiya National Law University, Lucknow.

* The author is a student at Gujarat National Law University, Gandhinagar.

[1] Jayesh H. Pandya v. Subhtex India Ltd., (2019) S.C.C. Online SC 1101.

[2] Arbitration and Conciliation Act, 1996, § 14(1)(a).

## II. Concept of 'Waiver' in Arbitration

Owing its origins to the principle of estoppel[3] and *venire contra factum proprium*,[4] waiver of the right to object is perhaps one of the most well-rooted equity-based principles.[5] The principle has been classified as a 'well-known general principle of law' in several civil legal systems as well.[6] It has traditionally been employed by the Courts to avoid prejudice and bias[7] that may be created due to untimely objections raised by a party.[8] Consequently, the principle forms a part of majority of the codified procedural rules on arbitration.[9] Most of the institutional rules and domestic legislation that recognize waiver have retained the language used in Article 4 of the UNCITRAL Model Law on Commercial Arbitration (hereinafter 'Model law').[10]

---

[3] Phipps, (2007) 123 L.Q.R. 286; Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corp of India, The Kanchenjunga, [1990] 1 Lloyd's Rep 391; Commonwealth of Australia v. Verwayen, (1990) 170 C.L.R. 394; Prosper Homes v. Hambro's Bank Executor Trustee Co., (1979) P. & C.R. 395, 401.

[4] Charles Richards Ltd. v. Oppenhiem, [1950] 1 K.B. 616; A. G. GUEST AND SIR WILLIAM ANSON, ANSONS LAW OF CONTRACT, 523-527 (28th ed., Oxford University Press); Ram Chandra Rungta v. Ram Swarup Rungta, A.I.R. 2015 Cal. 24; K.S.R.T.C. v. M. Keshava Raju, A.I.R. 2004 Ker. 119.

[5] Duarte G. Henriques, *The role of good faith in arbitration: are arbitrators and arbitral institutions bound to act in good faith?*, 33(5) A.S.A. BULLETIN, 514-532 (2015); A. Newman, *Equity in Comparative Law*, (17) 4 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 807-848 (1968); Hessel E. Yntema, *Equity in the Civil Law and the Common Law*, 15(1/2) AMERICAN JOURNAL OF COMPARATIVE LAW, 60 (1960).

[6] Summary Record for meetings on the UNCITRAL Model Law on International Commercial Arbitration, Part III, 308th Meeting, June 4, 1985 413. available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/308meeting-e.pdf.

[7] Bridgette Toy-Cronin, *Waiver of the Rule Against Bias,* 9 AUCKLAND UNIVERSITY LAW REVIEW, 850 (2002).

[8] R. v. Nailsworth Licensing Justices Ex p. Bird, [1953] 2 All E.R. 652; Locabail (U.K.) Ltd. v. Bayfield Properties Ltd., [2000] Q.B. 451, 475.

[9] UNCITRAL Model Law on Commercial Arbitration, art. 4; UNCITRAL Arbitration Rules, art. 32; ICC Arbitration Rules, art. 40; ICSID Arbitration Rules, Rule 27; LCIA Arbitration Rules, art. 32.1; SCC Arbitration Rules, art. 36.

[10] *Id*.

The purpose of this provision has been identified as to prevent parties that are aware of a "*procedural defect in the arbitral process from raising it subsequently to resist the continuation of the arbitration or the enforcement of an adverse award made against it*".[11] Courts in India and elsewhere have consistently affirmed the principle in cases where a party is aware of the breach at the time it occurs and has an opportunity to object to the breach.[12]

As is the case with the most jurisdictions, the provision in the Model law was retained by India in the 1996 Act under Section 4 without alterations.[13] The provision reads as:

"4. Waiver of right to object. —

*A party who knows that—*

*(a) any provision of this Part from which the parties may derogate, or*

*(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.*"

While waiver may not be a readily discussed issue among commentators, Indian courts have substantial jurisprudence to offer on the nature and scope of Section 4 of the 1996 Act. With respect to the object of the provision, courts have often noted that "*it is intended to help the arbitration process function efficiently and in good faith*".[14]

[11] UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 35.
[12] Bharat Sanchar Nigam Ltd. v. Motorola India Pvt. Ltd., (2009) 2 S.C.C. 337; Narayan Prasad Lohia v. Nikunj Kumar Lohia, A.I.R. 2002 S.C. 1139; J.G. Engineer's Pvt. Ltd. v. Calcutta Improvement Trust, A.I.R. 2002 S.C. 766; *S.N. Malhotra and Sons v. Airport Authority of India*, 149 (2008) D.L.T. 757.
[13] The Arbitration and Conciliation Act 1996, § 4.
[14] Veena v. Seth Industries Limited, 2010 S.C.C. Online Bom. 1648; Ram Chandra Rungta v. Ram Swarup Rungta, A.I.R. 2015 Cal. 24.

## III. Detailed Facts and Procedural History of the Case

The dispute arose out of a partnership agreement signed in 2000. The partnership agreement contained an arbitration clause. In 2003, the dispute arose out of the partnership agreement. The Bombay High Court (hereinafter 'High Court') appointed an arbitrator pursuant to an application made by the claimant. The defendant, who had alleged that the arbitration agreement was collusive and forged, filed a writ petition in the High Court against the order of appointment. The writ petition was eventually dismissed by the High Court as it held that the questions on existence and validity of the arbitration agreement could be raised before the arbitrator.[15] Against this order, the defendant filed a Special Leave Petition (hereinafter 'SLP') in the Court. Consequently, the Court stayed the arbitration proceedings till the disposal of the SLP.[16] While the appeal was still pending, the arbitrator appointed by the High Court passed away. Three years later, in 2007, the Court, dismissed the SLP and appointed a new arbitrator.[17]

In the arbitration agreement contained in the contract, parties had agreed, amongst other things, that the arbitrator will render his award within four months of date of service of the copy agreement. The agreement also provided that the mandate of the arbitrator can be extended with the consent of the parties.

The arbitration proceedings began on May 4, 2007 and the timeline of submissions was agreed. The arbitrator set August 10, 2007 as the date for making statements of admission and/or denials. After submission of documents, a second preliminary meeting was scheduled on August 13, 2007.

---

[15] See Arbitration and Conciliation Act, 1996, § 16.
[16] Jayesh H. Pandya v. Subhtex India Ltd., 2004 S.C.C. Online S.C. 10.
[17] Jayesh H. Pandya v. Subhtex India Ltd., 2008 S.C.C. Online S.C. 36.

Pursuant to a request for a six-week extension made by the defendant in filing their written submission and eventual delay on the part of the parties, the arbitrator postponed the second preliminary meeting to August 27, 2007. In the second preliminary meeting, the defendant raised the issue of time-limit and argued that since the proceedings had commenced on May 04, 2007, the time limit to render the award according to the arbitration agreement was going to expire on September 04, 2007.

The defendant refused to extend the mandate of the arbitrator and argued for discontinuance of the proceedings. The arbitrator refused to discontinue the proceedings. The arbitrator was of the opinion that the objection regarding time-limit should have been raised earlier and the defendant should have communicated its intention to the arbitrator in the first preliminary meeting itself so that shorter time-frame could have been set. Against this, the defendant filed an application for termination of arbitrator's mandate in the High Court.[18]

The High Court took into account the facts and circumstances of the cases and ruled that the defendant had waived its right to object to the breach of time-limit by not objecting promptly.[19] On appeal, the Court ruled that the time-limit expressed in the arbitration agreement was final and binding and Section 4 was not applicable. Consequently, the Court terminated the mandate of the arbitrator.

## IV. Analysis of the Court's Judgment

The Court rightly noted that the arbitrator had failed to render the award in the stipulated time-period in arbitration agreement.[20] It further remarked that an arbitrator is required to resolve the dispute according to terms of the arbitration agreement.[21] In a

[18] The Arbitration and Conciliation Act, 1996, § 14.
[19] Jayesh H. Pandya v. Subhtex India Ltd., 2008 (5) Mah L.J. 749.
[20] *Supra* note 1, ¶ 14.
[21] *Id., ¶ 18.*

scarcely worded ruling, the Court did throw light on the applicability of waiver under Section 4. It observed that the principle of waiver comes into act when there is a voluntary relinquishment of right.[22] It also noted that the principle of 'deemed waiver' finds support under Section 4 and any determination to that effect would be based on facts and circumstances of a case.[23] However, at this juncture the court took an odd turn and without analysing the circumstances in which the arbitral proceedings took place, it ruled that the parties and the arbitrator cannot derogate from the express terms of the contract i.e. the time-limit expressed in the arbitration agreement was final and binding.

The approach adopted by the Court raises several questions. While the court did take 'waiver of right to object' into consideration – a principle which formed the focal point of the High Court judgment, it based its ruling on a separate ground without evaluating the facts in the light of Section 4 of the 1996 Act. Further, by holding that express terms of the arbitration agreement are final and binding, the Court ignored (or perhaps, rejected) the idea that contractual terms can be altered, or, at least waived off,[24] through the subsequent conduct of the parties.[25]

Role of a judge in interpretation of a contract is to find the true intention of the parties.[26] Though, Indian approach on contractual interpretation tends to focus more on the express terms of the contract,[27] courts have frequently placed reliance on

---

[22] P. Dasa Muni Reddy v. P. Appa Rao, (1974) 2 S.C.C. 725.
[23] *Supra* note 1, ¶ 20.
[24] I.N.G. Bank N.V. v. Ros Roca S.A., [2011] E.W.C.A. Civ. 353.
[25] Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partner Ltd., [1970] A.C. 583; *Shewchuk v. Blackmount Capital Inc.*, 2016 O.N.C.A. 912.
[26] Patrick S. Ottinger, Principles of Contractual Interpretation, 3 LOUISIANA LAW REVIEW 60 (2000) ; Larry A. DiMatteo, *False Dichotomies in Commercial Contract Interpretation*, 11 (1) JOURNAL OF INTERNATIONAL TRADE LAW AND POLICY, 27-43 (2012).
[27] Nabha Power Limited v. Punjab State Power Corporation Limited, (2018) 11 S.C.C. 508.

the surrounding circumstances and the conduct of the parties to reach to a interpret the terms of the contract.[28] Further, Indian courts also acknowledge that contractual dynamics may shift and parties may contract out of the written terms through their conduct.[29] In context of the stipulated time in the contract, court have ruled that parties may give a 'go-by' to such stipulation by subsequent conduct.[30] The decision of the Court in the present case is a complete neglect for the established jurisprudence on the contractual interpretation based on parties' conduct.

With respect to waiver, the importance of conduct of a party was emphasised by Denning LJ in *Charles Richards Ltd.* v. *Oppenhiem*. In a much celebrated judgment, he pronounced: "*If the defendant as he did led the plaintiffs to believe that he would not insist on the stipulation as to time and that if they carried out the work he would accept it and they did it he could not afterwards set up the stipulation in regard to time against them. Whether it be called waiver or forbearance on his part or an agreed variation or substituted performance does not matter. It is a kind of estoppel by his conduct he made a promise not to insist on his strict legal rights.*"

Indian Courts have heavily relied on this King's Bench ruling to determine the applicability of Section 4 of the 1996 Act.[31] According to the ruling, as long as the conduct of a party leads to other party in believing that it would not enforce its rights, waiver comes into picture. With respect to arbitration, it is often remarked that there is a contractual relationship between the parties and the arbitrator.[32] The Court has also affirmed this

[28] Khardah Company Ltd. v. Raymon & Co. (India) Private Ltd., (1963) 3 S.C.R. 183; Pure Helium India Pvt. Ltd. v. Oil & Natural Gas Commission, A.I.R 2003 S.C. 4519; Godhra Electricity Co. Ltd. v. State of Gujarat, 1975 (1) S.C.C. 199; Hindustan Wires Ltd. v. R. Suresh, 2013 S.C.C. Online Bom. 347.
[29] Mcdermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 S.C.C. 181.
[30] *Id.*; Arosan Enterprises Ltd. v. Union of India, (1999) 9 S.C.C. 449
[31] See Ram Chandra Rungta v. Ram Swarup Rungta, A.I.R. 2015 Cal. 24; K.S.R.T.C. v. M. Keshava Raju, A.I.R. 2004 Ker. 119.
[32] PHILIPPE FOUCHARD, R*elationships between the Arbitrator and the Parties and the Arbitral Institution*, in ICC, THE STATUS OF THE ARBITRATOR 12, 21-23 (ICC

view.[33] Indeed, as parties agree to submit their dispute to an arbitrator, a certain contract is deemed to have been emerged.[34] Consequently, principles such as good faith and estoppel do apply between an party and the arbitrator. Even assuming an absence of such relationship between the party and the arbitrator, the general principles of good faith, estoppel and of course, waiver, do apply between the parties to the arbitration. Since, in the present case, the claimants never intended to discontinue the arbitral proceedings, it is rightfully entitled to argue on waiver on the part of the defendant.

Drafting history of Article 4 reveals that there were major concerns regarding interpretation of the provision.[35] Vague terms such as 'without delay' or 'promptly' were ultimately substituted.[36] Nevertheless, courts have interpreted 'without undue delay' to mean after a party gets aware of an irregularity, the objection must be raised in the next scheduled hearing or written submissions.[37] It is observed that that waiver is deemed to have taken place "*when a party, knowing that an irregularity has been committed, does not object and, instead, participates in the arbitration proceedings without protest*".[38]

In a strikingly similar case where the mandate of the arbitrator was challenged on the ground that the time-limit to render the

---

Ct. Bull. Spec. Supp. 1995) and ICC FINAL REPORT ON THE STATUS OF THE ARBITRATOR, 7(1) I.C.C. Ct. Bull. 27, 29 (1996).

[33] Voestapline Schienen Gmbh v. Delhi Metro Rail Corpn. Ltd., (2017) 4 S.C.C. 665.

[34] S.N.F. S.A.S. v. Chambre de Commerce Internationale, Paris Court of Appeal of 22 January 2009, XXVIV Y.B. Comm. Arbitration 263 (2009).

[35] Summary Record for meetings on the UNCITRAL Model Law on International Commercial Arbitration, Part III, 308th Meeting, June 4, 1985 412-413. available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/308meeting-e.pdf.

[36] *Id.*

[37] CLOUT case No. 659 [Oberlandesgericht Naumburg, Germany, 10 Sch 08/01, 21 February 2002], http://www.dis-arb.de/de/47/datenbanken/rspr/olg-naumburg-az-10-sch-08-01-datum-2002-02-21-id166.

[38] K.S.R.T.C. v. M. Keshava Raju, A.I.R. 2004 Ker. 119; Mascon Multiservices and Consultants Pvt. Ltd. v. Bharat Oman Refineries Ltd., (2015) 7 Bom. L.R. 88.

award had come to an end, the Bombay High Court had ruled that the parties had waived their right to object as they failed to take 'clear and unambiguous stand' in front of the arbitrator with respect to enforcing time-limits.[39] The High Court in the said case also took into account the Court's ruling in *N.B.C.C. Ltd. v. J.G. Engineering Pvt. Ltd.* (hereinafter 'NBCC') but distinguished it and rightly held that NBCC Ltd. had not laid down an absolute proposition.[40] Similarly, in another ruling, Bombay High Court took into account factors such as "*agreeing to file pleadings and obtaining convenient time for hearing of the matter*" for reaching the conclusion that the petitioner had waived off his right to object.[41]

At this juncture, it must be noted that it was the defendants who had requested for a six-week extension for filing their written statement. Owing to their request, the arbitrator had granted a two weeks extension. Courts have often relied on such conduct of the parties as an indication of waiver.[42] In *Sh. Bhupinder Singh Bindra* v. *Union of India*,[43] the court held that where a party had consented to adjournment and had contributed to dragging the proceedings, it could not have later argued that the mandate of the arbitration had been terminated on account of his failure to render the award within the contractual time-limit.[44] In another ruling, delay on the part of the parties to file their written submissions on time was held be an indisputable evidence that the parties had waived off their right to object the time-limit set out in the arbitration agreement.[45] Both Indian as well as English

[39] Snehdeep Auto Centre v. Hindustan Petroleum Corporation Ltd., (2012) 6 Mah. L.J. 344.
[40] *Id.*
[41] Hindustan Wires Ltd. v. R. Suresh, 2013 S.C.C. Online Bom. 347.
[42] Sh. Bhupinder Singh Bindra v. Union of India, (1995) 5 S.C.C. 329; Hindustan Wires Ltd. v. R. Suresh, 2013 S.C.C. Online Bom. 347.
[43] *Id.*
[44] *Id.*
[45] Army Welfare Housing v. M/S Mathur & Kapare Associates Pvt Ltd., (2016) 235 D.L.T. 329.

courts have also ruled that a waiver can be implied[46] and where a should have reasonably known that a breach of the arbitration agreement may be committed, it is deemed have waived its right to object.[47] The series of foregoing decisions only strengthen the argument that that the issue of waiver was improperly dealt by the Court.

While it may be argued that the arbitrator was at fault for ignoring the time-limit, it is worth remembering that the arbitration proceedings had been plagued with considerable delay and was stayed on account of pre-arbitral court interference. Defendant had filed several petitions in the High Court and the Court on the ground that the arbitration agreement was invalid causing considerable delay and finally, substitution of the initially appointed arbitrator. As the court dismissed the petition on account of competence-competence,[48] the defendant had finally reserved the jurisdictional objections to be contended before the arbitrator. It has been previously held that where a party intends to raise jurisdictional objections before the arbitrator, the time-limit stipulated under the arbitration agreement is deemed to be waived.[49] The Court ought to have looked into this aspect of the case. Additionally, the defendants insisted an extension of six weeks for filing written statement and played substantial part in the delay of the proceedings.

The fact that the Court does not choose to address the much-detailed judgment of the High Court is also perplexing. There are also several crucial facts that the Court neglected in its analysis of Section 4. For instance, it was admitted by the defendant's

---

[46] Waman Shriniwas Kini v. Ratilal Bhagwandas & Co., 1959 Supp (2) S.C.R. 21; B.S.N.L. v. BPL Mobile Cellular Ltd., (2008) 13 S.C.C. 597; HUGH BEALE, CHITTY ON CONTRACTS 4-091 (32nd edn., Sweet and Maxwell); Hughes v. Metropolitan Ry., (1877) 2 App. Cas. 439.

[47] Reliance Industries Limited v. Union of India, [2018] E.W.H.C. 822 (Comm).

[48] The Arbitration and Conciliation Act, 1996, § 16.

[49] Mascon Multiservices and Consultants Pvt. Ltd. v. Bharat Oman Refineries Ltd., (2015) 7 Bom. L.R. 88.

counsel that the contention of time-limits should have been urged in the first preliminary meeting itself, however, owing to a miscommunication between the defendant and his counsel, the said contention was not raised.[50] Parties have a considerable say in deciding the time-frame of the proceedings.[51] In this case, the parties voluntarily agreed to a time-frame that practically nullified the time-limit set out in the arbitration agreement. With respect to the defendant, the overwhelming number of petitions filed by it before courts to delay the arbitral proceeding, its conduct during the arbitral proceeding as it sought six week extensions in an arbitration that it desired to be concluded be four months, and its decision to not object to the initial time-frame set by the arbitration ran inconsistent with their objection on the time-limits and made strong case for waiver.[52] Following the consistent jurisprudence on Section 4, it is safe to conclude that the parties waived their right to assert time-limit when they decided the timeline in the first meeting.

## V. The Court's Improper Reliance on NBCC Judgment

With respect to termination of the arbitrator's mandate, the court ruled that in absence of parties' consent, an arbitrator's mandate ends if it exceeds the stipulated time-limit for rendering the award in the contract. It seems a fairly correct observation as arbitrator's mandate depends on the terms of the arbitration agreement. However, the issue in present case was something else. The issue was whether the petitioners had waived off their right to object

[50] Jayesh H. Pandya v. Subhtex India Ltd., 2008 (5) Mah L.J. 749.
[51] PETER ASHFORD, *Preliminary Meeting*, in Peter Ashford (ed.), HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION 234 (2d ed., 2014); Tishta Tandon, *Section 29A: Time-Bound Arbitration, Have Arbitral Tribunal Become the Organs of the Court*, 7 (2) INDIAN JOURNAL OF ARBITRATION LAW, 152 (2019).
[52] EDWARD FRY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS 520 (6th edn., Sweet & Maxwell 2012); Karsondas Kalidas Ghia v. Chhotalal Moti Chand, (1924) I.L.R. 48 Bom. 259.

to the breach of the arbitration agreement. As discussed above, the Court sought to rely on its ruling in NBCC.[53]

However, court's reliance on NBCC is unfitting. In NBCC, the arbitration had been undergoing for over eight years.[54] The arbitrator did not only fail to dispose the matter within six months as ordered by the High Court, he could not publish the award even after his time period was extended twice by the parties. The court understood that after completion of the proceedings, there was no cogent reason for the delay caused. Hence, it was a case of an arbitrator's failure to act without undue delay as much as his termination of mandate. In NBCC, the Court took the less controversial route and ruled on the basis of terms of the contract. Either ways, the termination was justified. Thus, in effect, the court in NBCC did not lay down an absolute proposition.[55] Nor did the judgment rule out a contingency that conduct of the parties could mean that they do not intend to comply with the mandatory time limit.[56]

## VI. Conclusion

Arbitration's quick and efficient resolution is one of the many factors which makes it so popular in commercial contracts. It is remarked that "*the object of providing time limit for rendering an award by the arbitrator is aimed at expeditious resolution of the disputes rather than to leave the disputes unsettled or inconclusive on the expiry of the stipulated period*".[57] In the present case as well, parties included a four month period because at the time of concluding the agreement, they had intended a quick resolution of their disputes. However, it is frequently seen how the same parties that desire a quick resolution of dispute at the time of signing of the contract often resort to

---

[53] N.B.C.C. Ltd. v. J.G. Engineering Pvt. Ltd., Civil Appeal No. 8 of 2010.
[54] *Id.*
[55] Snehdeep Auto Centre v. Hindustan Petroleum Corporation Ltd., (2012) 6 Mah. L.J. 344.
[56] *Id.*
[57] Shyam Telecom Ltd. v. Arm Ltd., (2004) 77 D.R.J. 91.

delaying tactics after finding themselves on the wrong side of the dispute.[58] This case is a perfect example of how the same time limits that are included for quick resolution can be used to sabotage the arbitral proceedings.

In the past few years, the approach of Indian Courts towards arbitration has taken turns. Courts are frequently adopting an approach which supports arbitration and ensures its efficiency. There have also been efforts by both the legislature as well the judiciary to ensure quick resolution of disputes. However, this proactive role approach has also created some complications. Problems created by insertion of Section 29A[59] indicates that legislative changes may not be the solution and reinforces the belief that efficiency and integrity of the arbitral process is heavily dependent on the courts. Thus, between the leaps and bounds of the so-called 'pro-arbitration' approach, parties must not be allowed to take undue benefit of the contractual arrangement or the provisions of the Act. It could be achieved by taking into account the circumstances of the case the respective good faith of the parties. The Court has earlier opined that being commercial contracts, arbitration agreements should not be construed with a purely legalistic mindset.[60] As this case shows, a straitjacket approach in favour of the rigid contractual adherence does produce undesirable results.

[58] Chandok Machineries v. S.N. Sunderson & Co,. 2018 S.C.C. Online 11000; Johan Steyn, Remedies Against the Reluctant Respondent: The Position Under English Law, 5 (3) ARBITRATION INTERNATIONAL, 294-299 (1989); Cedric Harris, *Abuse of the Arbitration Process-Delaying Tactics and Disruptions – A Respondent's Guide*, 9 (2) JOURNAL OF INTERNATIONAL ARBITRATION, 7-92 (1992) ; J. Martin H. Hunter and Jan Paulsson, 'A Code of Ethics for Arbitrators in International Commercial Arbitration', 13 INT'L BUSINESS LAWYER, 153-160 (1985).

[59] Manini Brar, *Implications of the New Section 29A of the Amended Indian Arbitration and Conciliation Act, 1996*, 5 (2) INDIAN JOURNAL OF ARBITRATION LAW, 113-128 (2017); Tishta Tandon, *Section 29A: Time-Bound Arbitration, Have Arbitral Tribunal Become the Organs of the Court*, 7 (2) INDIAN JOURNAL OF ARBITRATION LAW, 146-160 (2019).

[60] Enercon (India) Ltd. v. Enercon Gmbh, (2014) 5 S.C.C. 1.

Published by the student body of the Indian Arbitration Law Review, and printed by Aquarius Publishers, Bhopal.