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CORRUPTION DEFENCE AND THE DOCTRINE OF ESTOPPEL IN INVESTOR-STATE DISPUTES

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Abstract

Definitional requirements of "investment" are a pre-requisite needed to be satisfied in order to invoke the jurisdiction of an investment tribunal. For these purposes, the term 'investment' is defined by the contracting states under their respective bilateral investment treaties (BIT). The primary requirement for an investment to be legal is that it shall be in consonance with the laws of the host State. The investor is vested with the right to be treated fair and equitably (FET) as required under substantive protections guaranteed under BITs as well as minimum standard treatment under customary international law. Ambiguity arises in cases where the investment has been acquired through corrupt practices. More often than not, the State officials are involved in the fraudulent transactions. However, it is the investor that has to bear the consequences of entering into such an arrangement. The paper has been divided into three parts that address the issue of corruption defence and the applicability of doctrine of estoppel in arbitral proceedings. Firstly, the paper aims to address the attitude of the arbitral tribunals in cases involving the corruption defence. Secondly, the paper looks into the applicability of the doctrine of estoppel in investment arbitration. Lastly, the paper aims to look into the appropriate course of action that could be adopted in such cases.

I. Introduction

Liberal economic structures have brought about greater interdependency in the world owing to proliferation of trade and

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commerce among nations.[1] As a result of increased trade, the need for protection of investments on foreign soil becomes a matter of concern for individuals and governments alike.[2] Bilateral Investment Treaties (BITs) between states have served the purpose of guiding investments on foreign soil.[3] In fact, there has been a substantial spike in the number of investment treaties concluded in the last two decades.[4] The spike in BITs is symbolic of the desire of each state to guarantee investment protection to private investors in order to attract investments.[5]

The BIT between the contracting states forms the substantive law (*lex specialis*) governing arbitrations instituted in the event a dispute arises with respect to protection standards envisaged under the treaty.[6] These contracting States therefore define 'investment' as per their requirements, a fundamental aspect of which, is, that an 'investment' is '*it must be in invested in accordance with the law of the host state*'.[7]

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1 John R. Oneal et al., *The Liberal Peace: Interdependence, Democracy, and International Conflict*, 1950-85, 33 J. OF PEACE RES. 11–28 (1996).

2 *Foreign Direct Investment for Development, Maximising benefits, Minimising Costs*, OECD, 2002, (Sep. 27, 2018, 3:31 PM) https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf, (Sep. 27, 2018, 3:31 PM).

3 Helena Sprenger, *The Importance of Bilateral Investment Treaties (BITs) When Investing in Emerging Markets*, (Sep. 27, 2018, 3:31 PM), https://www.americanbar.org/groups/business_law/publications/blt/2014/03/01_sprenger.html.

4 Antonio R. Parra, *ICSID and the Rise of Bilateral Investment Treaties: Will ICSID be the Leading Arbitration Institution in the Early 21st Century*?, PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) Vol. 94 (April 5-8, 2000), pp. 41-43, (Sep. 20, 2018, 4:31 PM) https://www.jstor.org/stable/25659347?seq=1#page_scan_tab_contents.

5 Christoph Schreuer, *Investments, International Protection*, (Sep. 22, 2018, 9:31 PM) https://www.univie.ac.at/intlaw/wordpress/pdf/investments_Int_Protection.pdf.

6 ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (2012).

7 Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction (April 29, 2004) ¶74.

In the nature of transactions between states and investors, there are more often than not traces of bribery or corruption.[8] Owing to involvement of such illicit means, an investment founded on corruption is, as per the scope of an investment laid down in most modern BITs, illegal.[9] States often escape their liabilities under the BIT by claiming illegality of investment..[10] The effect of such claim, if proved, renders ICSID tribunals to decline jurisdiction over the dispute.[11]

It flows logically and has been observed by many noted authors that a transaction concluded on the basis of bribery and corruption is bound to be clandestine.[12] Unlike a private transaction, wherein, the contract is voidable at the request of any of the parties in case of a fraudulent transaction, in investor-State disputes, only the investor bears the risk of entering into such an arrangement. This problem has been seen in a plethora of arbitral awards, wherein State actors have initially promoted a corrupt investment but this allows for the State to subsequently claim illegality of investment when questioned on the treatment accorded to the investors.[13] In certain cases, corruption may be

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8 Jason Yackee, *Investment Treaties and Investor Corruption: An Emerging Defence for Host States?*. (Sep. 27, 2018, 3:55 PM) https://www.iisd.org/itn/2012/10/19/investment-treaties-and-investor-corruption-an-emerging-Defence-for-host-states/.

9 Ferry Ardiyanto, *Foreign Direct Investment and Corruption*, 2-12 (2012), (Sep. 27, 2018, 3:10 PM) https://dspace.library.colostate.edu/bitstream/handle/10217/71542/Ardiyanto_colostate_0053A_11539.pdf?sequence=1.

10 Margareta Habazin, *Investor Corruption as a Defence strategy of Host States in International Investment Arbitration: Investors Corrupt acts gives an unfair advantage to Host States in Investment Arbitration*, 18 CARDOZO JOURNAL OF CONFLICT RESOLUTION, 805-828 (2017).

11 Metal-Tech Ltd v The Republic of Uzbekistan, ICSID Case No. ARB/10/, Award (October 4, 2013).

12 United Nations, *Declaration against Corruption and Bribery in International Commercial Transactions*, (December 16, 1996), 36 Int'l Legal Materials 1043 (1997); UN General Assembly, *United Nation Convention Against Corruption*, (October 31, 2003), A/58/422.

13 World Duty Free Company Limited v The Republic of Kenya, ICSID Case No. ARB/00/7, award (October 4, 2006) ¶172., Yukos Universal Ltd. V. The Russian Federation, UNCITRAL, PCA Case No. AA 227 (July 18, 2014),

so ingrained in the system that the investor has no choice but to bribe the public officials to obtain the investment.[14] This provides a very convenient platform for the State to expropriate the investor's assets and later claim illegality of investment based upon the charges of corruption.

Therefore, the issue that arises is that if state is benefitting out of the investment that it has itself allowed illegally, why should it not be put on the same pedestal as the investor. This paper seeks to study the approach of various investment arbitration tribunals and critically analyse the same to conclude by suggesting an approach best suited to look at such investments in consonance with the principles of international law.

II. Approach of tribunals in cases involving corruption defence

Investment tribunals have more often than not held investments found on corruption to be illegal and therefore denied jurisdiction over such disputes.[15] The earliest of such decisions was rendered under the auspices of the International Chamber of Commerce. Judge Lagergren, who presided over the tribunal in ICC Case No. 1110 was the earliest notable case to deny jurisdiction due to presence of corruption in acquisition of investment.[16] He opined that such corruption, even if absolutely necessary to initiate an investment in a particular jurisdiction, is unacceptable and must render the investment invalid.[17]

¶1369., Gustav FW Hamster GmbH & Co KG v. Republic of Ghana, ICSID Case no. ARB/07/24, Award (June 18, 2010), ¶123.

14 Florian Haugeneder, *Corruption in Investor-State Arbitration*, 10(3) J. WORLD INV. & TRADE 323, 330 (2009).

15 Florian Haugeneder, I*nvestment Arbitration - Corruption and Investment Arbitration: Substantive Standards and Proof,* KLUWER ARBITRATION, 1-31, 2012, https://law.yale.edu/system/files/documents/pdf/sela/Haugeneder_Liebscher_Corruption.pdf.

16 ICC Case No. 1110 of 1963.

17 *Id.*

The basic strand of reasoning that runs behind such decisions is that corruption is illegal in most jurisdictions and contravenes the principles of transnational public policy.[18] Transnational public policy refers to "*fundamental rules of natural law, principles of universal justice, jus cogens in public international law, and the general principles of morality accepted by civilised nations*".[19] It is an accepted principle that in case of violation of international public policy, the other party's conduct is rendered irrelevant for the purpose of the tribunal's adjudication.[20] The investor is simply unable to assert a claim in investment treaty arbitration by reason of his/her own misconduct.[21] The idea is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.[22] Therefore, irrespective of the involvement of the State in the corruption, the illegal act on part of the investor renders his claims invalid as the investment stops being protected by the BIT. By implication of such denial of jurisdiction, the state gets a clean chit. In cases where the state has induced corruption or created circumstances wherein indulging in corruption was necessary in order to make the investment, the state is in the wrong.[23] Not punishing the state, therefore, itself runs against the principle of *'nemo auditur*

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18 World Duty Free Comp. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006) ¶181.

19 ICC Case No. 7047 (1994); Wena Hotels Ltd v The Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award (December 8, 2000); ICC Case No. 3916(1982).

20 Nartnirun Junngam, *Public Policy in International Investment Law: The Confluence of the Three Unruly Horses*, 51 TEXAS INT'L LJ, 67-100 (2016)

21 Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, 29(1) ICSID REV., 180, (2014).
World Duty Free Comp. v Republic of Kenya, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006), ¶162 & 179.

22 Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013) ¶389

23 Mark W Friedman, *Corruption in International Arbitration: Challenges and Consequences*, GLO. ARB. REV. (2017)

turpitudinem allegans'[24] which means that no one can be heard to invoke his own turpitude. In extension to this maxim is another, i.e. "*in pari causa turpitudinis cessat repetitio"* which means that where both parties are guilty, no one may preclude a court from intervening in a dispute involving an unlawful transaction. It can clearly be seen that the conventional course of action creates a dichotomy in law.

State officials and employees are often involved in making corrupt representations and indulging in other corrupt practices.[25] Moreover, in most cases of corrupt investments, the State knowingly overlooks the corrupt practices for a substantial amount of time. Thus, in such cases, as acknowledged by various ICSID tribunals, it is not righteous to allow the State to use the corruption defence only when a claim lies against them for the violation of investor rights.[26] The State would be estopped from raising violations of its own law as a jurisdictional defence when it knowingly overlooked them and endorsed an investment which was not in compliance with its law.[27] It is an accepted proposition that in cases where the State did not prosecute anyone, it cannot claim illegality of investment on grounds of corruption.[28]

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[24] Andrew Newcombe, *The Question of Admissibility of Claims in Investment Treaty Arbitration*, KLUWER ARBITRATION BLOG (2010).

[25] Florian Haugeneder, *Investment Arbitration - Corruption and Investment Arbitration: Substantive Standards and Proof*, KLUWER ARB., 1-31, (2012)

[26] Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, Award (February 6, 2008) ¶120; Fraport AG Frankfurt Airport Services Worldwide v Philippines, ICSID Case No ARB/03/25, IIC 299, Award (August 16, 2007) ¶346. Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine, ICSID Case No ARB/08/0, IIC 431, Decision on Jurisdiction (March 8, 2010), ¶140; H & H Enterprises Investments Inc v Arab republic of Egypt, ICSID Case No ARB/09/15, IIC 542, Decision on Jurisdiction (June 5, 2012), ¶52-54; Railroad Development Corp v Guatemala, ICSID Case No. ARB/07/23, Award (June 29, 2012), ¶144-7.

[27] Fraport AG Frankfurt Airport Services Worldwide v Philippines, ICSID Case No ARB/03/25.

[28] Brody Greenwald, *The Viability of Corruption Defences in Investment Arbitration When the State Does Not Prosecute*, 2015, (Sep. 30, 2018, 1:15

In the case of *Metal-Tech vs. Uzbekistan*, the respondent State successfully used the corruption defence to evade liability.[29] Metal-tech had entered into a joint venture with two Uzbek companies. The dispute arose when the joint venture failed to distribute the unpaid dividends and a bankruptcy proceeding was intimated against it. In response to allegations pertaining to bribery against Metal-tech, the tribunal stated that it lacked jurisdiction as the investment of Metal-tech in Uzbekistan was underpinned with corruption.[30] Holding that the Respondents prevailed, the tribunal merely asked them to share the cost of proceedings with the other party owing to the efforts made by Metal-tech to minimise the costs.[31] The *Metal-Tech* case has triggered an increased level of due diligence of foreign investors prior to making investments in a foreign territory.

The case of *Wena Hotels vs. Egypt* is another landmark decision in this regard. The tribunal, after placing all facts and evidence on record, held that it could not immunise Egypt of its liability because it had not prosecuted the consultants involved in corruption, in spite of having proper knowledge of the same.[32] Moreover, the Paris Court of Appeal has also held that mere allegations without indicting or prosecuting the alleged beneficiaries of the corruption was an insufficient basis to decide in favour of the State.[33] Therefore, there has been an ambivalent

PM) https://www.ejiltalk.org/the-viability-of-corruption-Defences-in-investment-arbitration-when-the-state-does-not-prosecute/.

29 Metal-Tech Ltd. v. The Republic of Uzbekistan, ICSID Case No ARB/10/3, Award (October 4, 2013) ¶110.

30 Stefanie Schacherer, Metal-Tech Ltd. v. The Republic of Uzbekistan, Investment Treaty News, (Oct. 18, 2018, 11:59 PM) https://www.iisd.org/itn/2018/10/18/metal-tech-v-uzbekistan/.

31 Metal-Tech Ltd. v. The Republic of Uzbekistan, ICSID Case No ARB/10/3, Award (October 4, 2013) ¶421.

32 Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award (Decembers 8, 2000) ¶116.

33 Shaparak Saleh, *Protection of States' Diplomatic Assets in France*, KLUWER ARBITRATION BLOG, 2018, (Sep. 27, 2018, 3:31 PM)

attitude of investment tribunals while dealing with the Corruption defence of the Respondent States. The following section examines the applicability of Doctrine of Estoppel and whether it is the appropriate course of action.

III. Applicability of the Doctrine of Estoppel

It is a general principle of state responsibility in international law that the states can be held liable for the conduct of its officials, when exercising elements of the governmental authority.[34] Therefore, the actions of the state officials bind the State and it can be held accountable for the same. It is from this principle, that the applicability of the doctrine of estoppel in international law originates. Estoppel, as a principle of international law, bars the State from reversing certain affirmations made by it.[35] The genesis of the doctrine lies in the established principle *'nullus commodum capere de sua injuria propria'* i.e. no one can be allowed to take advantage of his own wrong.[36] Therefore, as the corruption can be attributed to the State as well, granting complete immunity to the State is against the international principle of rationality and proportionality.

The application of doctrine of estoppel to investor-State disputes has not found much support in international investment law.[37] The doctrine of estoppel does not normally bar a State from raising a corruption defence. The application of the doctrine of estoppel must involve a clear statement of fact which is voluntary,

http://arbitrationblog.kluwerarbitration.com/2018/02/21/protection-states-diplomatic-assets-france/.

34 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 7, (2001).

35 L.C. MacGibbon, *Estoppel in International Law*, 7, INT'L & CO. L.Q., 512 (1958).

36 Charles T. Kotuby, *General Principles of Law, International Due Process and the Modern Role of Private International Law*, 23 DUKE J. OF COMP. AND INT.L.423-428 (2013).

37 Andreas Kulick, *About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals*, 27 EURO. J. OF INT. L, 108-115 (2016).

unconditional and authorized and is also relied on to the other party's detriment.[38]

Bribes are almost always concealed, and corruption is almost universally prohibited.[39] The doctrine of estoppel is only applicable as a rule of international law when the State has made positive affirmations triggering the actions of the investors.[40]

However, considering the clandestine nature of transactions, it becomes doubtful that any investor would be able to demonstrate that they relied to their detriment on a clear, unconditional, and authorised statement by the State, that it would be lawful to pay a bribe. Herein, another contention that a State may raise to its defence is that it cannot be held responsible for the unlawful conduct of its officials who are not "*cloaked with governmental authority*". It follows that the State may not be liable for the private acts of the officials, "*where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State.*"[41] In most cases, the officials indulge in corruption act outside the scope of their employment in pursuance of their personal interests.[42] The 'scope of

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38 Derek Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, 33 BYIL. 176,202 (1958); Pan American Energy LLC v. Argentina, ICSID Case no. ARB/03/13, Award (July 27, 2006) ¶151.

39 Maziar Jamnejad, *World Duty Free v The Republic of Kenya: a Unique Precedent?*, CHATHAM HOUSE (Aug 7, 2018, 11:16AM) https://star.worldbank.org/corruption-cases/sites/corruption cases/files/documents/arw/Moi_World_Duty_Free_Chatham_House_Mar_28_2007.pdf.

40 Government of the Province of East Kalimantan v. PT Kaltim Prima Coal et al., ICSID Case No. ARB/07/3, Award (Dec. 28, 2009), ¶211.

41 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Nov. 2001, Supplement No. 10 (A/56/10), chap. IV.E.1.

42 Camille I. Aromas, *The Corruption Defence : An Asymmetrical Treatment Between the Investor and the Host State*, (Sep. 27, 2018, 3:31 PM) https://divinalaw.com/corruption-Defence-asymmetrical-treatment-investor-host-state/.

employment' of the State officials cannot be extended to actions undertaken privately and for individual gains.[43]

The idea behind holding the claimant liable is the principle of public policy, namely '*ex dolo malo non oritur actio'* that states that no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.[44] The law protects not the litigating parties but the public or in this case, the mass of tax-payers and other citizens of the country.[45] Therefore, as the investor is unable to establish his claims without relying on an illegal act, his claims are barred by the doctrine of clean hands.[46] On similar grounds though, a complicit state's defence is also based on an illegal act. Therefore, the consequence of granting immunity to the State is that both the parties to the agreement are being treated differently based upon the same factual matrix.

IV. Appropriate Course of action

The practice of using corruption defence to evade liability arising from breach of treaty obligations towards investors is a serious issue affecting the fairness of investment treaty arbitration.[47] It is essential for tribunals to balance the risk between both the parties and accord equal treatment to them.[48] The burden of entering into an agreement based on fraudulent activities falls only on the investor in case the State is allowed to use the corruption defence

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43 Howard Whitton, *Implementing effective ethics standards in Government and the Civil Service*, (Sep. 17, 2018, 4:30 PM) https://www.oecd.org/mena/governance/35521740.pdf.

44 Public Policy - General Principles: As to the first, in 1 CHITTY ON CONTRACTS at ¶17-007 (7 ed.).

45 World Duty Free Comp. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006) ¶181.

46 Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008), ¶141.

47 ALOYSIUS P. LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION (2014).

48 Carolyn B. Lamm, *Fundamental Rules of Procedure: Whose Due Process is it?*, 2014, (Sep. 27, 2018, 3:31 PM) https://www.arbitration-icca.org/media/3/14246917853210/lamm_fundamental_rules_of_procedure_whose_due_process_is_it.pdf.

to its advantage.[49] While investor must not be absolved of their wrongdoings, they should not be the only party bearing the brunt of the corrupt transaction.[50] Despite not changing the practice, the *Metal-Tech* tribunal did acknowledge that blanket immunity for the defendant party can lead to an unsatisfactory outcome in cases of corruption.[51] The prevailing practice allows the State, in such cases, to get away by sharing the cost of proceedings and is granted immunity from any further liability.[52]

The corruption defence encourages the State to enter into corrupt transactions at the acquisition of the investment, treat the investment in an unfair and arbitrary manner by expropriating it and later claim the corruption defence.[53] Therefore, in order to deter such an attitude, the State must be equally liable and must be estopped from raising the claim of immunity in cases wherein it has induced the corruption. In such a scenario, even though, the investment becomes illegal owing the provisions of the BIT, the tribunal should not rule out its jurisdiction. Instead, certain alternatives should be delved upon to ensure that both the parties bear the same risk and are treated equally.

If the investment of the investor has been actively promoted by the Host State for a substantial period of time despite being fraudulent at the time of inception, then the Host State should

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49 Michael Hwang S.C, *Corruption in Arbitration- Law and Reality*, (Sep. 27, 2018, 3:09 PM) https://www.arbitration-icca.org/media/4/97929640279647/media013261720320840corruption_in_arbitration_paper_draft_248.pdf.

50 Jason Summerfield, *The Corruption Defence in Investment Disputes: A Discussion of the Imbalance Between International Discourse and Arbitral Decisions*, 7 TDM 1 (2009).

51 Metal-Tech Ltd v The Republic of Uzbekistan (ICSID Case No. ARB/10/3)

52 Ruth Cowley, *Investor corruption: Bribery at centre of failed investor claim*, (Sep. 27, 2018, 3:12 PM) http://www.nortonrosefulbright.com/files/investor-corruption-115917.pdf.
Jason Yackee, *Investment Treaties and Investor Corruption: An Emerging Defence for Host States*, 2012, (Sep. 27, 2018, 3:31 PM) https://www.iisd.org/itn/2012/10/19/investment-treaties-and-investor-corruption-an-emerging-Defence-for-host-states/.

not be granted the privilege of using the corruption defence merely because certain claims of unfair and unjust treatment lie against them. It is against the principles of international law to recognise claims arising out of an investment based on fraudulent conduct.[54] It is further against the principles of international law to allow the State to use its own wrongdoings to its advantage.[55] Therefore, in order to create a balance, if it can be established that obtaining the investment without indulging in corrupt acts was impossible or such indulgence was induced by the state itself, then the State shall be estopped from raising the plea of illegality on the grounds of bribery or corruption. The quantum of compensation for the investors must depend on the performance of the investment.[56]

V. Conclusion

There is often distrust involved when a dispute arises between the investor and the foreign State. In order to evade the compensation sought, the Host State always is on the lookout to find defences under the BIT to elude the jurisdiction of the tribunal. One of the common defences used by the Host State is the corruption defence wherein the Host State claim that the investors indulged in fraudulent actions at the inception of the investment. There is an accepted principle that an international tribunal shall not hear a case that is created in violation of principle of good faith. The allegations of corruption make the investment illegal under the BIT and ousts the jurisdiction of the

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54 Michaela Halpern, *Corruption as a complete Defence in Investment Arbitration or part of a balance*?, 23 WILL. J. OF INT. L. & DIS. RES., 297-318 (2016)

55 Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, 29 ICSID REV.,180, (2014).
World Duty Free Comp. v Republic of Kenya, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006) , ¶162 & 179.

56 Metal-Tech v Uzbekistan: *No Jurisdiction Because of Corruption* (Sep. 27, 2018, 6:31 PM), http://www.cisarbitration.com/2013/12/16/metal-tech-v-uzbekistan-no-jurisdiction-because-of-corruption/

tribunal itself. This provides a convenient platform for the State to indulge in corrupt agreements with the investors and subsequently immunise itself from any liability by preparing a corruption defence. Using this defence, the investors are usually forced to pay bribes by the state officials at the time of entering into an agreement. Thereafter, the State easily treats the investors in an unjust manner by expropriating their investment with the freedom of later claiming illegality of investment.

The tribunals must attempt to strike a balance between the risk bore by both the parties in a contract. As it is only the State that can claim the corruption defence, it is detrimental to the interest of the investors. Therefore, the State must be held equally liable and the tribunal must continue to have jurisdiction to hear the dispute. The parties must together claim responsibility of entering into a corrupt agreement and the State must not be completely immune. The principle of estoppel shall disallow the State from raising the claim of illegality when they have authorised the investment previously. When the Host State knowingly overlooks any illegality in the inception or performance of the investment, the claims of the investor shall be admissible before the tribunal.

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THE INTERIM AWARD PUZZLE IN THE INDIAN ARBITRATION REGIME: FUTURE COURSE

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Abstract

The grant of Interim Awards is a lesser opted method but not a novel concept in Indian arbitration proceedings, with its use being traced back to the inception of the Arbitration & Conciliation Act, 1996 itself. This seemingly straightforward provision however, suffers from uncertainties which obstruct the pro-arbitration atmosphere currently prevailing in Indian courts. As the jurisprudence on the subject is limited, this article reviews the judicial treatment of the provision until now in the context of pragmatic realities like costs, possibility of use of the provision as a delay tactic, and the limited statutory prescription. In the light of the recent observations of the Supreme Court in the Bhadra Products case, which recommended to the Parliament to club the challenge of interim award with the final award under Section 34 to avoid 'piecemeal challenges' and reduce costs. It becomes necessary to evaluate the far-reaching consequences of taking away of such recourse from parties at the interim stage. In addition, the article also questions the considerable discretion of the tribunal and subsequently the courts, upon which the application of the provision relies. The article also touches upon the peripheral issue of the grant of interim award on admitted liability and whether it is permitted to contract out of Section 31(6) of the Act. Considering the deficiency of discussion on the aforesaid provision in the 246th Law Commission Report recommendations and Arbitration & Conciliation (Amendment) Act 2018, this article explores the need and extent to which the interim award provisions should be amended for a greater degree of certainty, uniformity and compliance with international standards.

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I. Introduction

"Arbitral award" is defined in Section 2(1) (c)[1] of the Arbitration and Conciliation Act, 1996 ("the Act") as including an "interim award", also occasionally fashioned as a "partial award". Sub-section (6) of Section 31 of the Act empowers the Arbitral Tribunal to make an interim award on "*any matter with respect to which the Tribunal may make a final arbitral award*"[2]. There are broadly two ways in which an interim award takes effect; an interim arbitral award is can be in its essence a final award, as it conclusively determines the rights and liabilities of parties on an issue and is binding upon them[3], and interim in the sense that it is made at the interim stage[4] wherein the arbitral tribunal has *not* become *functus officio* and secondly, if the form of the award is such that it is intended to have effect only so long as the final award is not delivered, it will have the force of the interim award and it will cease to have effect once the final award is made[5]. It is a common method used by tribunals to delineate the issues (like jurisdiction, liability, applicable law, etc.) in dispute and, where appropriate, determine some issues at an early stage of the proceedings[6]. A 2012 survey by the Queen Mary University in collaboration with White and Case LLP found that partial or interim awards are issued in one third of international arbitral proceedings[7], highlighting the need to exact its principles in the domestic

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1 Arbitration & Conciliation Act 1996 § 2(1)(c).
2 Arbitration & Conciliation Act 1996 § 31(6).
3 Satwant Singh Sodhi v. State of Punjab, (1999) 3 SCC 487, ¶6.
4 McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181, ¶68-70.
5 Satwant Singh Sodhi v. State of Punjab, (1999) 3 SCC 487, ¶6.
6 Harsh Hari Haran, *Do Parties Need Recourse against Interim Awards?,*WOLTERS KLUWER ARBITRATION (Oct. 3, 2018, 11 AM), http://arbitrationblog.kluwerarbitration.com/2018/09/06/parties-need-recourse-interim-awards/.
7 Queen's Mary, White & Case LLP, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, p. 38,* http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2012_International_Arbitration_Survey.pdf.

arbitration regime. It is important to differentiate an interim award under the Act from an interim/partial award granted by an emergency arbitrator in some international and institutional arbitrations. Under the Act, an interim arbitral award can be challenged under Section 34 of the Act by the virtue of it being included in the definition of an 'arbitral award'. Additionally, an arbitrator has the discretion to submit more than one interim awards[8]. The grant of interim awards in India thus stands on two unstable pillars; uncertain components of an interim award and, its fluctuating judicial treatment.

II. Compositional Uncertainty: Determining the Nature of Interim Award

The Indian arbitration regime *vis-a-vis* the Act, provides for submission and the subsequent challenge of an interim award, however, it neither defines what constitutes an interim award nor provides clarity on the fine line separating such an award from an interim *measure* under Section 9 and Section 17 of the Act. Determining the nature of the 'award' becomes necessary while accurately identifying the statutorily mandated recourse against it, as a jurisdictional award and an interim measure attract challenge under Section 34[9] and Section 37[10] of the Act, respectively.

The Hon'ble Supreme Court seems to have indicated that one of the tests for an order to partake the character of an award or an interim award is that the decision must be of a dispute or claim

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8 ONGC v. Anil Construction Co., AIR 2000 Guj 284.

9 Wording of Section 34 provides that recourse against an 'arbitral award' may be made only by an application for setting aside the award in accordance with sub-section (2) and (3) of Section 34. Since, sub-section (c) of Section 2 provides that an arbitral award shall include an interim award, it is necessarily concluded that an interim award can also be challenged only under Section 34 of the Arbitration Act.

10 Clause (b) of sub-section (1) of Section 37 and clause (b) of sub-section (2) of Section 37 provide for appeal against orders granting or refusing to grant any interim measure under Section 9 and Section 17 of the Act respectively.

arising out of, or relating to, the agreement.[11] It has been observed that it would not be conducive to interpret the decision of the Joint Arbitration Committee with regard to the venue to be an interim award, conferring a right of challenge to an aggrieved person under Section 34 of the Act.[12] By an interim award, the arbitrator has to decide a part of the dispute referred to him; he may determine some of the issues or some of the claims which form a part of the dispute.[13] Where the tribunal merely recorded the finding that a majority of the shareholders did not want a division of the properties of the company, such statement of factum did not constitute an interim award. Thus, in such circumstances, it was held that it was not an appropriate stage for filing of an application under Section 34 of the Act.[14]

Difference between "interim award" and "decision on jurisdiction"

Another contentious issue raised in this regard have been cases wherein interim awards have been made on seemingly jurisdictional issues thereby raising questions of their treatment either as an award under Section or an interim award under Section 31(6) of the Act. After grappling with the issue of limitation in *NTPC vs. Siemens*[15], the Supreme Court has recently ruled in *M/s Indian Farmers Fertilizer Co. vs. M/s Bhadra Products*[16], that an award on the issue of limitation is to be treated as an interim award and can be challenged under Section 34[17] of the Arbitration Act. The Supreme Court held that as long as the award finally decides an issue between the parties, it was an

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11 Sanshin Chemicals Industry v. Orientals Carbons & Chemicals Ltd., (2001) 3 SCC 341.

12 *Id.*

13 1 A. WADHWA & A. KRISHNAN, JUSTICE RS BACHAWAT'S LAW OF ARBITRATION 1684 (6 ed. Lexis Nexis 2018).

14 Deepak Mitra v. D.J. Alld., AIR 2000 All 9.

15 National thermal Power Corporation Ltd. v. Siemens Atkiengesellschaft, (2007) 1 Arb LR 377.

16 M/s Indian Farmers Fertilizer Co. v. M/s Bhadra Products, 2018 SCC Online SC 38, ¶16, 29.

17 Arbitration & Conciliation Act 1996 § 34.

interim award binding on the parties[18]. Further, the issue of limitation was distinguished from a *jurisdictional* issue in the sense that issues of jurisdiction are the ones which are solely prescribed under Section 16 of the Act, such as, questions of validity of an arbitration agreement, constitution of the arbitral tribunal, and whether the subject matter of dispute is covered under the arbitration clause, and hence, in the present case the drill under Section 16 could not be followed. In *Noida Toll Bridge Co. Ltd. vs. Mitsui Marubeni Corporation*[19], it was held by the court that a decision of the arbitral tribunal which is not concerned with the competence of the tribunal, but deals with a legal infirmity attributed to the claim in itself, is an interim award and cannot be taken as a decision on the jurisdiction. Therefore, a decision of the arbitral tribunal that an unregistered partnership firm is entitled to make claims before it and the statutory bar under Section 69 of the Partnership Act, 1932 is inapplicable, was held to be an interim award and not a decision on the jurisdiction of the tribunal.[20]

Difference between "interim award" and "interim measure"

It is pertinent to note that, an interim measure has to be differentiated from an interim award by examining the object of the order and degree of conclusiveness of rights and liabilities of the parties. An interim order is in the nature of an interim measure of relief granted for the preservation of certain rights of the parties.[21] An interim award passed ostensibly under Section 17,

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18 Naval Sharma, Shriya Luke, *India: Interim Award On Limitation Can Be Challenged Under Section 34 Of The Arbitration & Conciliation Act 1996*, MONDAQ (7 Oct., 2018, 12 PM) http://www.mondaq.com/india/x/667478/trials+appeals+compensation/Interim+award+on+limitation+can+be+challenged+under+Section+34+of+the+Arbitration+Conciliation+Act+1996.

19 Noida Toll Bridge Co. Ltd. v. Mitsui Marubeni Coporation, (2005) 3 Arb LR 234.

20 *Id*.

21 Adya Pandey, *Tracing the Steps of Emergency Arbitration in India*, THE WORLD JOURNAL ON JURISTIC POLITY, 1, 5(2017).

but with no intention of providing protection of the subject matter, cannot be taken to be as an order of interim relief[22]. Even though the arbitrator states that the award is made under Section 17 and also awards security, it does not affect the nature of the award as an award contemplated to be an interim award under Section 31(6).[23] A mandatory award directing payment of certain sums by one party to the other based on a prima facie determination on the *lis*, but not being in the nature of a final determination of the rights of the party, has been held to be an interim award, falling within ambit of Section 31(6).[24] An interim arrangement differs from both, an interim award and an interim measure in the sense that it is intended to have force till the time proceedings are subsisting and any such arrangement provided for in arbitration proceedings has been held to have ended with the final disposal of the proceedings.[25]

Therefore, from the above discussion, it can be inferred that the terms of reference, conclusiveness of substantive rights and the proximity of the issue with the contract will have bearing on the question of determining the nature of a decision as an interim award. The decision in *Bhadra Products*[26] has also to a great extent differentiated jurisdictional awards from interim awards. Despite the encouraging developments, it can be observed that the precedential parameters set are extremely subjective, which can be swayed in either direction. Considerable reliance has to be placed upon the wisdom of the tribunal and the court in dealing with the intricate issues of orders, awards and jurisdiction.

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22 1 A. WADHWA & A. KRISHNAN, JUSTICE RS BACHAWAT'S LAW OF ARBITRATION 1686 (6 ed. Lexis Nexis 2018).

23 Asian Electronics Ltd. v. M.P. State Electricity Board, (2007) 3 MPLJ 203 (DB).

24 *Supra* note 23.

25 Nand Singh v. Hazoor Singh, (1996) Supp Arb LR 453 (Del).

26 M/s Indian Farmers Fertilizer Co. v. M/s Bhadra Products, 2018 SCC Online SC 38, ¶20-28.

III. Judicial Treatment of Interim Awards: Special Focus on Discretion, Recourse and Enforceability

Discretion of the Tribunal: How much is too much?

With respect to the scope and threshold of judicial interference, the Courts have frequently respected the arbitral tribunal's discretion in the grant of an interim award. The Bombay High Court has held that it is 'reasonable' and 'moderate' and in interest of both the parties to order the consortium of lenders to wait for arbitrators to pass the interim award to claim their monies.[27] The Court further clarified that if the interim award was not in favour of the debtor, the lenders would be at liberty to immediately take steps to enforce the pledged security of 20,00,000 shares of the company without further referring the matter to the Court.[28] It is a recognized principle, both as a matter of authority and as a matter of principle that the arbitral tribunal has the complete discretion to decide whether or not to pass an interim award.[29] Hence, a notice of motion in arbitral appeal was dismissed as there was no question of law raised by the manner in which the majority arbitrators exercised their discretion and there was no basis on which the exercise of their discretion could be challenged.[30]

It can be observed that in the absence of any agreement to the contrary, the arbitrators have considerable discretion in the grant and subject matter of the interim award which, consequently can cause lesser uniformity and certainty, lowering the attractiveness of India as a seat of arbitration. To counter this, the Courts have

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[27] Kalyan Sangam Infratech Ltd v IDBI Bank Ltd, 2015 SCC OnLine Bom 2055.

[28] Lenders can claim dues only after passing of Interim Award, SCC (*Oct. 5, 2018, 5 PM) https://blog.scconline.com/post/2015/05/06/lenders-can-claim-dues-only-after-passing-of-interim-award/.*

[29] 1 A. WADHWA & A. KRISHNAN, JUSTICE RS BACHAWAT'S LAW OF ARBITRATION 1689 (6 ed. Lexis Nexis 2018).

[30] Ex mar BV v. National Iranian Tanker Co., (1992) 1 LLYOD'S REP 169.

obligated the arbitral tribunal to make the award only after 'proper hearing', barring exceptional cases where they can properly find that they are not satisfied that the defence or set-off is made in good faith, or where there is a sum properly due on the basis of the respondent's own figures.[31] Guidelines of the aforesaid nature, not amounting to directions may provide a useful guide to regulate the tribunal's conduct and avoid the uncertainties that accompany ever-fluctuating discretion.

The Enforcement-Stay Interplay

An interim award can be enforced in accordance with Section 36 of the Act in accordance with the provisions of the Code of Civil Procedure, 1908 ('Code') as a decree of the Court. In the context of a final arbitral award, there is no automatic stay on the operation of the award, if there is an application to set aside award under Section 34 pending with the Court. However, in the context of interim awards, it is important to note the judgment of V. *Raghavan vs. Dr. R. Venkitapathy,*[32] wherein the Madras High Court noted that, what is contemplated under Section 36 of the said Act is only the postponement of the enforcement of the award and not the stay of further proceedings by the Arbitral Tribunal pursuant to an interim award. Hence, it seems that pendency of the proceedings before the Court under Section 34, challenging the interim award cannot stall the Arbitral Tribunal from passing the final award. However, this remains a grey area in absence of any precedent which lays down a definite position.

Right time to challenge: Countering the 'piecemeal challenge' argument

Despite the pro-arbitration atmosphere prevailing in the judicial sensibilities, the future discourse in this regard may be altered in view of the observations of the Supreme Court in the *Bhadra*

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[31] 1 A. WADHWA & A. KRISHNAN, JUSTICE RS BACHAWAT'S LAW OF ARBITRATION 1688 (6 ed. Lexis Nexis 2018).

[32] V. Raghavan v. Dr. R. Venkitapathy, 2015 SCC OnLine Mad 8514.

Products case[33], wherein Justice Nariman opined for the Parliament to make a provision so that all interim awards may be consolidated with the final award, a combined challenge to which may be filed under Section 34 of the Act, thereby avoiding the 'piecemeal challenge' trend and reducing costs. This recommendation, if adopted, will effectively take away the right of the suffering party from approaching the Court on substantive issues until the final award has been rendered, by the time the parties may have suffered irreparable harm on account of execution of the interim award. Additionally, the arbitration proceedings in such a scenario will proceed on the foundation of the decided interim award, without addressing the opposing arguments in Court and would ultimately reduce the ambit of hearings on further related issues. In the hypothetical situation where, in an arbitration arising from a construction contract, a contractor claims damages for wrongful termination of the contract and payment for work done and the employer counter-claims for costs incurred in engaging a replacement contractor, an interim award holding that the contract was validly terminated, would greatly reduce the scope of the damages hearing.[34] In light of these pressing disadvantages, the counter-argument of costs reduction and unnecessary delay given by the Supreme Court may not be able to adequately safeguard the rights of the parties. Therefore, a balance must be struck to rectify the possible drawbacks highlighted by the Court.

IV. Interim Award on Admitted Liability & Possibility of Contracting out

The principles for passing an interim award on admissions are akin to the principles followed by courts in passing a judgment on

[33] M/s Indian Farmers Fertilizer Co. v. M/s Bhadra Products, 2018 SCC Online SC 38, ¶29.

[34] *Supra* note 6.

admissions under Order XII Rule 6 of the Code.[35] In the *Numero Uno*[36] case, the court has held that pendency of counter claim does not denude the arbitrator of the power to pass an interim award in the original suit/claim if such an interim award is otherwise justified which inter alia included interim awards made on admitted liability. No interference would be permissible only because the defendant has made a counter claim or because some areas of dispute, independent of the area covered by the interim award, remains to be resolved.[37] The court further went on to hold that in the event that the counter claim is successful, adjustments can be made to the final award after considering the amount already awarded in the interim award.[38]

Contracting out of an interim award

The power of making an interim award as conferred under Section 31(6) of the Act and under Section 27 of the Arbitration and Conciliation Act, 1940 ('the 1940 Act') seems to be similar with the difference that Section 27 of the 1940 Act[39] opened with the words "unless a different intention appears in the arbitration agreement…'. The omission of these words should not be construed so as to deprive the parties of their right to agree to a single award to be made covering all disputes. It seems that it would be possible by virtue of Section 19(2) of the Act, which states that parties are free to agree on the procedure to be

35 Numero Uno International Ltd. v Prasar Bharti, 2008(1) ArbLR 446(Delhi) ¶1.

36 Numero Uno International Ltd. v Prasar Bharti, 2008(1) ArbLR 446(Delhi) ¶7.

37 Yaman Kumar, Gunjan Chhabra, Award *On Admitted Liability In Arbitration Proceedings*, (Oct. 11, 2018, 3 PM) http://www.mondaq.com/india/x/485728/Arbitration+Dispute+Resolution/Interim+Award+On+Admitted+Liability+In+Arbitration+Proceedings.

38 *Supra* note 35.

39 Arbitration Act 1940 § 27.

followed by the arbitral tribunal in conducting proceedings, the parties may choose to *rule out* an interim award by agreement.[40]

Notwithstanding the above proposition, an interim award cannot go against the contract provisions.[41] An interim award directing the owner to execute the sale deed even when the apartments were not complete was held to be without jurisdiction where according to the contract owners were bound to execute the sale deed only after the owner's share of apartments were completed in all respects.[42] Therefore, whilst it is possible to exclude Section 31(6), i.e. impose a complete/partial restriction on grant of interim awards by virtue of an agreement to the contrary, arbitrator/court will not be permitted to go beyond the contract in case the parties have not made such agreement to the contrary.

V. Conclusion

Although some principles in respect of dealing with interim awards has been laid down by the Courts, we observe that crucial issues remain to be determined and applied at the discretion of the tribunal and the Court on a case to case basis. The recommendation by way of parting words in *Bhadra Products* are extreme inasmuch as taking away the right of the parties to recourse at the interim stage and do not appear to be the appropriate solution. The concern of the Court in making such a recommendation is valid as the parties do incur significant time and costs in dealing with challenges to interim awards also posing threat to the efficacy of newly introduced Section 29A which imposes a time limit of one year to complete arbitration proceedings and grant the final award with the possibility of only a one-time extension of six months if the parties mutually consent. However, the solution is when both, the tribunal and

[40] 1 A. WADHWA & A. KRISHNAN, JUSTICE RS BACHAWAT'S LAW OF ARBITRATION 1682 (6 ed. Lexis Nexis 2018).

[41] *Id*.

[42] V.N. Krishna Rao v. Turnkey Constructions Pvt. Ltd., AIR 2004 NOC 350 (Kant).

court adopt a standardized discretionary approach. As mentioned earlier, it may be useful if the Supreme Court lays down some guidelines for tribunal and lower courts as and when such a case comes before it for adjudication. If the nature of the contract makes it beneficial to render a single award, parties should be encouraged to specifically opt out of Section 31 (6) and expressly bar the grant of interim awards if any arbitration proceedings ensue, to avoid unnecessary costs and delays. As far as amendment of the Act goes, Section 36 may be amended to include provisions for enforcement of interim award and stay of arbitration proceedings pending such enforcement. Consequently, Section 29A, which as mentioned earlier provides for a one-year time limit to issue the final award may also be amended to provide for concessions wherein an interim award is granted, so as to avoid dissolution of the tribunal on expiry of the prescribed time period. To reduce delays, it would be beneficial to provide for an expeditious hearing to the challenge to the interim award; it may be useful to amend Section 34 of the Act to such extent. Strict adherence of the precedents should be adopted so that there is no interference with the finality of the interim award. Although the amendments would increase the degree of certainty, judicial certainty will prevail only when the tribunal and the Courts conform to precedents, adopt a pro-arbitration approach and *suo moto* deploy all possible methods to reduce costs and delays.

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IS ARBITRATION NECESSARILY A HUMAN ACTIVITY? – TECHNOLOGICAL DISRUPTION AND THE ROLE OF ROBOTS IN ARBITRATION

*Varsha Banta**

Abstract

The present paper is an endeavour into understanding technological disruption in the field of arbitration. In a dynamic world where individuals and businesses constantly outsource their tasks to external agencies for benefits of greater expertise or reduced costs, this paper argues that this inclination towards outsourcing is permeating the legal services industry as well. The only difference is, here, this external agency, Artificial Intelligence ("AI"), threatens the place of humans in the legal sphere, most notably within the field of arbitration law. More specifically, the discussion unfolds into increased reliance on predictive justice tools to grant awards, and the challenges such reliance poses in terms of efficiency, confidentiality and control of proceedings.

This paper is a relevant inquiry as it creates a space to stop and take heed of the rapid technological reforms the world is undergoing today. It takes a balanced view of the changes and the benefits they bring, but advocates for a traditional, humane approach to arbitration, with a view to continually uphold principles of equity and fairness. It is an attempt to remind oneself of the value of the human legal consciousness, and the perils of over-mechanization of legal services. Although present literature discusses the viability of robots as arbitrators, it does not offer a definitive stance. An attempt to offer such a stance has been made in this paper.

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Introduction

The word disruption is used liberally and frequently in today's dynamic commercial environment. Principally used to connote any pioneering business innovation within an existing framework[1], a 'disruption' is a rite to passage to a new way of doing things. This is accompanied by several positive changes. This is because it obviates an intermediate actor or process that imposes economic or time constraints, on remaining actors in the chain. Consider Jeff Bezos of Amazon, for example, the largest online retail platform today. What Bezos essentially did through his business model was to innovate and provide the same goods and services as physical retail outlets, but on a larger scale, at better costs and most importantly, at the convenience of the consumer's click.[2] More recently, Amazon has been developing *Prime Air*, a delivery system that will use remote-controlled robotic vehicles to transport goods from the Company's order fulfilment centres to the consumers.[3] The use of robotics to facilitate ease of business is however not limited to giants like Amazon, but is gradually being adopted as a way of life in countries such as Japan with the largest elderly population in the world. Between 2010 and 2025, the number of Japanese citizens is likely to rise only by 7 million.[4] This leaves a considerably low percentage of the population available and able to join and actively contribute to the workforce, which is further compounded by strict immigration laws dissuading a foreign labour force.[5] However, Japan has found a solution to the thin labour supply within eldercare and personalized services through robotic nursing aides. Japanese researchers are also endeavouring to provide a more humane touch to these robo-nurses, indicating a possible overtake of human nurses, who would pride themselves on their ability to empathize and nurture.

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1 Airini Ab Rahman, *Emerging Technologies With Disruptive Effects: A Review*, 7 PERINTIS eJOURNAL 111, 112 (2017).

The question that begets an answer is thus, whether this degree of disruption has hit law and the legal services industries yet. Although such heavy reliance on Robotics and Artificial Intelligence ("AI") has not penetrated this historically human-dominated profession, manual performance of mechanical tasks such as contract drafting and case management has been substituted in favour of smart contracts and e-discovery, among other facilitative AI technologies.[6]

In the field of arbitration particularly, Online Dispute Resolution ("ODR") and online hearings[7] have worked to increase the expanse of arbitration to reach lower-value disputes in a transnational sense. This is a positive shift as traditionally, parties to arbitration with deep pockets often take recourse to it due to high costs, which acts as a dissuader to parties with lower disposable resources. Some argue that with time, given the pervasive role that robots and other interactive technologies are playing in our lives it is, but, inevitable that robots will be accorded the role of arbitrators.[8] Nonetheless, several scholars and ethics researchers argue against this proposition. They place a higher value upon the human consciousness, human self-awareness[9] for legal considerations of equity and due process.[10]

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2 John F. Furth, *Why Amazon And Jeff Bezos Are So Successful At Disruption*, ENTREPRENEUR INDIA, (Oct. 13, 2018, 10:04 AM), https://www.entrepreneur.com/article/312481.

3 Margaret Rouse, *Amazon Prime Air* Drone, TECHTARGET, (Oct. 13, 2018, 10:06 AM), https://internetofthingsagenda.techtarget.com/definition/Amazon-Prime-Air-drone.

4 ALEC ROSS, THE INDUSTRIES OF THE FUTURE 15 (Simon & Schuster 2016)

5 *Id.* at 16.

6 The future of arbitration: New technologies are making a big impact — and AI robots may take on "human" roles, HOGAN LOVELLS PUBLICATIONS, 1, 1 (2018).

7 United Nations Commission On International Trade Law, UNCITRAL Technical Notes on Online Dispute Resolution, UNCITRAL, (Oct. 14, 2018, 11:48 AM), http://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf.

8 *Supra* note 6, at 3.

This paper will be divided into three parts. *Part I* will trace and identify the various technological developments in the field of arbitration with exclusive reliance on AI, and particularly the proposition of predictive justice.[11] *Part II* will weigh the benefits of and challenges to such a proposition concerning efficiency, confidentiality, and control of proceedings.[12] *Part III* will argue for arbitration as a primarily human activity, with emphasis on legal considerations of the definition of arbitrators along with ethical considerations of human consciousness and equity.[13]

PART I

The advent of information technology has occurred both in offline as well as online arbitration. Computers although first invented in 1822 by British mathematician Charles Babbage, have undergone significant development. Today, their elementary frameworks albeit in sophisticated forms, often incorporate complementary technologies such as robotic engineering.[14]

Offline arbitration or traditional arbitration utilizes technologies available or operable online and applies it to the pre-existing framework. These technologies include transmitting messages or files, video conferencing, handling and managing documents along with tracking the transfer of documents.[15] However, the relationship between ODR and technology is much deep-rooted. Conventionally used to resolve online trade disputes between traders such as eBay[16], ODR remains one of the critical links

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9 Steven Goldberg, Artificial Intelligence and the Essence of Humanity, NYU PRESS, 151, 171 (1994).

10 Gabrielle Kaufmann-Kohler and Thomas Schultz, The Use of Information Technology in Arbitration, KLUWER LAW INTERNATIONAL, 5, 35 (2005).

11 *Supra* note 6, at 2.

12 *Supra* note 10, at 39.

13 *Supra* note 9, at 173.

14 Computer Hope, *When Was the First Computer Invented*, COMPUTER HOPE (Oct. 14, 2018, 11:07 AM), https://www.computerhope.com/issues/ch000984.htm.

15 *Supra* note 10, at 9.

between information technology and arbitration17 due to its efficiency and further capitalization on existing technologies for offline arbitration. The resolution of not only e-commerce disputes, but also small disputes, especially when they involve rather large distances between the parties, or even different countries of residence is a critical component of ODR. Thus it is not merely a by-product of e-commerce or even a set of tools that belong to the broader field of cyberspace law, but a change with potentially profound implications for the entire field of dispute resolution.18 However, for this paper, we shall focus not on the facilitative and locative functions of technology regarding online platforms and digitalization of document transfer, but the more substantive proposition of AI as a potential arbitrator19 in the years to come. This proposition represents a very apparent shift from reliance on AI to the replacement of humans, with its own bundle of costs and caveats.

For this part, let us make a necessary reference to a widely debated and controversial litigation in the United States, titled the *Loomis* case[20], which relied on algorithmic formulae to sentence a man attempting to flee an officer and operating a vehicle without the owner's consent. The software titled COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) was a "web-based tool designed to assess offenders' criminogenic needs and risk of recidivism." Through offender-related data, it focused on "predictors" that are known to affect recidivism among similar groups. Although the judge had not relied on the software exclusively, the decision certainly evoked questions regarding the use of software in adjudication.[21]

16 *Supra* note 7.
17 *Supra* note 10, at 7.
18 *Id.* at 7.
19 *Supra* note 8.
20 State v. Loomis, 881 N.W.2d 749, 66, 68 (Wis. 2016).

Comparing this methodology to arbitration, we would find that the concept of "predictive justice"[22] is most akin to the methodology in *Loomis*.[23] 'Predictive Justice' refers to algorithmic tools that use AI to analyse arbitration or court decisions in order to statistically derive probabilities about how the present case will be decided.[24] Proponents of this wave of AI argue that a reliance on such tools would necessarily increase the rate of accuracy and make arbitration a party-friendly dispute resolution process, eliminating hindrances to awards caused due to delay, such as by manual document analysis. However, before we accept this change embellished in the promise of accuracy and efficiency, we must ask ourselves, is accuracy the end goal? Further, what is it that an arbitrator must consider during such proceedings? If arbitration had been a necessarily precedent bound mechanism, such as is common law; the trend analysis of such predictive tools would point the arbitrator in the right direction. However unlike common law, cases in arbitration proceedings have only persuasive value.[25]

Statistical references and predictions risk relegating the subjective element of cases- that is the fact matrix to a secondary consideration, and thus sole reliance on such tools jeopardizes further natural justice considerations like *audi alterem partem*.[26] If anything, the hierarchy should be reversed to accord predictive justice tools at a level of final reference, with unbinding value. This reversal would allow the arbitrator to prefer subjective considerations of the present case, and if necessary, grant an

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21 Joe Forward, *The Loomis Case: The Use of Proprietary Algorithms at Sentencing*, STATE BAR OF WISCONSIN, (Oct. 14, 2018, 12 PM), https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=9&Issue=14&ArticleID=25730.

22 *Supra* note 11.

23 *Supra* note 20.

24 *Supra* note 11.

25 Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARBITRATION INTERNATIONAL, 357, 358 (2006).

26 *Supra* note 10, at 35.

appropriate award irrespective of such trend analysis. The next part will engage in a comparison of the pros and cons accompanying such tools.

PART II

If we were to track recent global trends, we would notice that whenever any massive technological, ideological or political change is proposed, there are always dissidents and proponents that rise - who either aggravate the perils of adoption of such change or advocate for its dire need. This is because no such change occurs in a vacuum and thus must necessarily complement other sectors. The same holds for tech-disruption in arbitration as well, although the concept of predictive justice tools is not exclusive to it. Apart from the *Loomis* case, several federal courts in the US have begun resorting to predictive justice. However, these predictions are still made by human actors. Here, predictive decision-making, as opposed to normative decision-making is resorted to when a legal issue has not been definitively addressed by the nation's highest court, and a resort to this is an extra measure.[27]

Several benefits arising from predictive justice have been identified, including regulatory simplification, decision-making consistency, aggregation of diverse preferences and insulation from external influence.[28] For this paper, we shall place our focus on the latter two. Let us consider aggregation of preferences first. Advocates for predictive justice argue that the risk of poor judgment by a single decision-maker is dealt with more effectively when decisions are taken in groups. This is because the risk of deviation is minimized due to group conferment or deliberation.[29] Although this argument may hold in cases where all decision-makers are human, it would fall almost instantaneously if such a

[27] Michael Abramowicz, *Predictive Decisionmaking,* 92 VIRGINIA LAW REVIEW, 70, 72 (2006).

[28] *Supra* note 27, at 80-90.

decision-maker were non-human, that is a robot. Unless such a robot were capable of replicating a human consciousness, or at least a similar degree of social intelligence[30], no such conferment would be possible, and would thus be a deviation by default, assuming it be a sole arbitrator or panel of such arbitrators.

Let us now consider the advantage of eliminating external influence. External influence typically refers to influence exercised by non-institutional actors such as interest groups with private interests in the matter.[31] Such interests are often conveyed and fulfilled through the most widespread form of influence – bribery.[32] However, these influences are still traceable back to the beneficiary of such favourable decisions. They are still external. However, with the shift to robots, or AI assisted technologies that are brimming at the surface, these influences and control mechanisms may, very efficiently, be internalized within the robot through programming, which will be near impossible for a layperson to identify in a decision. On the other hand, it could also be argued that robotic arbitrators would provide a more objective analysis, helping to eliminate internal influence by regular arbitrators that may manifest in the form of corruption or bias.

A resultant challenge that arises is due process difficulties of proceedings and confidentiality breaches of documents. Confidentiality particularly raises increased practical issues in an IT context, because of the extreme ease with which documents can be copied and transmitted, and because entire video conferencing sessions can be easily recorded.[33] As regard to arbitrators, the duty of confidentiality is imposed only in some jurisdictions. In Switzerland, arbitrators are bound by a duty of

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29 *Supra* note 9.
30 *Id.*
31 *Id.*
32 *Supra* note 27, at 30.

confidentiality, which derives from their contractual relationship with the parties. In other countries, such as England and Germany, specific provisions allow dissenting opinions by arbitrators, which might otherwise be regarded as a breach of the confidentiality obligation imposed on the arbitration tribunal.[34] However, the matrix of rights and duties[35] can only be imposed upon those governed by law, a prerequisite to which is being given legal status by law. Subsequent ethical considerations, which may arise, is who we define as a legally governable subject, under various forms of government, be it liberal democracies such as the United States or theocracies such as Saudi Arabia. This is a challenge that will be addressed in the final part, which will argue against such legal status to robots.

PART III

The concept of a person in law is inclusive. As opposed to a conventional understanding of a person to mean a natural person, the legal status of personhood is also accorded to corporations and companies incorporated under company law in most if not all countries. Some nations welcome robots into this definition with open arms. Saudi Arabia for instance, granted citizenship to a humanoid robot Sophia in 2017.[36] Although this grant came ahead of a foreign investment initiative, what is relevant here is *the intent to perceive robots at par with humans*. While some may argue this is but a logical step in the rapid global economic trajectory, others raise ethical considerations against this inclusion.

Greater is the apprehension for ethics scholars within the legal field, and these apprehensions are well placed. Adjudication, mediation, arbitration, and all other dispute resolution mechanisms are necessarily human endeavours. They require a

33 *Supra* note 10, at 40.
34 *Supra* note 32.
35 Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld,* WIS. L. REV., 975, 986-87 (1982).

degree of social intelligence, deliberation, and self-awareness that is quintessentially human. It is the result of experiential learning, which may be akin to observed behaviour, or Natural Language Processing (NLP) in robots.[37] Even assuming that this observed behaviour of human conduct and consciousness could be inculcated within AI, what about discretionary agency? There are often saturation points in almost all-legal decision making that reach a deadlock, where precedents and analysis can only assist so much. It is at this point that the decision-maker must exercise independent judgment, removed from statistical or mathematical predictions. It is at this juncture that the decision-maker must take into account principles of equity and fairness, to be accepted only if emanating from human consciousness.

As humans, we view efficiency as an indicator of competency, and thus naturally often feel compelled to trust the OS (Operating System) of our computers or accept what personal assistants like Alexa may suggest. However, speed is not necessarily synonymous to accuracy. And further, accuracy is not the goal, as the question then arises accuracy *against what*?

Legal decision-making is not a predictive exercise where the consistent preciseness of a decision is being measured against the last. Although we must take heed of the changing technological landscape within which we will arbitrate, several conservative perspectives denote that legal decision-making must remain the

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[36] *Sophia The Robot Gets Saudi Citizenship*, THE ECONOMIC TIMES, (Oct 15, 2018, 11:02 AM), https://economictimes.indiatimes.com/news/science/sophia-the-robot-gets-a-saudi-arabian-citizenship/first-ever-robot-citizen/slideshow/61355634.cms.

[37] Daniel Jurafsky and James H. Martin, *Speech and Language Processing An Introduction to Natural Language Processing, Computational Linguistics And Speech Recognition*, PRENTICE HALL SERIES IN ARTIFICIAL INTELLIGENCE, (Oct 16, 2018, 11:30 AM), http://www.deepsky.com/~merovech/voynich/voynich_manchu_reference_materials/PDFs/jurafsky_martin.pdf.

reserve of humans. Although technological advancements provide a plethora of benefits such as speed, efficiency, value innovation and consistency, the major challenge is delineating regulatory frameworks, and more specifically the area of law that would predominantly govern robotic arbitration. As opposed to human intelligence,

AI follows an exact, pre-programmed route to arrive at a decision, whereas legal deliberation is a fundamentally intuitive process. However, others would argue that intuition is really just pattern recognition, and what robots would be undertaking would be a more reliable and sophisticated form of pattern recognition. Nonetheless, a review of natural justice principles would necessarily refute any potential or achieved sophistication. Legal tenets such as fairness, and the very agency of the arbitrator must be placed as the highest priority. Although arbitration efficiency should remain a goal we seek to achieve, it should not come at a cost that undermines the fundamentals of adjudication.

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THE PUBLIC POLICY DOCTRINE IN ARBITRATION: A PRIMER ON ITS EFFECT ON CHALLENGES AND ENFORCEMENT OF AWARDS

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Abstract

Arbitration law in India is principally governed under the Arbitration and Conciliation Act, 1996 (the "Act") (as amended in 2015). The aim and object of the Statute is to foster an environment wherein alternative modes of dispute settlement, such as arbitration, negotiation and mediation are given full effect to and judicial intervention in such modes of dispute resolution are kept at a bare minimum. The Act therefore delineates permissible instances wherein the intervention of the Courts would be warranted.

This paper aims to analyse one such permissible instance under the Act – that of setting aside and challenge to an arbitral award on the ground of Public Policy. The interpretation of the term Public Policy has come under severe judicial scrutiny, often resulting in contradictory and ambiguous interpretations being applied to the doctrine by the Courts.

Part I of this paper traces the development of the doctrine under the pre-1996 regime and its peripheral, yet gradual intrusion under the Act. Part II analyses the 'broad' and 'narrow' view of Public Policy, as given effect to by the Courts and traces its impact on the enforcement of domestic awards and the challenge to foreign arbitral awards. Part III interprets a host of judicial decisions starting from Saw Pipes and Renusagar to Associate Builders and Shri Lal Mahal. Part IV captures the amendments brought in the 1996 Act by the 2015 Amendments introduced by the Parliament. Part V concludes by positing that the recent judicial trends suggest that the narrow view of Public Policy is being favoured by

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the Courts which in essence will allow India to market and develop itself as a global hub of arbitration, for prospective investors and litigants alike.

I. Introduction

Arbitration and Conciliation (or Mediation) have evolved as effective mechanisms of alternative dispute resolution in India, providing parties with a forum for settlement of their disputes, without having to invest their resources in protracted litigation before the Civil Courts in India. However, the awards rendered through such alternate means of dispute resolution are subject to the review of the civil courts *inter alia* on the grounds of it being violative of the Public Policy of the country.

An arbitral award made under Part I (awards made in an India-seated Arbitration) of the Arbitration and Conciliation Act, 1996 (the "Act") can be challenged under Section 34 (2) (a) and (b) of the Act which is derived from Article 34 of the UNICITRAL Model Law. Therefore, the objective of this paper is to trace the development of the public policy doctrine in arbitration and reflect upon its use as a ground for challenging or setting aside an arbitral award.

A. PUBLIC POLICY IN THE PRE-1996 LANDSCAPE

The Arbitration (Protocol and Convention) Act, 1937

The doctrine of Public Policy was initially codified in The Arbitration (Protocol and Convention) Act, 1937 (the "Protocol and Convention Act"). Under the provisions of the Act, a foreign award would not be enforced if it contradicted the *public policy* or the *law of India*.[1] The Foreign Awards (Recognition and Enforcement) Act, 1961 (the "Foreign Awards Act") also provided for the non-enforcement of a foreign award if it was

[1] The Arbitration (Protocol and Convention) Act 1937 § 7.

contrary to the public policy of India[2] and was derived from Article V(2)(b) of the New York Convention which read as follows:

> *"V (2) -Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) The recognition or enforcement of the award would be contrary to the public policy of that country".*

Therefore, upon a conspective reading of both these Acts, the provision in Section 7 of the Protocol and Convention Act rendering a foreign award unenforceable merely upon it being contrary to the *law of India*, was no longer considered to be a valid ground for resisting the enforcement of an award under the New York Convention. The grounds for the unenforceability of a Foreign Award, though constricted, did not however have an effect on the public policy doctrine firmly entrenched in respect of foreign awards.

The Arbitration Act, 1940

The Arbitration Act, 1940 (the "1940 Act") dealt with arbitrations seated in India. The Supreme Court[3] while lamenting upon the inefficacy of the Act to establish Arbitration as a viable mode of dispute settlement observed as follows:

> *"…The way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the*

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2 The Foreign Awards (Recognition and Enforcement) Act 1961 § 7(i)(b)(ii).

3 Guru Nanak Foundation v. Rattan Singh, (1981) 4 SCC 634, 635.

> *decisions of the Courts been clothed with 'legalese' of unforeseeable complexity."*

However, it would be pertinent to note that the public policy doctrine did not manifest itself as an impediment to the enforcement of an award under the provisions of the 1940 Act. The Courts primarily restricted the grounds of challenge to an arbitral award to *error apparent on the face of the award,*[4] misconduct of the arbitrator or the proceedings,[5] making of the arbitral award after the proceedings had become invalid or were superseded[6] or cases where the award was improperly procured or was otherwise invalid.[7] There were however a few decisions where setting aside of an award for misconduct of the arbitrator was premised on the notion that an arbitrator is bound to act in accordance with the public policy of India.[8] The Bombay High Court also held that even though arbitrators were not bound by strict rules of procedure or evidence; *such of the rules of evidence which were based on fundamental principles of justice and public policy* applied to arbitral proceedings as non-observance of the same would lead to substantial injustice being perpetrated.[9] To apply the public policy doctrine for setting aside of an arbitral award under the 1940 Act, the Courts thus applied a twofold test:

a. If the arbitrator had knowledge of the illegality of the contract entered into between the parties; and

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4 Union of India v. A.L. Rallia Ram, AIR 1963 SC 1685.
5 The Arbitration Act 1940 § 30 (a).
6 The Arbitration Act 1940 § 30 (b).
7 The Arbitration Act 1940 § 30 (c).
8 HMG Engineering Pvt. Ltd, (2000) 1 Bom CR 221; M/S. Kochhar Construction Co. v. Union of India & Anr, ILR (1987) 1 Del 571, ¶24; Fertilizer Corporation of India Ltd. v. Bharat Painters, AIR 1986 Orissa 82, ¶6; Abhai Singh v. Sanjay Singh, AIR 1989 All 214, ¶20.
9 Aboobaker Latif v. Reception Committee of the 48th Indian National Congress, AIR 1937 Bom 410, ¶12.

b. Having knowledge of the illegality of the contract, nevertheless proceeded to deliver an award in relation to disputes arising out of the contract.[10]

B. PUBLIC POLICY UNDER THE 1996 ACT

With the enactment of the 1996 Act, the law governing Indian arbitrations and enforcement of Foreign Awards were brought under the ambit of a single statute, repealing the erstwhile 1940 Act, the Protocol and Convention Act and the Foreign Awards Act. The scheme of the 1996 Act is as follows:

- Part I dealing with India seated arbitrations;
- Part II dealing with enforcement and recognition of foreign awards falling under the New York Convention and the Geneva Convention; and
- Part III dealing with Conciliation.

Part I of the Act further divides India seated arbitrations into the following two categories:

- Where the parties to the dispute are both Indian (domestic arbitration); and
- Where *at least* one of the parties to the dispute is a foreign citizen, a body corporate or entity whose central management and control is exercised from outside India or by the Government of a foreign country (international commercial arbitration).[11]

The UNICITRAL Model Law: Introducing Public Policy under the 1996 Act

It would be pertinent to note that Part I of the 1996 Act is effectively a reproduction of the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model

[10] ITC Limited v. George Joseph Fernandes & Anr, (1989) 2 SCC 1, ¶26.
[11] Arbitration and Conciliation Act 1996 § 2(1)(f)

Law"). Article 34 of the UNCITRAL Model Law, setting out the provisions for a challenge to an award before a national court, mirrors the grounds set out in Article V of the New York Convention for the refusal of the enforcement of a foreign award.[12] Therefore, Section 34 of the 1996 Act, which is modelled on Article 34 of the UNCITRAL Model Law, and Section 48 of the 1996 Act, which is modelled on Article V of the New York Convention, both contain a reference to the ground of 'public policy' to challenge an award or seek refusal of enforcement, respectively.

Section 48 of the 1996 Act (Part II) allows parties to object to the enforcement of a foreign award made under the New York Convention on grounds of Public Policy.[13] Additionally, Section 57 of the Act (Part II) provides for the non-enforcement of a Geneva Convention Award on grounds of Public Policy and the award conflicting with the *principles of the law of the country*.[14]

II. Judicial Interpretation of Public Policy: The Broad & Narrow View

The Public Policy Doctrine has judicially been pigeon-holed into the *broad* view and the *narrow* view. The narrow view espouses a restricted interpretation of the Public Policy doctrine calling for Courts to exercise caution in creating new heads of Public Policy whereas the broad view undertakes a contextual approach to the Public Policy doctrine, leaving it open to be amended and modified on a case to case basis.

In the *Gherulal* case,[15] the Supreme Court observed that "*though the heads are not closed and though theoretically it might be permissible to*

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12 ANTON G. MAURER, THE PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION 59 (Huntington, New York: Juris 2013).

13 Arbitration and Conciliation Act 1996 § 48(2)(b).

14 Arbitration and Conciliation Act 1996 § 57(iii).

15 Gherulal Parakh v. Mahadeodas Maiya & Ors, AIR 1959 SC 781, ¶21, 23 & 30.

evolve a new head under exceptional circumstances of a changing world it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days." In *Kedar Nath Motwani vs. Prahlad Rai,*[16] the Court however clarified that the enforcement of a contract would be deemed to be against the Public Policy of India only if the illegality went to the root of the contract.

The broad view of the Public Policy doctrine, however, gained currency with the Supreme Court's ruling in the *Muralidhar* case,[17] wherein the Court observed that "*what constituted public policy earlier might not constitute public policy now, hence the development of new fields of public policy was imperative. Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed moulds for all time."* In *Central Inland Water Transport,*[18] observing that adopting a narrow view of the Public Policy doctrine would countenance judicial law making, the Court held that "*public policy connotes some matter which concerns the public good and the public interest. The concept of what is good for the public or in public interest or what would be harmful or injurious to the public good or interest has varied from time to time."* This view was further strengthened in *Rattan Chand Hira Chand,*[19] where the Supreme Court decided that an injury to public interest would depend upon the context in which it is made and any contract which had a tendency to injure public interest was one against public policy. Although it was the legislature's duty to keep pace with the changing paradigms of society, it was the duty of the Courts to step in upon the Legislature's failure to

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16 Kedar Nath Motwani v. Prahlad Rai, AIR 1960 SC 213.

17 Muralidhar Aggarwal & Anr v. State of Uttar Pradesh & Ors, (1974) 2 SCC 472, ¶28 – 32.

18 Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156, ¶92.

19 Rattan Chand Hira Chand v. Askar Nawaz Jung (Dead) by LRS and Ors., (1991) 3 SCC 67, ¶19 & 23.

fill the lacuna and to decide what they felt is against the Public Policy of the country.

However, there was a fundamental divergence once again from the broad view when the Courts in the *Zoroastrian Cooperative Housing Society Case*[20] refused to intervene in the formation of a society limiting membership to people of a particular religion. Premising its arguments on the *Gherulal* principle (supra), the Court upheld the sanctity of the contract entered into between the parties and held that *an agreement otherwise legal could not be held to be void unless it resulted in the performance of an unlawful act.*

A. THE IMPACT OF PUBLIC POLICY ON ENFORCEMENT OF FOREIGN AWARDS

The enforcement of foreign awards under the 1996 Act are governed under the principles enshrined in the Geneva Convention and the New York Convention. While the illegality of the contract forms the principal ground for non-enforcement of a foreign award under the Geneva Convention,[21] violation of the Public Policy of the country where the award is sought to be enforced is the principal criterion required under the New York Convention.[22] It would be pertinent to note at this point in time that India was one of the first countries to ratify the New York Convention and incorporate its provisions within its own municipal laws, by virtue of the enactment of the Foreign Awards (Recognition and Enforcement) Act, 1961.

In *Renusagar Power Company Ltd. vs. General Electric Company,* [23] the Supreme Court adopted the narrow view of the Public Policy and

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[20] Zoroastrian Co-operative Housing Society v. District Registrar, Coop. Societies (Urban), (2005) 5 SCC 632, ¶26 & 38.

[21] David Taylor & Son v. Barnett Trading Co, (1953) 1 WLR 562, ¶563.

[22] Deutsche Schachtbauund Tiefbohrgesellschaft mbH v. Ras Al-Khaimah National Oil Co, [1987] 2 All ER 769.

[23] Renusagar Power Company Ltd. v. General Electric Company, (1994) Supp 1 SCC 644, ¶63 & 66.

held that "*public policy*" would mean the *doctrine of public policy as applied by the Court in India and not international public policy*." Placing reliance on the objects and reasons of the Foreign Awards Act, the Court reasoned that facilitation of international trade and commerce would be severely affected if the broad view of Public Policy was sought to be enforced. The Courts set out certain tests to determine when a foreign award can be said to fall foul of the Public Policy doctrine in order for the court to refuse its enforcement:

- If the award contradicted the fundamental policy of Indian law;
- If the award was vitiated by virtue of it affecting the interests of India; and
- If the award was against the basic tenets of justice and morality.

A distinction was also drawn between the award itself and the enforcement of the award, noting that the public policy doctrine applied only at the enforcement stage of the award and precluded the Courts from undertaking a review of the merits of the award[24]. The application of the public policy doctrine for the non-enforcement of a Foreign Award would thus be valid only if it fell afoul of any of limbs of the three-pronged test as laid down in *Renusagar*[25] and if the Public Policy that was being infringed upon, was the *Public Policy of India and not of any other foreign country*[26].

B. THE IMPACT OF PUBLIC POLICY ON DOMESTIC AWARDS

Upon the enactment of the 1996 Act, the Courts had a general tendency to apply the narrow view even to Part I arbitrations.[27]

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24 *Id* at ¶34 – 36.
25 Id at ¶66.
26 Smita Conductors Ltd. v. Euro Alloys Ltd, (2001) 7 SCC 728, ¶12.
27 Olympus Superstructure v. Meena Khetan AIR 1999 SC 2102; Narayan Lohia v. Nikunj Lohia AIR 2002 SC 1139.

In *Konkan Railway,*[28] the Court categorically observed that "*the statement of Objects and Reasons of the Act clearly enunciates that the main objective of the legislature was to minimize the supervisory role of Courts in the arbitral process* and that *under the new law the grounds on which an award of an arbitration could be challenged before the Court have been severely cut down*." Similarly, the Bombay High Court, in the *Vijaya Bank*[29]case, had held that a mere mistake in applying the substantive law of India to an award would not incur the Public Policy objection to its enforcement. The narrow view of the Public Policy doctrine, as enunciated in *Renusagar* was thus imported even in cases of Part I arbitrations.

III. *Saw Pipes* - Nullifying The Narrow View of Public Policy for Part I Arbitrations

In 2004, the Supreme Court in *ONGC Ltd. vs. Saw Pipes Ltd*,[30] distinguished between domestic and foreign awards with respect to public policy. While considering a challenge under Section 34 of the Act to a Part I award, the Supreme Court held that the narrower concept of public policy enunciated in *Renusagar* was only applicable to foreign awards and not Part I awards. Apart from the three heads of public policy laid down in *Renusagar,* the Supreme Court interpreted public policy to include "patent illegality" and held that an award can be set aside if it is *patently illegal and if such illegality went to the root of the matter or was so unfair and unreasonable that it shocked the conscience of the Court*.[31] Therefore, it was held that patent illegality would include considerations such as whether an award was based on an erroneous proposition of law or erroneous application of the law or was against the terms of the contract.[32] The court relied on section 28(1)(a) of the 1996

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28 Konkan Railway Co. Ltd. v. Mehul Construction Co, (2000) 7 SCC 201, ¶4.
29 Vijaya Bank v. Maker Development Services Pvt. Ltd, (2001) 3 Bom. CR 652, ¶21 & 35.
30 ONGC Ltd. V Saw Pipes Ltd., (2003) 5 SCC 705 ¶28.
31 *Id.* at ¶31.
32 *Id.* at ¶55.

Act to justify its interference with the award. The Supreme Court held that the meaning of the term *public policy was wide enough in the case of domestic awards, to even incorporate a ground of "patent illegality"*.[33] In my view, the Supreme Court in *Saw Pipes* fundamentally misconstrued Section 28(1)(a) as a provision applicable to the jurisdiction of Courts considering challenges to awards. In reality, Section 28(1)(a) is a provision (along with Section 28(1)(b)) that governs the law to be applied by an arbitral tribunal in deciding the dispute between the parties. They were therefore both merely choice of law provisions. A new head of public policy was thus evolved, which did not take into account the Supreme Court's own caution on creating new heads of public policy without any conclusion on "*clear and incontestable harm to the public*"[34] or that such heads could only be created to prevent an "*injury to public interest or welfare.*"[35]

The phrase 'patent illegality' has been read to mean an obvious illegality based on a clear ignorance or disregard of the provisions of law.[36] *Saw Pipes* effectively first interpreted and enunciated the law regarding liquidated damages as it should be based on the specific facts and circumstances of the case, and then found the arbitral tribunal's application of this (new) law to be erroneous. This process is inconsistent with ascertaining that a finding suffered from *"patent illegality"* and suggests that the Supreme Court did not exclude mere *"error of law"* or even *"error in application of the law"* when it referred to *"patent illegality"*. Introducing patent illegality has unforeseen consequences especially with respect to international commercial arbitration where foreign law is a

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33 *Id.* at ¶22.

34 Gherulal Parakh v. Mahadeodas Maiya & Ors, AIR 1959 SC 781 ¶23.

35 Murlidhar Aggarwal & Anr v. State of Uttar Pradesh & Ors., (1974) 2 SCC 472 ¶30 & 31; Rattan Chand Hira Chand v. Askar Nawaz Jung (Dead) by LRS and Ors., (1991) 3 SCC 67 ¶ 17 & 19.

36 Prem Singh v. Deputy Custodian General Evacuee Property, AIR 1957 SC 804; Basappa v. Nagappa, AIR 1954 SC 440; Syed Yakoob v. K.S. Radhakrishnan, AIR 1964 SC 477.

question of fact and such mistake in application of foreign law could lead to awards being set aside on grounds of mistake of fact. A mistake of fact has never been recognized in any jurisdiction, much less in India as constituting a ground to set aside an award. Even *Saw Pipes* recognizes that a mere error of fact (or law for that matter) is not an available ground of challenge under the 1996 Act.

The second qualification introduced by *Saw Pipes* was that the illegality must go to the root of the matter. Here, the Supreme Court does not explain what is meant by an illegality going to the root of the matter. Does it mean that if the illegality forms part of the legal basis for deciding the matter, it goes to the root of the matter? In cases where there are several independent grounds for sustaining a legal decision and the illegality affects one of such grounds, does such illegality go to the root of the matter? This lacuna in the law allows parties to come forward with frivolous claims under Section 34 of the 1996 Act to resist the enforcement of the award passed against it.

In *McDermott International Inc. vs. Burn Standard Co. Ltd,*[37] the Supreme Court clarified that it only has a limited supervisory role and could only interfere with the findings in *Saw Pipes,* it being a coordinate bench ruling, when circumstances exist where such findings would shock the conscience of the court. The Supreme Court in this case broadened the scope of patent illegality given in *Saw Pipes* to include awards which could be set aside due to perversity in evidence and award vitiated by internal contradictions.[38] This line of reasoning has been repeatedly followed by subsequent judgements, thereby introducing a *patent error of law* under the head of patent illegality[39]. Even if the courts

[37] McDermott International Inc. v. Burn Standard Co. Ltd, (2006) 11 SCC 181.
[38] *Id.* at ¶65.
[39] Jagmohan Singh Gujral v. Satish Ashok Sabnis, (2004) 1 Bom CR 307; Bharat M.N. v. Satish Ashok Sabni, (2003) 6 Bom CR 257; Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd., (2006) 11 SCC 245.

agree to not interfere with the merits of the award, the introduction of such grounds of setting aside induces a merit based review of the awards.[40] Courts have preferred using the tests laid down in *Saw Pipes* and *McDermott International Inc.* to set aside awards based on a merits review, rather than restricting its application to rare cases in which the circumstances require interference,[41] or using the "*judicial approach*" test to conduct merits reviews of awards and then if so required, to set aside awards even in the absence of a finding that the approach of the Arbitrator was arbitrary or capricious.[42]

Western Geco: Defining Fundamental Policy of Indian Law

The Supreme Court in *Western Geco,*[43] after having considered the position established in *Saw Pipes,* held that there was ambiguity in the meaning of the phrase 'fundamental policy of law in India' which was the first head of public policy enunciated in *Renusagar.* The Court in *Western Geco* elucidated the 'fundamental policy of law in India' to mean:

- The undertaking of a fair, bona fide, reasoned and judicial approach by the Courts *qua* the subject matter of the dispute;
- The compliance of the Court's decision with principles of natural justice; and
- The compliance of the Court's decision with the *Wednesbury principles of reasonableness.*[44]

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40 In Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd., (2007) 8 SCC 466.

41 Centrotrade Minerals & Metals, (2006) 11 SCC 245. J.G. Engineers v. Union of India, (2011) 5 SCC 758.

42 Ogilvy & Mather Pvt. Ltd & Anr. v. Union of India, 2012 SCC OnLine Del 3364; State of West Bengal v. Bharat Vanijya Eastern Pvt. Ltd. 2017 SCC OnLine Cal 4.

43 ONGC Ltd. v. Western Geco International, (2014) 9 SCC 263, ¶35 – 39.

44 Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation, (1947) 2 All ER 680 (CA).

Failure to adhere to these standards would render an award perverse and irrational, making it a legal nullity. The issue with the *Western Geco* principles arises however due to enforcement of arbitral awards now having to pass the *Wednesbury* test, again allowing the Courts to undertake a merits review of the award. Furthermore, by observing that the contours of the fundamental policy of law in India would not be necessarily restricted to the categories mentioned as above, the scope of judicial review of arbitral awards was by implication deemed to be a necessity.

Additionally, by importing the *Wednesbury* principles into the 1996 Act, administrative law principles of judicial review were sought to be read into the provisions of the Act, which expressly go against the object and intent of the act of keeping judicial intervention to a bare minimum.[45]

Associate Builders: Applying Public Policy to Part I arbitrations

Closely following the *Western Geco* ruling, the Supreme Court in *Associate Builders*[46] reiterated the grounds upon which an award can be challenged under the Act:

- Fundamental policy of Indian law which *inter alia* includes compliance with statutory provisions, application of principles of *stare decisis*, judicial approach and compliance with natural justice and *Wednesbury* principles;
- The interests of India;
- Justice (when it shocks the conscience of the Court) or Morality (primarily limited to sexual immorality contained under Section 23 of the Indian Contracts Act);
- Patent illegality affecting the root of the matter; and
- Making of the award induced by means of fraud or corruption.

45 Arbitration and Conciliation Act 1996 § 5.
46 Associate Builders v. Delhi Development Authority, AIR 2015 SC 620, ¶12.

Upon establishing the grounds for challenge of an award under Section 34 of the Act, the Court further added that it did not sit in appeal over the arbitrator's decision while applying the Public Policy doctrine and restrained itself from interfering with a 'possible view' of the arbitrator, even if the evidence was scanty or not as per legally prescribed standards.[47]

Judicial flip-flop on application of Public Policy to Foreign Awards

The Supreme Court in *Hindustan Zinc*[48] observed that even the enforcement of an arbitral award made under Section 48 of the Act (Part II) could be resisted on grounds of illegality of the Contract or the award itself being against the terms of the Contract. After its ruling in *Venture Global Engineering*[49] holding that a foreign award can even be challenged under Part I of the Act (Section 34), the broad view of the Public Policy doctrine as enunciated in *Saw Pipes* (supra) became applicable to the enforcement of foreign awards. It would however be pertinent to note that *Venture Global* was subsequently overruled by the Court's decision in *BALCO,*[50] although the application of BALCO was deemed to be prospective, i.e. to Arbitration agreements entered into post 6 September 2012. This view was further strengthened by another ruling of the Apex Court in *Phulchand Exports*[51] where the Court observed that the term public policy appearing in Section 48(2)(b) of the Act was similar to the expression used in Section 34 of the Act. Thus, the broad standard of review of domestic arbitral awards on grounds of Public Policy under Part I of the Act was read into enforcement of a foreign arbitral award under Part II of the Act as well.

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47 *Id.* at ¶32 – 34 & 52.
48 Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445, ¶14.
49 Venture Global Engg. v. Satyam Computer Services Ltd, (2008) 4 SCC 190.
50 Bharat Aluminium v. Kaiser Aluminium, (2012) 9 SCC 552.
51 Phulchand Exports Limited v. O.O.O. Patriot, (2011) 10 SCC 300, ¶16.

The Supreme Court however indulged in a course correction of sorts through its ruling in *Shri Lal Mahal*[52] by admitting its error in its previous rulings and recognized the different standards applicable for the enforcement of Awards under Part I and Part II of the Act. The Court held that Public Policy under Section 48 of the Act needed to be given a restricted meaning, as in *Renusagar* and precluded the implication of patent illegality as a ground of Public Policy as observed in *Saw Pipes*. It deviated from its position in *Venture Global* and *Phulchand Exports* and held that an 'error' in a foreign award did not constitute a violation of Public Policy. Therefore, the broad interpretation given to the term 'fundamental policy of Indian Law' in *Western Geco* would not apply to a Part II arbitration, even though the expression 'in conflict with the public policy of India' finds mention in both Part I and Part II of the Act.

IV. The 2015 Amendments to the Arbitration Act

The amendment to the 1996 Act introduced in 2015 solidified the narrow approach to the Public Policy doctrine for both a challenge to an arbitral award under Section 34 (Part I) of the Act and the enforcement of a foreign award under Section 48 (Part II) of the Act. Sections 34(2) and 48(2) carry an explanation appended to them, stating that an award would be deemed to be against Public Policy only if:

- The making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or 81;
- It is in contravention with the fundamental policy of Indian law; or
- It is in conflict with the most basic notions of morality or justice.

[52] Shri Lal Mahal v. Progetto Grana Spa, (2014) 2 SCC 433.

In the case of domestic arbitration i.e. an India-seated arbitration between two Indian parties, Sub Section 2A to Section 34 was inserted to permit review of an award on the grounds of 'patent illegality appearing on the face of the award'. However, the provision of patent illegality (which in itself is a clear reference to *Saw Pipes*) introduced under Section 34 has now been qualified by the following safeguards:

- The patent illegality firstly must be 'on the face of the award' – meaning that an issue of law cannot be re-determined or extrapolated by the Courts and the illegality must flow expressly from the award; the Courts cannot imply or infer the illegality of an Award.
- Re-appreciation or reinterpretation of an issue of law has been strictly barred vide the *proviso* to Section 34 prohibiting the setting aside of an award merely on the ground of an 'erroneous application of the law'.

The Supreme Court, however, in a clarificatory ruling[53] dispelled all doubts regarding the interpretation of the Public Policy doctrine under the amended regime, holding that the 2015 amendments have done away with the position of law as enunciated in *Saw Pipes* and *Western Geco* and that *both sections 34 and 48 have been brought back to the position of law in Renusagar* (the narrow view).

V. Recent Judicial Trends

Recent judgements have used the doctrine of public policy to settle, or at least try to settle, the issue of two Indian Parties choosing a foreign seat of arbitration. After *BALCO* and *Reliance Industries*,[54] the Supreme Court in *Sasan Power Ltd. vs. North*

[53] HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited (formerly Gas Authority of India Ltd.), 2017 SCC OnLine SC 1024.

[54] Reliance Industries v. Union of India (2014) 7 SCC 603.

American Coal Corporation India Pvt. Ltd,[55] got the opportunity to settle the issue of seat of arbitration between two parties domiciled in India, and whether such foreign seated arbitration is contrary to the Public Policy of India. However, the Court did not conclusively decide on the issue even though the Madhya Pradesh High Court[56] dealt with the said issue, before it came up in appeal to the Supreme Court. The Madhya Pradesh High Court in *Sasan*, under section 45 of the Act, refused to rely on the decision of the Supreme Court in *TDM Infrastructure (P) Ltd. vs. UE Development India (P)*,[57] and the Bombay High Court in *Addhar Mercantile Private Limited vs. Shree Jagdamba Agrico Exports Pvt. Ltd*,[58] and instead relied on *Atlas Export Industries vs. Kotak & Company*.[59]

In *TDM Infrastructure*[60] and *Addhar Mercantile*[61], the Supreme Court of India, and the High Court of Bombay respectively, held that two Indian parties cannot be permitted to choose a foreign seat of arbitration as it would essentially lead to a departure from Indian law and would be in contravention of the public policy of India. However, in *Atlas Export*, a division bench of the Supreme Court of India, adjudicating under the erstwhile 1940 Act, held that when the parties have willingly agreed to enter into an arbitration agreement and designated a foreign seat of arbitration, the agreement *ipso facto* does not become void for contravening Public Policy.[62] The Madhya Pradesh High Court, concurring with the position taken in *Atlas Export* held that merely because

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55 Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd, (2016) 10 SCC 813.

56 Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd, 2015 SCC Online M.P. 7417.

57 TDM Infrastructure (P) Ltd. v. UE Development India (P), (2008) 14 SCC 271.

58 Addhar Mercantile Private Limited v Shree Jagdamba Agrico Exports Pvt. Ltd, 2015 SCC OnLine Bom 7752.

59 Atlas Export Industries v. Kotak & Company, (1999) 7 SCC 61.

60 *TDM Infrastructure*, (2008) 14 SCC 271 ¶23.

61 *Addhar Mercantile*, 2015 SCC OnLine Bom 7752 ¶8.

62 *Atlas Export*, (1999) 7 SCC 61, ¶10 & 11.

two Indian companies have entered into an arbitration agreement which was to be held in a foreign country cannot by itself be enough to nullify the arbitration agreement, since it does not contravene the Public Policy of India.[63] Therefore, Indian parties are free to arbitrate outside India and an award rendered in this process would be governed by Part II of the Act.

Interestingly when the matter came to the Supreme Court of India, it held that the issue of whether two nationals can be governed by a foreign arbitration does not arise and proceeded to decide the case on the nature of the agreement between the parties.[64] The court held that since the dispute has a *foreign element* present in it, the Indian nationals can be allowed to have a foreign seated arbitration.[65] The Court also held that even if an arbitration agreement is inconsistent with Section 23 of the Indian Contract Act, as being contrary to public policy, it only affects the legality of the substantive contract. It does not invalidate an arbitration agreement which is independent and severable from the underlying contract.[66]

Similarly, the Delhi High Court recently in *GMR Energy Limited vs. Doosan Power Systems India Private Limited and Ors*,[67] also referred to the judgments in *Sasan Power* and *Atlas Export* and held that two Indian parties selecting a foreign seat of arbitration does not contravene public policy. The court held that since an arbitration agreement is an independent agreement which is not dependent on the substantive agreement, the parties were therefore entitled

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63 Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd, 2015 SCC Online M.P. 7417 ¶52.

64 Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd, (2016) 10 SCC 813 ¶28 & 29.

65 *Id.* at ¶29.

66 *Id.* at ¶50.

67 GMR Energy Limited v. Doosan Power Systems India Private Limited and Ors, 2017 SCC OnLine Del 11625 ¶31.

to choose a foreign seat of arbitration, regardless of the contractual rights and obligations of the parties.

It would also be apposite to note at this point in time that *Venture Global* which was set aside by *BALCO* was recently agitated again before the Supreme Court upon additional facts being brought on record by the parties to the dispute. In a division bench judgment of the Supreme Court[68] where dissenting views were given by Justice Chelameswar and Justice Sapre, the matter has since been referred to a larger bench for adjudication. Interestingly, Justice Chelameswar in paragraph 127 of the judgment observes as follows:

> *"The award of an arbitral tribunal can be set aside only on the grounds specified in Section 34 of the AAC Act and no other ground. The Court cannot act as an Appellate Court to examine the legality of Award nor can it examine the merits of the claim by entering the factual arena like an Appellate Court…"*

A similar view was also expressed in *Sutlej Construction vs. The Union Territory of Chandigarh.*[69] However, this view seems to be far from being settled, as the Supreme Court of India in *Vedanta Limited vs. Shenzen Shandong Nuclear Power*[70] under Section 34 of the Act, revised the award given by the arbitral tribunal. The Supreme Court of India in the Shenzen case, modified the interest rate given by the arbitral tribunal as the same was held to be, "*arbitrary, exorbitant and had no correlation with the contemporary international rate of interests"*. However, while revising the award, the Supreme Court of India did not elaborate on why the Court was justified to interfere in the award or how such award suffers from patent illegality or was against the public policy of India. Interestingly

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68 Venture Global Engineering LLC and Ors v. Tech Mahindra Ltd and Ors, (2017) 13 SCALE 91 (SC).

69 Sutlej Construction v. The Union Territory of Chandigarh, (2017) 14 SCALE 240 (SC).

70 Vedanta Limited v Shenzen Shandong Nuclear Power, 2018 SCC Online SC 1922.

before the appeal was made to the Supreme Court of India, the Delhi High Court refused to interfere with the award as it did not satisfy the test of patent illegality enumerated in Section 34 of the Act.[71]

The recent judicial trend suggests therefore that when Indian parties have willingly entered into a foreign seated agreement, it cannot be by itself held to be contrary to the public policy. This is of particular practical significance to multi-national corporations who may contract through an Indian subsidiary, but are in essence, controlled and managed by a foreign entity. Therefore, the strict approach of determining the nature of the arbitration based purely on the country of incorporation[72] poses further issues in adopting a strict view of the issue of whether two Indian parties may select a foreign seat.

VI. Conclusion

The interpretation of the Public Policy Doctrine in Arbitration has undergone severe scrutiny in recent times and in the absence of a statutory definition of the same, the Courts have upended the legislative process of defining the contours of the doctrine, often leading to conflicting and contradictory positions on the same. In certain instances, as has been noted above, mere infractions of Indian Laws have been held to violate Public Policy while the introduction of the 'patent illegality' principle has allowed the Courts to sit in appeal over the Arbitrator's decision.

Resolution of disputes through Arbitration primarily hinges on the principle of minimal judicial intervention. Moving forward, to ensure that India becomes a global hub of arbitration in the world, the doctrine of public policy needs to be given a restrictive meaning and more importantly needs to be properly delineated in

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71 Vedanta Limited v Shenzen Shandong Nuclear Power, 2018 SCC Online Del 10916.

72 Arbitration and Conciliation Act 1996 § 2(1)(f).

reference to its width and scope. While the recent judicial trend points to an increasingly restrictive and narrow scope of Public Policy being given effect to by the Courts, the need of the hour is in statutorily defining the contours of Public Policy to ensure that the lacuna and vacuum that currently exists in our Statute books in reference to the same does not come in the way of prospective investors and litigants from carrying out their business with ease under India's robust economic climate, or seating their arbitrations in India.

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CONFLICTING JURISPRUDENCE ON THE ARBITRABILITY OF IP DISPUTES IN INDIA: NAVIGATING THE JOURNEY FORWARD

Rudresh Mandal[*]

Abstract

Broadly, intellectual property is concerned with the grant of considerable protection (measured in terms of monopoly rights) to its owner. In recognition of the tilt towards the owner brought about by these monopoly rights, States have sought to develop intellectual property policies and laws which strive to establish of a balance between the protection afforded to 'creators' and the benefit derived by the 'public' from exploiting IP. Conventionally, in furthering this balance, IP disputes have been considered to be in the exclusive realm of the judiciary. This paper seeks to explore the possibilities of arbitration as an alternative to adjudicating IP disputes. Part I of this paper outlines the theoretical debate surrounding the arbitrability of IP disputes. Thereafter, Part II briefly engages in analysing the Indian position on the same, with a cursory comparative analysis. Subsequently, Part III engages in charting a way forward on the arbitrability of IP disputes.

Introduction

With the courts of India struggling to meet its extraordinary pending caseload (an approximate of 3.3 crore),[1] arbitration has emerged as an efficacious alternative to traditional dispute resolution. The process of adjudication - measured in terms of

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[1] Harish Nair, *3.3 crore backlog cases in courts, pendency figure at highest: CJI Dipak Misra*, INDIA TODAY (June 28, 2018), https://www.indiatoday.in/india/story/3-3-crore-backlog-cases-in-courts-pendency-figure-at-highest-cji-dipak-misra-1271752-2018-06-28.

time and cost - is central to the development of economy of India, and in shaping global views on the ease of doing business.[2] Scholars have documented the need to build a robust domestic system for dispute resolution outside the traditional courts of the State.[3] Arbitration has emerged as one of the three systems of alternative dispute resolution (other two being mediation and negotiation) with a view towards streamlining adjudication in India. Consequently, with the growing popularity of arbitration, the outcome of the arbitral process has received the sanction of the State, which itself seeks to enforce the arbitral award.[4]

The selection of the 'bench' by the parties is what distinguishes an arbitration from a regular court proceeding. The primary benefit of this selection arises from the specialisation attached to the arbitrators in dealing with particular fields of dispute,[5] whether it be insolvency, capital markets or intellectual property ("IP"). Effectively dealing with disputes concerning patents, trademarks or copyright requires a thorough understanding of the intricacies of the scenario, from the built-in code of video games, to musical notations and components of medicine, along with an informed commercial understanding of the concerned industry. Herein, the effectiveness of arbitration is manifest in reducing the time and cost required to adjudicate such complex IP disputes. However, the flipside to private adjudication of disputes include the limitations of authority inherent in these arbitral tribunals,

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2 Bibek Debroy & Suparna Jain, *Strengthening Arbitration and its Enforcement in India – Resolve in India*, NITI AAYOG, niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf.

3 John McDermott, *Arbitration and the Courts,* 11 THE JUSTICE SYSTEM JOURNAL 248, 248-250 (1986).

4 Blackman *et al*, *Alternative Dispute Resolution in Commercial IP Disputes,* 47 AMERICAN UNIV. LAW REV. 1709, 1710-1713 (1998).

5 Gregg Paradise, *Arbitration of Patent Infringement Disputes: Encouraging the Use of Arbitration through Evidence Rules Reform*, 64 FORDHAM L. REV. 247, 262-264 (1995).

which preclude their jurisdiction over parties which do not consent, increased expenditure and suspect quality of arbitration.[6]

Indian IP jurisprudence is however notorious in its lack of clarity on the arbitrability of IP disputes. The 2015 amendment to the Arbitration and Conciliation Act, 1996 did not seek to define 'arbitrability' and this confusion was only compounded by the Bombay High Court reaching two opposite conclusions on the issue at hand, in *Eros International Media Ltd. vs. Telemax Links India Pvt. Ltd*[7] and *Indian Performers Right Society Limited vs. Entertainment Network Ltd.*[8] This paper seeks to trace the disharmony in legal opinion on the arbitrability of IP disputes, especially in the Indian context.

I. The Theoretical Debate Surrounding the Arbitrability of IP Disputes: Irreconcilable Tensions

While previously, the Courts of the State enjoyed sole jurisdiction over IP disputes, today we have witnessed a shift towards arbitration of these disputes, with bodies including the World Intellectual Property Organisation[9] and the International Chambers of Commerce[10] supporting arbitral processes. However, uniform practice across countries is conspicuous in its absence. The position in India has been no less clear, with the Supreme Court in *Ayyasamy vs. A. Paramasivam and Ors.*[11] including

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6 Darryl Horowitt, *The Pros and Cons of Arbitration*, COLEMAN & HOROWITT LLP, www.ch-law.com/files/pdf/news/Arbitration.pros.cons.client.memo.pdf.

7 Eros International Media Limited v Telemax Links India Pvt Ltd and Others (2016), SCC OnLine Bom 2179.

8 The Indian Performing Right Society Ltd v Entertainment Network (India) Ltd (2016) SCC OnLine Bom 5893.

9 *Alternative Dispute Resolution*, WIPO, www.wipo.int/amc/en/.

10 ICC, *Adjudicating Intellectual Property Disputes, an ICC report on specialised IP jurisdictions*, INTERNATIONAL CHAMBERS OF COMMERCE, https://iccwbo.org/publication/adjudicating-intellectual-property-disputes-an-icc-report-on-specialised-ip-jurisdictions/

11 A Ayyasamy v. A Paramasivam and Others, (2016) 10 SCC 386.

'*patents, trademarks and copyright*' in its list of inarbitrable disputes. This was in consonance with the Supreme Court's traditional conceptualisation of IP disputes revolving around adjudication of rights in rem.[12] However, this expansive proposition of the Court (devoid of qualifications) should not be read to imply that IP disputes always suffer from inherent subject matter non-arbitrability, since they are rights *in rem*. Whether or not a particular IP dispute can be the subject of arbitration will have to be decided on an evolving basis, specific to the conditions of every case.[13] The Bombay High Court,[14] for instance, outrightly rejected the Supreme Court's idea of IP disputes being inherently non-arbitrable. Further, the Court's holding in *Ayyasamy* on IP being non-arbitrable ought to be considered as mere obiter, as the case was concerned with the arbitrability of fraud. The mention of IP disputes as being inherently non-arbitrable was a result of the Court's quotation of the 'non-arbitrability list' from a commentary.[15] In light of this jurisprudential confusion, it would be worthwhile to examine both sides of the story on arbitrability of IP disputes, before we analyse the relevant Indian High Court judgments on the issue.

IP discourse has revolved around the very nature of IP, which derogates from possibilities of submitting IP disputes to arbitration, notwithstanding the general benefits of arbitration. The arguments raised against the arbitrability of IP disputes can be broadly compartmentalised into 4 streams of thought.

First, the grant of IP rights has been understood to lie in the sole domain of the sovereign. Consequently, only the sovereign can undo what it bestows upon its subjects. Thus, private institutions

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12 Common Cause, A Registered Society v Union of India and Others, (1999) 6 SCC 667.

13 Utkarsh Srivastava, *Putting The Jig Saw Pieces Together: An Analysis of the Arbitrability of Intellectual Property Right Disputes In India*, 33 ARBITRATION INTERNATIONAL 631, 635-637 (2017).

14 *Eros*, *supra* note 7.

15 SRIVASTAVA, *supra* note 13.

like arbitral tribunals, which do not possess the authority of the sovereign cannot dilute or expand the scope of a right granted by the State.[16]

Second, flowing from the first argument raised above, scholars posit that public interest often demands that the sovereign, in exercise of its power, shift certain subjects from the public to the private realm. In essence, this implies that the 'creator' of the IP; its owner, has the sole right to exploit it, to the exclusion of all third parties, who are now obliged to recognise the protective boundaries of the grant of IP rights to its creator. Hence, an arbitral tribunal will not be able to invalidate this monopoly in favour of the creator, owing to lack of the authority of the State.[17]

Third, consent of the parties is the driving force behind the power and authority of arbitral tribunals. Necessarily therefore, the tribunal can exercise no power *vis-à-vis* third parties, unlike rulings of Courts on rights *in rem*. Arbitral awards cannot confer rights, nor impose obligations on third parties.[18] Juxtaposing this argument against the monopoly nature of IP rights (them being rights against third parties), would prevent arbitration of IP disputes.

Fourth, the grant of IP rights to creators is based on the understanding that such grants will help attain social and economic ends, whether it be encouraging creativity, maximising welfare or enhancing research. In the absence of an IP rights regime, creators would have negligible incentive to make their

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16 Therese Jansson, *Arbitrability Regarding Patent Law - An International Study*, 1 JURIDISK PUBLIKATION 49, 53 (2011).

17 Daniel Mathew, *Arbitrating Intellectual Property Disputes in India*, SSRN (Mar. 28, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2942684

18 Prarthna Bathija & Apoorv Madan, *Demystifying the Arbitrability of Patent Disputes in India*, INDIACORPLAW (Aug. 3, 2018), https://indiacorplaw.in/2018/08/demystifying-arbitrability-patent-disputes-india.html.

work public and this would in turn negatively impact welfare.[19] If we were to allow private adjudicatory bodies to negate this grant, creators would be disincentivised from displaying their work, ultimately rebelling against the very ends the system was designed to attain.

Booz Allen Hamilton Inc. vs. SBI Home Finance[20] put forth a possible *fifth* argument, wherein it was stated that often specific, specialised tribunals are created by statute, granting them sole jurisdiction over certain types of disputes. Consequently, this recognition of exclusive jurisdiction, ousts the jurisdiction of all other adjudicatory authorities, including arbitral tribunals. When read in conjunction with scholarship which suggests that specialised IP tribunals should be established by the State, this leads us to inquire whether tribunalisation of IP disputes is feasible or not. However, that enquiry is beyond the scope of this paper, but would be beneficial to explore in the future.

At the outset, *Redfern & Hunter*,[21] and *Karim Youssef*[22] argue that the remarkable development of the scope of arbitration has brought about the 'death of arbitrability' as a concept in itself. Broadly, in a plethora of jurisdictions, all disputes that possess a commercial element are amenable to arbitration. With the expansion of the range of rights that lend themselves to being arbitrated upon, the '*concept of arbitrability, as central as it may be to arbitration theory, has virtually died in real arbitration life*'.[23]

With this background in mind, the following arguments in favour of the arbitrability of IP disputes have been put forward:

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19 ROBERT MERGES, JUSTIFYING INTELLECTUAL PROPERTY, 300-310 (2011).
20 Booz Allen Hamilton Inc. v. SBI Home Finance, (2011) 5 SCC 532.
21 REDFERN & HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 154 (1999).
22 KARIM YOUSEFF, THE DEATH OF INARBITRABILITY IN L. MISTELIS ED. ARBITRABILITY: INTERNATIONAL & COMPARATIVE PERSPECTIVES, 47-48 (2009).
23 *Id.* at 47.

First, the fluidity of the notion of public policy problematises the endeavour to include/exclude specific matters from its scope. The dynamism of public policy only further compounds the issue. Being a bundle of unique rights, characterised by distinct manners of acquisition and divergent features, IP rights necessitate the understanding that a public policy backed blanket ban on arbitrability of IP disputes, is misinformed. The confusion on the limits of public policy would allow certain IP disputes to be arbitrable, and others not.[24]

Second, the outcome of the arbitral process is limited to the consenting parties, and thus does not affect the world at large. Therefore, arbitration of IP disputes would not derogate from the sovereign's grant of IP rights to creators.[25] Naturally, an arbitral tribunal cannot register copyright, or quash a patent in general for that would impact the rights of the public.[26] The idea is that the arbitral award cannot extend itself to annul grants of IP rights which have an *in rem* nature, an issue to which we shall turn later.

Third, if the question of validity of IP (an *in rem* determination) is incidental to the central question before an arbitral tribunal, the tribunal would be free to decide whether to ignore the incidental question or not. If it chooses to answer only the central question, then the argument of inarbitrability would not apply.[27]

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[24] CHRISTOPHER KEE *ET AL*, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE, 188-189 (2011).

[25] MATHEW, *supra* note 15 at 7.

[26] GARY BORN, NON-ARBITRABILITY AND INTERNATIONAL ARBITRATION AGREEMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION, 991-993 (2009).

[27] *Non-Core Insolvency Claims: Straddling The Line Between Arbitrability And Non-Arbitrability*, AFIA (AUG. 15, 2017), afia.asia/2017/08/non-core-insolvency-claims-straddling-the-line-between-arbitrability-and-non-arbitrability/.

II. The Arbitrability of IP Disputes in India: Questions of Nature and Relief

In *Booz Allen*,[28] the Supreme Court distinguished arbitrable disputes from inarbitrable ones using two approaches. *First*, if the subject matter – the nature of the dispute was amenable to arbitration and *second*, if the relief prayed for could be awarded solely by the Courts of the State or by private arbitral tribunals. This paper first examines arbitrability of IP dispute *vis-à-vis* the nature of the dispute itself.

A. A 'NATURE' BASED DETERMINATION OF ARBITRABILITY

Traditionally, IP rights have been regarded as being rights *in rem*, thus being inarbitrable. However, *Booz Allen*[29] problematised this simplistic assertion, holding that there may exist subordinate *in personam* rights, that is, rights that were derived from principal *in rem* rights, which arose from contractual relationships and were thus inherently arbitrable. To illustrate, rights which flow from a technology sharing or IP licensing agreement, would be *in personam* rights subordinate to the principal IP *in rem* right, and arise through derivation from the latter.[30] Consequently, adjudication of such a dispute would operate only between the concerned parties and not affect the world at large, and hence such contractual IP disputes can be resolved through arbitration.

The Bombay HC, in *Eros Media*[31] had the opportunity to adjudicate upon the arbitrability of IP infringement claims. Interestingly, the same Court had earlier noted that claims of passing off/infringement could not be resolved by arbitration.[32]

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28 *Booz Allen, supra* note 20.
29 *Id.*
30 SRIVASTAVA, *supra* note 13 at 637.
31 *Eros, supra* note 7.
32 *Steel Authority of India Ltd. v. SKS Ispat And Power Ltd and Others,* Notice of Motion (L) No.2097 of 2014 in Suit No.673 of 2014

Eros Media,[33] however rejected this line of argument, holding that proceedings pertaining to infringement of IP rights necessarily revolved around the determination of rights *in personam*, and did not concern rights *in rem*. The Court's reasoning was simple- the arbitral award was binding between the parties to the dispute only, and did not affect similar claims that could be levied against different defendants in other actions before any adjudicatory authority. While a right *in rem* did indeed form the basis for the claim of infringement, the infringement claim was inherently concerned with *in personam* rights.

Addressing the arbitrability of questions of validity and existence of IP rights, the Court in *Eros Media*[34] further held that such questions were not capable of resolution through arbitration. The Court's holding here was premised on its conceptualisation of an arbitral tribunal being incapable of adjudicating upon the validity of IP rights, which are rights *in rem*. In essence, only the sovereign can take away what it grants.[35] For example, an arbitral tribunal would lack the power to grant or invalidate registration of a trademark, since that would not only amount to determining the ownership of the trademark, but more importantly, impact the rights of the trademark applicant against everybody else.[36] *Booz Allen*[37] adopted a similar stream of thought, with the Supreme Court holding that a judgment in rem was one that does not operate against a specific party, but '*determines the status or condition of property which operates directly on the property itself*.' Judgments of this nature lay in the sole territory of the Courts of the State. Interestingly, in the USA, an adverse finding on the validity of a patent by an arbitrator is required to be entered in the Register of

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33 *Id.*
34 *Id.*
35 THOMAS HALKET, ARBITRATION OF INTERNATIONAL INTELLECTUAL PROPERTY DISPUTES, 74 (2012).
36 *Eros, supra* note 7.
37 *Booz Allen, supra* note 20.

Patents. While this does not therefore give the award an *in rem* effect, it charts a somewhat middle ground.

Next in the saga of arbitrability of IP disputes was *IPRS Ltd. vs. Entertainment Network Ltd.*[38] This case posed a novel question to the Indian judiciary: would the mandatory registration of copyright derogate from the capacity of an arbitral tribunal to decide questions of existence of copyright in a work? Recognising that adjudication of such claims of infringement of copyright, might require determination of purely legal questions (the *Eros* Court did not deal with the feasibility of arbitrating legal questions of IP and strangely held that the determination of copyright was in essence a question of fact[39]), the Court here held that if an arbitral tribunal were permitted to decide the existence of copyright in a work, it would amount to a judgment *in rem*. The Calcutta HC, in *Diamond Apartments vs. Abanar Marketing*[40] also held that complex and nuanced issues of law should not be brought before arbitral tribunals. Adjudicating upon the scope and existence of a particular copyright would necessitate a decision on complicated legal questions, and should thus not be brought to arbitration.[41]

B. A 'RELIEF' BASED DETERMINATION OF ARBITRABILITY

In *Booz Allen*,[42] the Supreme Court held that the issue of arbitrability also had to be determined on the touchstone of the

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38 The Indian Performing Right Society Ltd v Entertainment Network (India) Ltd (2016) SCC OnLine Bom.

39 Shamnad Basheer, *Apocalyptic Arbitration of IP disputes?*, SPICY IP (APR. 21, 2016), https://spicyip.com/2016/04/18085.html.

40 Diamond Apartments v. Abanar Marketing, GA No. 1343 of 2015 (Calcutta High Court).

41 Pranav BR & Ganesh Gopalakrishnan, *Dealing with Arbitrability of Fraud in India – The Supreme Court's Fra(e)udian Slip?*, KLUWER ARBITRATION BLOG (NOV. 17, 2016), arbitrationblog.kluwerarbitration.com/2016/11/17/dealing-with-arbitrability-of-fraud-in-india-the-supreme-courts-fraeudian-slip/.

42 *Booz Allen*, *supra* note 20.

'*reliefs test*', that is, whether the relief sought before an arbitral tribunal could only be granted exclusively by the Courts of the State or specialised tribunals. The Bombay HC in *Rakesh Malhotra vs. Rajinder Malhotra*,[43] for instance, noted that all disputes arising from Sections 397 and 398 of the Companies Act, 1956 were actions *in rem*, and were thus inarbitrable and had to be submitted before the Company Law Board.

In contractual disputes, a wide range of reliefs is sought, ranging from a claim for damages, injunctions or specific performance. It is presumed that all reliefs claimed as a result of breach of contract (including contracts concerning IP) can be granted by an arbitral tribunal, and the tribunal can simply engage in a fact-based determination.[44] However, is it undeniable that there exists a number of situations where the relief claimed by a party in an IP related contractual dispute cannot be granted by a private arbitral tribunal, and would instead fall under the purview of the Copyright Board. Thus, all disputes arising out of issues revolving around copyright assignment[45] and compulsory licensing[46] (for example, questions of royalty refunds emerging from the licence) and disputes enlisted under Section 6 of the Copyright Act[47] would be amenable to adjudication only by the Copyright Board, and not arbitral tribunals.

However, when it comes to cases of infringement of IP with claims of damages/injunctions/lost profits, the position in Indian jurisprudence is conflicting. *IPRS vs. Entertainment Network*[48] and

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43 R. Malhotra v. RK Malhotra & Ors, MANU/MH/1309/2014.

44 *Eros*, *supra* note 5; Olympus Superstructures Pvt Ltd v. Meena Khetan, (1999) 5 SCC 651.

45 Copyright Act 1957 § 19A.

46 *Music Choice India Private Limited v Phonographic Performance Limited* (2010) SCC OnLine Bom 113.

47 Section 6 of the Copyright Act, 1957 deals with '*certain disputes to be decided by the Copyright Board*'.

48 IPRS, *supra* note 38.

Mundipharma AG vs. Wockhardt[49] read Section 62(1) of the Copyright Act[50] as a mandatory provision ('*Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the district court having jurisdiction*') and consequently hold that remedies flowing from infringement shall not be within the powers of an arbitral tribunal. The logic enshrined in these judgments would apply to other forms of IP as well. The approach embodied here however creates a blanket rule against arbitrability of IP disputes (including *in personam* suits) and runs contrary to the logic of the Arbitration Act.[51] In the view of the author, *Eros Media*[52] subscribes to a sound approach, balancing IP laws with that of the Arbitration Act. *Eros Media*[53] noted that provisions such as Section 62(1) were markers of the '*entry level for infringement suits in the judicial hierarchy*' and did not vest exclusive jurisdiction in the Courts of the State to provide remedies to infringement suits. Further, flowing from the approach in *Booz Allen*,[54] questions of infringement of IP are suits *in personam*, and do not affect the rights of the world at large.

Finally, recall that questions pertaining to the existence/validity of IP rights involve judgments *in rem* and therefore are hit by the bar of subject matter inarbitrability. Questions of nature also however fall foul of *Booz Allen's* reliefs test. For instance, Section 124 of the Trademarks Act, 1999 establishes the Intellectual Property Appellate Board[55] to exclusively adjudicate upon issues of invalidity of trademarks that have been statutorily registered. Notwithstanding there being no explicit bar against such

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49 *Mundipharma AG v. Wockhardt*, ILR (1991) 1 Delhi 606.
50 Copyright Act, 1957 § 62(1).
51 SRIVASTAVA, *supra* note 11 at 641-642.
52 EROS, *supra* note 5.
53 *Id.*
54 *Booz Allen*, *supra* note 18.
55 Section 124 deals with a stay of proceedings where the registration of a trademark is questioned and empowers only the IPAB to rectify the register.

questions being heard by the civil court, by virtue of Section 124, in *Data Infosys vs. Infosys Technologies*,[56] the Delhi HC ruled that only the IPAB could hear disputes of validity of registered trademarks. Consequently, the jurisdiction of an arbitral tribunal in this matter is ousted as well. Interestingly however, the jurisdiction of civil courts (the High Court) *vis-à-vis* patent revocation claims have not been ousted and would thus be arbitrable as well.[57] Nonetheless, since its subject matter involves an *in rem* determination, it would still remain inarbitrable.

At this stage, it would be worthwhile to briefly engage in a cursory comparative analysis of legal positions on arbitrability of IP disputes. At one end of the scale, lies jurisdictions such as Switzerland[58] and Belgium,[59] which generally recognise the *in rem* consequences of arbitral awards, that the holder of the IP may prevent its exploitation by others. The USA and Japan too are liberal in their approach of enabling the arbitrability of questions of existence/validity of IP rights, but limit this to operating between the parties to the arbitration.[60] The middle of the scale is representative of those jurisdictions (Italy,[61] Germany,[62] Portugal[63] and perhaps India), which allow arbitration of IP

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56 Data Infosys Ltd. v. Infosys Technologies Ltd., MANU/DE/0283/2016.

57 J. Deepak, *Counterclaim and the High Court's Jurisdiction over a Suit for Patent Infringement*, THE DEMANDING MISTRESS (Feb. 16, 2011), http://thedemandingmistress.blogspot.com/2011/02/counterclaim-and-high-courts.html.

58 ANNA MANTAKOU, ARBITRABILITY AND INTELLECTUAL PROPERTY DISPUTES, IN L. MISTELIS ED. ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES, 267 (2009); Article 177, Swiss Federal Act on Private International Law (1987).

59 Article 51, Belgian Patent Act (1997); Trevor Cook, *ADR as a Tool for IP Enforcement*, WIPO, http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ace_9/wipo_ace_9_3-main1.pdf.

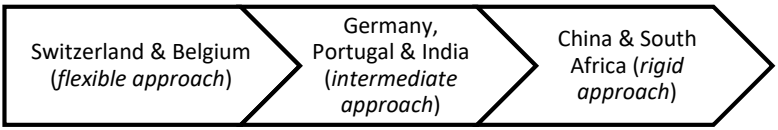
60 K. Adamo, *Overview of International Arbitration in the Intellectual Property Context*, 2 GLOBAL BUS. L. REV 7, 16-18 (2011).

61 MATHEW, *supra* note 17 at 7-8.

62 Erik Schafer, *The Use of Arbitration and Mediation for Protecting Intellectual Property Rights: A German Perspective*, 94 TMR 695, 708-711 (2004).

63 MATHEW, *supra* note 17.

disputes, barring those concerning disputes of existence, validity and ownership, which have a clear *in rem* nature. At the other extreme end of the scale are countries like China and South Africa which enact a ban on arbitration of certain IP disputes.[64]



III. The Journey Forward: Whether the Nature of the Rights or Nature of the Action?

In endeavouring to adjudicate upon the arbitrability of IP disputes in the future, the Courts should bear a crucial distinction in mind: that of the nature of the rights, from the nature of the action involved. While IP rights in general are indeed rights *in rem*, by virtue of operating against the world at large, every cause of action arising out of IP would not necessarily be an action having *in rem* consequences. In essence, nothing in the nature of IP rights should imply that they are characteristically not fit for arbitration. This distinction is often blurred (for example, by the petitioners in *Eros Media*[65]), but does not have any foundation in theory. *Booz Allen*[66] also stipulates that there is no blanket ban against the non-arbitrability of a right *in rem*. That said, we should undermine the necessity of examining the characteristics of the rights in question. An important part of the process of determining arbitrability, an action *in rem* (establishment of title over property, for instance) would invariably require judgment over a right *in rem*. Same is the case for actions and rights *in personam*. Distinguishing between the nature of the rights and nature of the action is merely a question of convenience towards an adjudication of arbitrability of IP

64 *Id.*
65 *Eros*, *supra* note 7.
66 *Booz Allen*, *supra* note 20.

disputes, while at the same time not deviating from the dictum of *Booz Allen.*[67]

Further, while the jurisprudential position in India is clear on the inarbitrability of questions of validity or existence of IP rights, *Gary Born* puts forth a novel argument supporting the arbitrability of such issues.[68] He argues that there should be no objections to an arbitral tribunal adjudicating upon the existence of an IP right, so as long as it only binds the parties. That should not be taken to imply that an arbitral tribunal can register copyright, or annul a patent. His argument merely is that a tribunal can engage in deciding issues of validity of an IP right, and this is in fact central to the tribunal's mandate; the only caveat being that the award must operate *inter partes*. However, it seems unlikely for such argument to gain traction in the Indian landscape, given the firm stance on inarbitrability of *in rem* disputes. For instance, the only adjudicatory authority which can engage in rectification of trademarks under the Trademarks Act is the IPAB.[69] Perhaps in countries with an extreme pro-arbitration mind-set, it might be accorded some importance.

Thus, given that claims of validity/existence would oust the jurisdiction of arbitral tribunals, one must be cautious of attempts to bypass the arbitral process by instituting such '*dressed up claims*',[70] which are mala fide and have no basis in law. While hearing these '*dressed up claims*' the adjudicatory body must accord necessary weightage to the arbitration clause. In *Ayyasamy*,[71] the Supreme Court noted that the burden to prove inarbitrability (a heavy one) necessarily lay with the party desirous of bypassing the arbitration clause. Only after a perusal of the material at hand

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67 SRIVASTAVA, *supra* note 13 at 643.

68 GARY BORN, NON-ARBITRABILITY AND INTERNATIONAL ARBITRATION AGREEMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 991-993 (2009).

69 SRIVASTAVA, *supra* note 13 at 644.

70 *RAKESH MALHOTRA*, *supra* note 39.

71 *Ayyasamy*, *supra* note 11.

establishes a prima facie case of an *in rem* action, or a complicated question of law, can the arbitration process be barred by the rule of inarbitrability.

IV. Conclusion

The question of arbitrability of IP disputes has traditionally been engaged with by scholars of arbitration, and rarely by those from the field of IP. The National IPR Policy, 2016 of India[72] on the one hand states that it is geared towards *inter alia*, '*strengthening of enforcement and adjudicatory mechanisms for combating intellectual property rights infringements*', but on the other hand only makes a passing reference towards the possibilities of exploring arbitration as a means towards adjudication of IP disputes. Indian jurisprudence, scholarship, statute and policy alike are yet to address the consequences of subjecting IP related disputes to arbitration and the judiciary is burdened with the problematic job of fashioning a remedy for this complexity. A right without an effective remedy is of little value, and since the benefits of arbitration over litigation (in terms of specialisation, competence and decentralisation) have been recognised, India would do well to commence conversation on the arbitrability of IP disputes.

[72] *National IPR Policy*, DIPP, dipp.nic.in/policies-rules-and-acts/policies/national-ipr-policy.

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MANDATORY RULES AND ITS EFFECT ON ENFORCEABILITY OF ARBITRAL AWARDS: THE 'SECOND LOOK' SOLUTION

Meenal Garg[*]

Abstract

Since its inception, the courts and the disputing parties have never seen eye to eye as far as the mandatory rules are concerned. This difference of opinion exists on the traditional public-private dichotomy which is exhibited by mandatory rules. The mandatory law problem is further aggravated once the parties seek to enforce an arbitral award. This paper is an attempt to review the existing scholarship pertaining to mandatory rules. The author has firstly tried to elaborate and clarify the concept of mandatory laws in the relevant context. Secondly, the paper explores the 'second look' doctrine which is often overlooked by commentators and scholars. Finally, the author has advocated a liberal exercise of this doctrine with a view to bring harmony amongst diverse interests of the courts, the parties and the arbitrator.

I. Introduction

Arbitration is founded on the principle of party autonomy. It is preferred over the conventional adversarial method of dispute resolution because it gives the parties a choice to determine various catalysts of arbitral proceeding like the arbitrators, the substantive law and the procedural law applicable to the dispute. Generally, an arbitrator is only required to consider the will of the parties and respect the agreed law while deciding a dispute.

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With the growing concept of arbitrability and cases like *Mitsubishi Motors*[1], scholars have directed their attention to the concept of mandatory laws. Such rules are criticised by the global business community as unreasonable restrictions on party autonomy while on the other hand their application is persistently insisted upon by states. In spite of the abundant literature on the subject, there is no general consensus among the national courts as well as international commentators as to how to deal with the concept of mandatory laws. This article will firstly examine the meaning of mandatory rules and its significance during an arbitration proceeding. Concludingly, it will examine the role of the enforcing court whose actions can give substance to an arbitral award or leave the whole arbitration exercise futile.

II. Understanding Mandatory Laws

A. DEFINING MANDATORY LAWS

In the contemporary arbitration arena, arbitrators are trying to understand and apply the concept of mandatory laws which is not defined in various national and international instruments. Before proceeding with the dilemma of mandatory law application in international arbitration, it would be prudent to first understand the meaning of 'mandatory laws'. There are a number of definitions that try to incorporate different elements pertaining to mandatory rules. Some of them are stated below to arrive at a working definition of mandatory rules.

The most cited dentition of mandatory law is by Professor Mayer. He defines mandatory rules as:

A mandatory rule (*loi de police* in France) is an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship. To put it another way: mandatory rules of law are a matter of public policy

[1] Mitsubishi Motors Co. v. Soler Chrysler Plymouth Inc., 473 U.S. 614 (1985).

(*ordre public*) and moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws.[2]

Another author states:

> *Internationally mandatory rules of law are... statutory provisions enacted by national parliaments in order to protect (or applied by courts to implement) specific public policies. These are not just any public policies, however; internationally mandatory laws enforce only those policies that are deemed to be so strong that – even in the situation of an international contract – the national statutory provisions must take precedence over any foreign law that would normally govern the contract.*[3]

The above definitions of mandatory law reflect that these rules are so invariantly linked to public policy that their application or non-application cannot be left to contractual parties as they might affect the interests of third party or of the public at large. This is supported by the fact that traditionally, arbitral awards were denied on the grounds of public policy.[4] It is submitted here that mandatory rules can be better understood with respect to public interest rather than public policy. This is because public policy is a subjective term which may vary from state to state. Moreover, public interest is a broader term which includes economic goals, legal goals etc. which might not be covered in public policy. This statement should not be misconstrued that mandatory rules are not public policy, rather, it simply means that mandatory rules include something more than just public policy. The correct

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2 Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2(4) ARB. INT'L 274, 274-75 (1986).

3 Jan Kleinheisterkamp, *The Impact of Internationally Mandatory Laws on the Enforceability of Arbitration Agreements*, 3(2) WORLD ARB. & MEDIATION REV. 91, 91 (2009).

4 *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), *signed* June 10, 1958, 330 U.N.T.S 38.

observation with respect to relationship between mandatory laws and public policy would be that "public policy and mandatory laws may reflect similar concerns."[5] On the other hand, "the common feature of international mandatory rules of law is the paramount pursuance of a public interest."[6]

Furthermore, it is to be understood here that there are two types of mandatory rules, namely, domestic and international. Domestic mandatory rules are those laws which can be circumscribed by the parties in an international scenario by means of an arbitration agreement. However, the international mandatory laws are those laws whose roots are found in almost all legal systems and in any case, cannot be avoided by the parties. The difference between the two is based upon the notion that not every law which is instrumental to domestic interests should form part of the so called 'international public policy', especially in case of international commercial arbitration. The difference between the two can be explained by way of a simple example.

Suppose, two parties, one from India and one from U.S.A. enter into a contract which will be performed in India. Both agree to submit all future disputes to an arbitrator. Here, in case of any breach, the contract law of India would apply. Further, suppose the breach involves a question of abuse of dominant position by one party, competition law will come into play. In this example, contract law of India can be termed as domestic mandatory law which can be avoided by parties by selecting the contract law of some other state. On the other hand, competition law represents crucial public interests which directly affect the consumers as well as other competitors in the market. Therefore, keeping aside the

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5 Luke Villiers, *Breaking in the 'Unruly Horse': The Status of Mandatory Rules of Law as Public Policy Basis for the Non-Enforcement of Arbitral Awards*, 18 AUSTRALIAN INT'L L. J. 155, 164 (2011).

6 Nathalie Voser, *Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration*, 7 AM. REV. INT'L ARB. 319, 325 (1996).

debate with respect to arbitrability of competition law, the parties cannot so easily avoid the application of competition law which is considered to hold a fundamental position in every state's economic policy. Thus, competition law can be said to be a branch of international mandatory law.

B. JUSTIFICATION OF MANDATORY LAWS

"The role of mandatory rules in international commercial arbitration is uniquely complicated because they put the interests of states and parties in direct conflict."[7] This is because if the mandatory laws are not followed, then the arbitration agreements would become a loophole for the parties that they can use to circumvent their obligations. On the other side, such rules cannot be applied that have been expressly or impliedly excluded from the ambit of the arbitration agreement.

There are a number of reasons forwarded for application of mandatory laws. For example, Lorenzo opines, "[L]egal certainty and legitimate expectations justify the application of mandatory rules... as these rules are recognisable in the frame of principles that govern world trade."[8] Amongst these reasons, the most frequently submitted justification for application of mandatory laws is the state's foremost responsibility to protect public interests. There is a strong evidence to suggest that even the most liberal national systems recognize supremacy of strong public policies in curtailing excess free wills.[9] In addition to this, some commentators have opined that while there may be fundamental disagreements as to which country's mandatory laws are to be

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7 Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, 6(2) MELB. J. INT'L L. 205, 206 (2005).

8 Sixto Sánchez Lorenzo, *Choice of Law and Overriding Mandatory Rules in International Contracts after Rome I*, 12 Y.B. PRIV. INT'L L. 67, 88 (2010).

9 *See* Charles H Brower II, *Arbitration and Antitrust: Navigating the Contours of Mandatory Law*, 59 BUFF. L. REV. 1127, 1142-43 (2011).

applied, they do not represent a challenge to the existence of mandatory laws per se.[10]

Calliess and Renner have made some noteworthy observations under the garb of transnational public policy norms. They opine that such norms are "the very interaction of private actors and public regulators".[11] In the views of this author, such interaction is nothing more and nothing less than mandatory rules in international arbitration. It is further submitted that mandatory rules are justified as they act as a bridge between the policy of promoting arbitration and protection of specific state or societal interests. To substantiate this in words of Maniruzzaman, "[t]he source of these rules lies in the national sovereignty of the State for the realization of public interest."[12]

In the views of this author, the liberalist argument that mandatory laws are in violation of parties' consent is also misconstrued. The rationale behind the application of particular mandatory laws is that it has sufficiently close nexus with *lex contractus* which is aimed to satisfy the facts and circumstances of a particular case. Therefore, it is only logical to assume that "[a]s long as parties have no particular expectation that they can escape mandatory rules by entering into arbitration agreements, those rules will vindicate public policy by exerting a deterrent effect, and parties weighing whether to bring or settle claims will do so in the shadow of mandatory law."[13]

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10 *Id.*

11 Gralf-Peter Calliess & Moritz Renner, *Transnationalizing Private Law - The Public and the Private Dimensions of Transnational Commercial Law*, 10 GERMAN L. J. 1341, 1355 (2009).

12 A.F.M. Maniruzzaman, *International Arbitrator and Mandatory Public Law Rules in Context of State Contracts: An Overview*, 7 J. INT'L ARB. 53, 54 (1990).

13 Alexander K.A. Greenawalt, *Does International Arbitration Need a Mandatory Rules Method*, 18 AM. REV. INT'L ARB. 103, 106-07 (2007).

C. THE ARBITRATOR AND THE MANDATORY LAW

The present debate regarding mandatory rules is that the arbitrator has no authority to apply law which falls outside the scope of the contract. This is based on the fact that an arbitrator derives his authority from an agreement between the parties. "One of the reasons why there is no consensus on the proper approach to mandatory rule issues is that the question can be approached in a diverse range of ways."[14] Furthermore, "[d]etermining the source of applicable mandatory rules [by the arbitrator] is a matter of controversy."[15] While different approaches have been forwarded to guide the arbitrators while applying mandatory rules, this paper focuses on the why instead of how an arbitrator should apply these mandatory norms.

In practice, it is not unusual to see arbitrators apply mandatory rules even though they were not agreed by the parties. Some authors believe that the arbitrators respect the mandatory rules as part of their public commitment which brings them in line with their transcendent values of their profession.[16] On the contrary, critics have opined that the arbitrator is not under any legal obligation to apply a particular set of mandatory rules. Jones has strongly argued:

> *As the arbitral tribunal is not a gatekeeper of any country's laws, it can determine whether to apply a mandatory rule, and which one, and it is likely to be more attuned to the interests of the parties than*

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14 Jeff Waincymer, *International Commercial Arbitration and the Application of Mandatory Rules of Law*, 5(1) ASIAN INT'L ARB. J. 1, 9 (2009).

15 Mohammad Reza Baniassadi, *Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?*, 10 INT'L TAX & BUS. LAW. 59, 68 (1992).

16 *See* Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20(5) AM. U. INT'L L. REV. 957, 1016 (2005).

> *to the interests of the legal system and the society as a whole, as compared to national courts.*[17]

This argument is very much true as all mandatory laws are foreign mandatory laws to arbitrators who do not have a *lex fori*.[18]

This discussion has brought us to square one. In other words, neither the arbitrator has any sense of obligation towards the laws of a particular state nor can he allow the parties to use arbitration as a means to contract out of their statutory claims. Then what could be the possible reason that leads the arbitrator to apply the mandatory rules.

Some commentators opine that the arbitrators can apply mandatory rules much like an international judge.[19] While, both arbitrators as well as an international judge do not have a *lex fori* and there is a possibility that arbitrators may put themselves in position of judges to override the *lex contractus*, yet, in the author's views, this notion does not serve as compelling evidence of application of mandatory laws by international arbitrators. One argument that can be forwarded against this is that judge aims to do justice while the arbitrator is interested in acting according to will of the parties. Moreover, such an approach may confer arbitrary authority on the arbitrator which may adversely affect his reputation. The reason for the same is that while choosing an arbitrator, the party considers not only the skill and knowledge of the arbitrator but also his ability to act within the scope of the arbitration agreement. If an arbitrator has a reputation for

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17 Doug Jones, *Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties: A Discussion of Voie Directe and Voie Indirecte*, 26 SINGAPORE ACAD. L. J. 911, 928 (2014).

18 *See* Carolina Pitta E Cunha, *Arbitrators and Courts Compared: The Long Path Towards an Arbitrators' Duty to Apply Internationally Mandatory Rules*, YOUNG ARB. REV., Apr 2016, at 26, 32.

19 *See* Maniruzzaman, *supra* note 12, at 56-57.

routinely overriding the *lex contractus*, no party would prefer to appoint such an arbitrator to adjudicate their disputes.

Professor Guzman's work on reconciling mandatory arbitration rules and international arbitration is noteworthy here. He has opined that in absence of any judicial review, the arbitrator will always be inclined towards application of the law agreed in the arbitration clause because honouring the arbitration agreement is one of the primary reasons for which an arbitrator is chosen. However, as soon as judicial review comes into play, the court may deny enforceability of award because the mandatory laws were not applied. Thus, the duty to produce an enforceable award acts as an incentive for the arbitrator to respect the relevant mandatory laws.[20] The author terms this as the incentive based approach. The rationale behind this approach is that the application of mandatory rules by the arbitrator does not stem from any obligations towards the state policies but from the interest of the parties to produce an unchallengeable and enforceable award. The word 'incentive' is used instead of 'obligation' because an arbitrator cannot be reduced as a slave to parties' will. While enforceability is one of the most dominant reasons as to why an arbitrator must respect the mandatory laws, it is not the only reason.

To put the matter in a nutshell, it is submitted that it is impossible to determine conclusively which factor or set of factors motivate an arbitrator to respect mandatory rules. However, the inference which can be drawn from the above discussion is that no matter what the reason may be, an arbitrator will always be inclined towards applying mandatory rules of law in an arbitral proceeding.

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[20] *See* Andrew T Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L. J. 1279 (2000).

III. Court Review of Arbitral Awards: The Real Problem

A solution as to why an arbitrator should apply a particular set of mandatory rules is not an end to the mandatory law problem. "One cannot overlook the fact that the application of mandatory laws by the arbitrator may give rise to complex problems."[21] As a matter of fact, the real part of the problem begins once an award has been delivered by the arbitrator. The problem here is the enforceability of the award.

In principle the arbitral awards are binding and enforceable.[22] The court cannot review such award on merits and it is deemed to be final. Mandatory laws pose an exception to this principle as they seek to protect vital public interests and it is the job of the courts to see whether these public interests are not compromised in any way. If it is found that public interests are vitiated due to wrong application of mandatory laws, the court may set aside an arbitral award.

Some authors have opined that there must be some regulation governing which sorts of disputes are arbitrable[23] or in other words, only disputes which are purely of private nature should be capable of being submitted to arbitration. The reason behind such argument is that whenever a dispute involving mandatory rules is brought before an arbitrator, it may be difficult for him to apply mandatory rules as different jurisdictions have different notions of what is regarded as mandatory. In response it is submitted here that such an argument is against the growing ambit of arbitrability. Today, states offer unbridled freedom to the parties to submit

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21 Matthias Lehmann, *A Plea for a Transnational Approach to Arbitrability in Arbitral Practice*, 42 COLUM. J. TRANSNAT'L L. 753, 772 (2004).

22 *See* also Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. III, *signed* June 10, 1958, 330 U.N.T.S. 38.

23 *See* Hong- Lin Yu & Peter Molife, *The Impact of National Law Elements on International Commercial Arbitration*, 4(1) INT'L ARB. L. REV. 17, 22 (2001).

almost any type of dispute to an arbitration forum. This is because the national courts have come up with the concept of 'second look'.

A. SECOND LOOK DOCTRINE

The 'second look' doctrine emerged in the infamous case law of *Mitsubishi Motors*[24] where the U.S. Court showed faith in the abilities of an arbitrator to apply mandatory laws because of a potential review at the enforcement stage. The second look doctrine simply means that the courts can and will review all arbitral awards in respect of those disputes which involve mandatory laws. This approach is also known as the 'equilibrium approach'[25] as it acts as an intermediary approach to two extreme approaches. The first extreme is the supremacy of arbitration in which the arbitrator pays no heed to mandatory rules. The other extreme is supremacy of courts which means that any dispute concerning mandatory rules is not arbitrable at all. Under, the second look approach the parties get the freedom to submit a dispute to arbitration and the courts get a chance to ensure that the parties have not, in any way, circumscribed out of their statutory obligations.

A potential argument against second look can be that the arbitrators cannot precisely determine the place where the arbitral award is sought to be enforced. This is because the losing party will always try to conjure a mandatory law claim in its country to escape the liability imposed by the arbitral award. This argument has substance in it and needs to be addressed.

A possible solution to this can be a change in the attitude of the reviewing authority or the enforcing court. Dr. Blanke has seen the matter from English perspective and has opined that the job

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[24] *See* Mitsubishi Motors Co. v. Soler Chrysler Plymouth Inc., 473 U.S. 614 (1985).

[25] *See* also Eric A Posner, *Arbitration and the Harmonization of International Commercial Law: A Defense of Mitsubishi*, 39 VA. J. INT'L L. 647 (1999).

of the courts is not to inquire whether laws which are considered to be mandatory in English law have been applied by the arbitrator or not rather the court has to see why the arbitrator has applied a particular set of mandatory rules.[26] This seems to be a valid argument considering that the concept of truly 'international mandatory rules' is a far cry. Contributing to this ideology, Greenawalt has opined, "...the non-waivable character of mandatory rules can be recharacterized to focus on protecting the core interests behind the mandatory rule rather than on honoring every aspect of the rule as codified in a particular national law."[27] The logic behind such an ideology is based upon the nature of mandatory rules. It has already been established that such rules are based upon those interests which are found or can be near almost found in all legal systems. The ideology simply advocates that the national courts must protect only the interests and not the national law. If foreign mandatory rules offer the same level of protection as of the national law, the courts should have no problem while enforcing an award.

Arguing on similar lines, Lorenzo has opined, "The application of mandatory rules means that arbitrators will take into consideration and will consider legitimate the binding character and the intervention of economic public policies or governmental interests from a state closely connected with the contract...."[28] Furthermore, there is a highly unlikely possibility that the arbitrators will always apply the law of the state where the award is sought to be enforced.

The English Courts have held:

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26 *See* Gordon Blanke, *Brexit and Private Competition Law Enforcement under the Arbitration Act, 1996: Taking Stock: Part 2*, 10(1) GLOBAL COMPETITION LITIG. REV. 1, 3-4 (2017).

27 Greenawalt, *supra* note 13, at 118.

28 Lorenzo, *supra* note 8, at 88.

> *[A]n arbitration award should be enforced in England. In this context it seems to me that (absent a finding of fact of corrupt practices which would give rise to obvious public policy considerations) the fact that English law would or might have arrived at a different result is nothing to the point. Indeed, the reason for the different result is that Swiss law is different from English law, and the parties chose Swiss law and Swiss arbitration.*[29]

Similarly the Indian Courts have held, "... contravention of law alone will not attract the bar of public policy and something more than contravention of law is required."[30]

Thus, it can be concluded that in lieu of the pro-arbitration policy, the global attitude of national courts is to ensure underlying public interest and not the robust enforcement of their national laws. Moreover, countries that have tried to deviate from this basic norm have been criticised by scholars and commentators.[31]

B. STANDARD OF REVIEW: NEED FOR JUDICIAL GLOBALIZATION

The next point of debate which is associated with the applicability of 'second look' doctrine is what should be the standard of review to be adopted by the courts while reviewing arbitral awards. To reframe this statement, should a court make a rigorous effort to find some manifest lacuna or only consider those defaults which are prima facie visible.

Guzman has argued that the courts should indulge in de novo review of every case. His argument is based upon the premise that review by a court is inevitable and if the court permits any

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[29] Omnium de Traitement et de Valorisation S.A. v. Hilmarton, [1999] 2 Lloyd's Rep. 222, 224 (Q.B.) (U.K.).

[30] Renusagar Power Co. Ltd. v. General Electronic Co., A.I.R. 1994 S.C. 860 (Ind.).

[31] *See* E.g. Gisèle Stephens-Chu & Yann Dehaudt-Delville, *Towards a Clearer Standard of Review by the French Courts of International Arbitral Awards Relating to Public Law Contracts*, 11(1) DISP. RESOL. INT'L 67 (2017).

leniency, there is a chance that arbitrators will 'fool' the courts that the mandatory rule is applied.[32] It is admitted here that an indeed review of arbitral awards by courts is inevitable; however, the lack of faith in the arbitrator is unjustified. Rau (while analysing various national and international case law) has opined "arbitrators usually do try their best ... to model their awards on what courts would do in similar cases...."[33]

One option for the parties can be that they limit the scope of judicial review in the contract itself. However, considering the fact that most parties opt for arbitration because it is less costly and less time consuming, the parties would always want limited judicial intervention.[34] Conversely speaking, had the parties wanted a de novo review by national courts, they never would have opted for arbitration in the first place.

The author argues that the courts should not generally undertake extensive review of each and every intricacy of the award. Perhaps, the lack of confidence in 'second look' is because the doctrine has been misconceived by many. As Sørensen and Torp have opined, "the second look is not a substantive review of the case, but a superficial test of the arbitrators' legal rationale."[35] Moreover, the initial prejudice in favour of enforcement of awards in itself narrows down the scope of judicial review.

Brozolo has opined that mere erroneous application or an application of mandatory laws which is contrary to the opinions of enforcement authorities does not count as a basis for setting

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32 *See* Guzman, *supra* note 20, at 1310-15.

33 Alan Scott Rau, *The Arbitrator and "Mandatory Rules of Law"*, 18 AM. REV. INT'L ARB. 51, 87 (2007).

34 *See* also Daniel M Kolkey, *Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations*, 22(3) INT'L LAW. 693 (1988).

35 Jakob B Sørensen & Kristian Torp, *The Second Look in European Union Competition Law: A Scandinavian Prospective*, 34(1) J. INT'L ARB. 35, 52 (2017).

aside an arbitral award.[36] Similarly, Gibson argues that courts should refuse enforcement only in exceptional cases. He further argues that the courts should not only respect their own legal systems' interests but also important public policies of other states.[37]

In the views of the author, only those manifest violations of mandatory rules which seriously jeopardize the goals of public policy should be basis for setting aside an arbitral award. It is admitted here that it will be difficult to differentiate the manifest violations from the non-manifest ones but the same can be determined by the courts by taking into account various factors like which branch of mandatory law is involved, the legal system of the state etc. In words of Villiers, "[w]hat constitutes an essential legal principle is, as yet, uncertain...."[38]

Some scholars have opined that by expanding scope of arbitrability, the courts have impliedly agreed to consequences of non-application of mandatory laws.[39] In response, it is submitted that the courts allow arbitration of 'mandatory laws' in light of increasing global trade and commerce. The liberal exercise of 'second look' (which has been advocated here) does not mean that 'mandatory rules' have been reduced to a 'semi-mandatory' status. There might be some cases in which the enforcing courts may be faced with circumstances which indicate that the parties have attempted to avoid their mandatory law obligations. In such cases, the court is left with no other option other than indulging in an in-depth review of the arbitral award. However, the basis

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36 *See* Luca G Radicati di Brozolo, *Mandatory Rules and International Arbitration*, 23 AM. REV. INT'L ARB. 49, 60 (2012).

37 *See* Christopher S Gibson, *Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*, 113 PENN ST. L. REV. 1227 (2009).

38 Villiers, *supra* note 5, at 180.

39 *See* Tamieka Spencer Bruce, *A Choice of Public Law? Resolving the International Arbitrator's Dilemma*, 20 AM. REV. INT'L ARB. 97, 113 (2009).

for such a de novo review should be provided by the party seeking such clarification.[40]

IV. Concluding Remarks

Mandatory rules as a factor during judicial review of arbitral awards has emerged one of the most vigorous and continuing debates amongst scholars and academicians. At the beginning of this paper, it was established that arbitration is the connecting bridge between party consent and public interest. The concept of second look has been submitted in light of this observation. Furthermore, it has been seen that there is plenty of room to accommodate the interests of both the courts and the parties. One can undeniably argue that court review of arbitral award affects the cost-effectiveness of the arbitral process, yet, in the author's views, this is the price to be paid to keep all stakeholders happy.

It has been seen that a very high standard of what qualifies as a mandatory rule has been established in almost all parts of the globe and therefore, it seems in practice, that if the courts exercise a liberal 'second look', refusal of arbitral awards on grounds of non-application of mandatory law would be a rare sight. To conclude it can be said that the only way to reconcile mandatory rules with international arbitration is when both the arbitrator as well as the court takes one step forward and recognizes each other's positions and interests.

40 *See* Kleinheisterkamp, *supra* note 3, at 116.

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CHANGING CONTOURS OF HOST STATE COUNTERCLAIMS IN INVESTOR-STATE ARBITRATION: WITH SPECIAL REFERENCE TO THE INDIAN POSITION

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Abstract

This paper seeks to expound the legal conundrum regarding host state counterclaims in investment arbitration. Host state counterclaims exemplify the complex nature of the system of investor-state arbitration. Unlike commercial arbitration, states do not have an automatic right to bring counterclaims against investors in investment arbitration. This paper attempts to make a comprehensive analysis of the law on host state counterclaims in investor-state dispute settlement ('ISDS') mechanism. The paper highlights the need to allow host state counterclaims. It shall critically analyse the requirements for admissibility of host state counterclaims, which include consent, connectedness, arbitration rules and procedural requirements and attempts to assimilate the same. Further, this paper analyses several international investment agreements ('IIAs') and underlines the divergent approaches to host state counterclaims in investment arbitration. Thereafter, it delineates the Indian approach to counterclaims in investment treaty practice. In doing so, it shall specifically analyse the Draft India Model and the India Model Bilateral Investment Treaties of 2015 and 2016 respectively. Thereafter, the paper shall examine the recent arbitral awards dealing with counterclaims and their interpretation of the dispute resolution provisions of the underlying IIAs. Finally, the authors propose a model clause corresponding to Article 28(9) of the Common Market for Eastern and Southern Africa Investment Agreement ('COMESA') and Article 14.11 of the Draft India Model

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Bilateral Investment Treaty expressly permitting host states counterclaims in investor-state arbitration. Thus, the paper seeks to suggest a shift from the existing paradigm of admissibility of host state counterclaims in investment arbitration.

I. Introduction

It is widely acknowledged that investor state arbitration suffers from a lack of balance.[1] Dispute settlement under IIAs allows investors to seek remedy for breach of obligations imposed upon the host state. On the other hand, it ensures that the host state abides by its obligations, and reduces political risk of foreign investment.[2] Nonetheless, a pertinent issue that arises is the uncertainty regarding the rights of the host state. In general, no rights are conferred upon host states vis-à-vis investors under IIAs,[3] preventing states from seeking a remedy under the ISDS mechanism. As a result, states make recourse to counterclaims when investors initiate arbitral proceedings against them.

By virtue of a counterclaim, the host state opposes the claim advanced by the investor. It is not an exercise of right of defence, but rather of a right to bring an action.[4] However, there are two fundamental impediments to advancement of counterclaims under IIAs. Firstly, obligations of the host state towards the investor under the IIA are unilateral; and secondly, the investor is

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1 *See* Andrea Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, 17 LEWIS & CLARK L. REV. 461 (2013).

2 *See* Charles N. Brower and Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 477 (2009).

3 Yaraslau Kryvoi, *Counterclaims in Investor-State Arbitration*, 21 MINN. J. INT'L L. 216, 218 (2012).

4 *See* DAFINA ATANASOVA, CARLOS ADRIAN MARTINEZ BENOIT AND JOSEF OSTŘANSKÝ, COUNTERCLAIMS IN INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) UNDER INTERNATIONAL INVESTMENT AGREEMENTS (IIAS) (The Graduate Institute Centre for Trade and Economic Integration 2012).

not a contracting party to the IIA.[5] Consequently, it is not feasible for a host state to bring counterclaims, let alone a primary claim.[6] In essence, states practically compromise upon their rights in investor-state arbitration. In light of this, the authors highlight the significance of counterclaims, and seek to suggest a shift from the existing paradigm of host state counterclaims in investment treaty arbitration.

II. The need to permit Host State counterclaims

Since most IIAs impose obligations only on states and not on investors,[7] investors are unaccountable for negligent or *mala fide* actions, thus creating a disequilibrium. The procedure in investor-state arbitration usually being one-sided, the disequilibrium can be redressed by allowing counterclaims brought by the host states.[8] This is one of the important benefits of permitting host state counterclaims in investor-state arbitration.

Permitting counterclaims would also increase efficiency[9] and ensure economy[10] of the ISDS mechanism. The system will be more consistent and definite when all aspects of a dispute are considered by one tribunal.[11] The redressal of counterclaims by different tribunals (such as domestic courts) only leads to

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5 James Crawford, *Treaty and Contract in Investment Arbitration*, 24 ARB. INT'L 351, 364 (2008).

6 Mehmet Toral and Thomas Schultz, *The State, A Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 577, 579 (Michael Waibel et al. eds., Kluwer Law International 2010).

7 JESWALD W. SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT: NATIONAL, CONTRACTUAL, AND INTERNATIONAL FRAMEWORKS FOR FOREIGN CAPITAL 383–4 (Oxford University Press 2013); Jason Webb Yackee, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States?*, 52 VA. J. INT'L L. 723, 742 (2012).

8 Bjorklund, *supra* note 1, at 463-4.

9 *Id.* at 475.

10 Kryvoi, *supra* note 3, at 221.

11 Hegel Elizabeth Kjos, *Counterclaims by Host States in Investment Dispute Arbitration "Without Privity", in* THE NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW (Philippe Kahn et al. eds., Brill 2007).

duplication and inefficiency, which is contrary to the objectives of international investment law.[12] Additionally, since arbitral awards are more readily enforceable than judgments of domestic courts, it will increase the possibility of states actually obtaining awards against investors.[13]

While trade and investment have their benefits, they can also cause significant negative externalities, such as interference with cultural and indigenous rights, environmental degradation and resource misallocation.[14] States often find it difficult to impose liability on investors for violation of such negative externalities. Hence, with the increasing threat to environment and human rights, a favourable counterclaim-friendly legal framework can have a significant deterrent effect on the investor.

Lastly, as articulated by South Africa in UNCITRAL Working Group sessions on states' concerns about investor-state dispute settlement:

It may actually also contribute to some of the concerns that we've raised in terms of probably discouraging frivolous claims and it may also have an effect on third party funding decisions as funders would have to assess the likelihood of affirmative liability in addition to the likelihood of success on the merits in the case against the opposing party.[15]

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12 *See* Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Declaration of W. Michael Reisman (Nov. 28, 2011).

13 Bjorklund, *supra* note 1, at 476.

14 Jeffrey Waincymer, *Investor-State Arbitration: Finding the Elusive Balance between Investor Protection and State Police Powers,* 17 INT'L TRADE & BUS. L. REV. 261, 261 (2014).

15 Anthea Roberts and Zeineb Bouraoui, *UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third Party Funding and Counterclaims*, BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (June 6, 2018), https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/.

Hence, admission of counterclaims has several benefits, which ultimately contributes to the strengthening of the ISDS mechanism.

III. Requirements for Admission of Host State Counterclaims

A counterclaim is admissible even if it is not expressly mentioned in the Bilateral Investment Treaty ('BIT').[16] As established in *Amto*,[17] two essential requirements need to be satisfied for the admissibility of counterclaims: Firstly, the parties must have consented to the jurisdiction of the tribunal over the counterclaims; and secondly, there must be a connection between the principal claim and the counterclaim. In addition, other requirements might also govern the admissibility of counterclaims such as arbitration rules and procedural requirements such as limited *locus standi* provisions.

IV. Consent

In the *Corfu Channel* case, the International Court of Justice established that consent is central to exercise of jurisdiction by a tribunal under international law.[18] It follows that a tribunal cannot adjudicate on a matter without the parties accepting its jurisdiction. Likewise, in international arbitration, the consent of both parties is necessary in order to initiate arbitral proceedings.[19] Investor-state arbitration, however, unlike commercial arbitration, is quite complex in this regard.

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16 HARNESSING FOREIGN INVESTMENT TO PROMOTE ENVIRONMENTAL PROTECTION: INCENTIVES AND SAFEGUARDS 427 (Pierre-Marie Dupuy and Jorge E. Vinuales eds., Cambridge University Press 2013).

17 Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005, Final Award, ¶118 (Mar. 26, 2008) [hereinafter *Amto*].

18 Michael Waibel, *Corfu Channel Case, in* 2 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 792, 795, ¶21 (Wolfrum Rüdiger ed., Oxford University Press 2010).

19 *See* ANDREA M. STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION (Oxford University Press 2012).

IIAs are triangular in nature.[20] States act as contracting parties, while the beneficiary of such agreements is a third party i.e. an investor. By virtue of entering into IIAs, states impose obligations upon one another. In turn, rights are created in favour of the investor. Consequently, the investor can initiate arbitral proceedings against the state if the state does not honour its obligations.[21] It is in this context that the requirement of consent must be examined.

It is well established in a number of arbitral decisions[22] that the scope of consent emanates from the text of the IIA in investor-state arbitration.[23] Under the ISDS mechanism, consent is perpetually present on part of the state. Through the dispute resolution provision of the IIA, the state, consents to arbitration at the time of entering into such IIA itself. On the other hand, by accepting the offer of the state in the dispute resolution provision of the IIA, an investor conveys its consent.[24] States have occasionally initiated arbitration against an investor based on contract,[25] but fail to do so under investment treaties.[26] This is because of two factors – (i) no rights are created in favour of the state under an IIA; and (ii) the lack of consent on part of the

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20 *See* Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56(2) HARV. INT'L L. J. 353 (2015).

21 *Id*. at 354.

22 Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, ¶39 (May 7, 2004) [hereinafter *Saluka*]; Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UCITRAL, Award on Jurisdiction and Liability, ¶689 (Apr. 28, 2011) [hereinafter *Paushok*]; Spyridon Roussalis, ICSID Case No. ARB/06/1, Award, ¶865-9 (Dec. 7, 2011) [hereinafter *Roussalis*]; Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶353-4 (June 18, 2010) [hereinafter *Gustav*].

23 Atanasova et al., *supra* note 4, at 13.

24 Abhimanyu George Jain, *Consent to counterclaims in Investor-State Arbitration: A Post-Roussalis Analysis*, 16(5) INT. A.L.R. 135, 140 (2013).

25 *See* Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited, ICSID Case No. ARB/98/8, Award (July 12, 2001).

26 Gustavo Laborde, *The Case for Host State Claims in Investment Arbitration*, 1(1) J.I.D.S. 97, 102 (2010).

investor. Even if an investor were to consent, the state cannot claim a breach of rights that are non-existent under the IIA. As a result, it is only when an investor seeks a remedy that an arbitral proceeding begins between the investor and the state.

In recent times, given their inability to commence arbitration against the investor, states have resorted to raising counterclaims.[27] For a counterclaim to subsist, there has to be an ongoing dispute between the investor and the host state. In the absence of a claim brought by the investor, the state cannot bring a corresponding counterclaim. In such a scenario, the state's ability to file a counterclaim depends upon the investor's decision to put forth a claim. Hence, the consent requirement remains asymmetrical in nature.

V. Connectedness

It was as early as the *Chorzow Factory* case when the necessity for a counterclaim to be connected with the principal claim was recognised.[28] It is thus required under every legal system that a counterclaim has a close connection with the subject matter of the primary claim.[29] In investor-state arbitration, the connection test comprises of two aspects – factual connection, and subject-matter (legal) connection.

In *Urbaser*, the tribunal opined that a factual connection is enough for it to exercise jurisdiction over counterclaims.[30] The test in order to determine if there exists a factual nexus is *firstly*, the claim and the counterclaim should be part of the same factual complex

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27 Ana Vohryzek-Griest, *State Counterclaims in Investor–State Disputes: A History of 30 Years of Failure*, 15 INT. LAW: REV. COLOMB. DERECHO INT. 83, 86 (2009).

28 The Factory at Chorzow (Claim for Indemnity) (Ger. v. Pol.), Merits Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 38 (Sept. 13).

29 Dafina Atanasova et al., *The Legal Framework for Counterclaims in Investment Treaty Arbitration*, 31(3) J. INT'L. ARB. 357, 379 (2014).

30 Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶1151 (Dec. 8, 2016) [hereinafter *Urbaser*].

and *secondly*, the respondent should rely on identical facts in order to refute allegations of the claimant and to establish counterclaims against it.[31]

In *Saluka*, along with the factual nexus test, the legal symmetry test i.e. that the main claim and the counterclaim should arise from the same legal source, was propounded for satisfaction of the 'connection' requirement.[32] The said requirement was subsequently affirmed in *Paushok*.[33] However, the legal connection requirement is an extremely stringent standard, which has been widely criticised.[34] Moreover, in recent times, it is observed that arbitral tribunals are taking a less restrictive approach towards the connection requirement.[35]

As stated earlier, IIAs are triangular in nature, and generally confer rights solely on the investors. Hence, host states do not derive any rights from IIAs, but only have obligations imposed upon them. Accordingly, the source of a counterclaim cannot be the BIT as no obligations are imposed on the investor under the BIT.[36] It is opined that such a stringent connection requirement makes the admissibility of any counterclaim near impossible.[37] Hence, the tribunals must not adopt a stringent approach of the legal symmetry test.

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31 Armed Activities on the Territory of Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶267 (Dec. 19).

32 *Saluka*, ¶76.

33 *Paushok*, ¶693.

34 ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 260 (Cambridge University Press 2009).

35 *Urbaser*, ¶1151.

36 Kelsey Brooke Farmer, *The Best Defence is a Good Offense - State Counterclaims in Investment Treaty Arbitration* 42 (2016) (unpublished LLM Research Paper, Victoria University of Wellington) (on file with authors).

37 Pierre Lalive and Laura Halonen, *On the Availability of Counterclaims in Investment Treaty Arbitration, in* 2 CZECH YEARBOOK OF INTERNATIONAL LAW 2011: RIGHTS OF THE HOST STATES WITHIN THE SYSTEM OF INTERNATIONAL INVESTMENT PROTECTION 143 (Alexander J. Belohlável and Nadežda Rozehnalová eds., Juris Publishing Inc. 2011).

VI. Arbitration Rules

When an investor and a host state proceed to arbitration, they are bound by a certain set of arbitration rules. Investors most commonly seek arbitration pursuant to the ICSID Convention[38] and its accompanying arbitral rules or pursuant to the UNCITRAL Arbitration Rules[39]. Thus, one possible source of a tribunal's authority to hear counterclaims is the arbitration's procedural rules.[40] In general, these rules can be categorised into two kinds – (i) those that provide for certain criteria for admission of counterclaims such as the ICSID Convention; and (ii) those that do not provide for any such criteria such as the SCC Arbitration Rules.

Article 46 of the ICSID Convention allows for "[…] counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre".[41] Similarly, Article II of the Algiers Accords, which governed the Iran-United States Claims Tribunal, allowed for counterclaims which arose out of "the same contract, transaction or occurrence that constitutes the subject matter of that national's claim".[42]

The UNCITRAL Arbitration Rules are not as restrictive as the ICSID Convention. Article 21(3) of the UNCITRAL Arbitration Rules provides that "[…] the respondent may make a

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38 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

39 G.A. Res. 65/22, UNCITRAL Arbitration Rules as revised in 2010 (Jan. 10, 2011) [hereinafter UNCITRAL Arbitration Rules 2010].

40 Bjorklund, *supra* note 1, at 471.

41 ICSID Convention, art. 46.

42 Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, U.S.-Iran, art. II, Jan. 19, 1981.

counterclaim […] provided that the arbitral tribunal has jurisdiction over it".[43] The 2010 Rules brought about a shift from the 1976 UNCITRAL Rules[44], which required that the counterclaim arose out of the same contract.[45] The present rules enables the tribunal to assert jurisdiction over counterclaims, considering the circumstances relevant to each case. [46]

Unlike the ICSID or Iran-United States Claims Tribunal, no requirements need to be fulfilled for counterclaims to be brought under the SCC Arbitration Rules.[47] The SCC Arbitration Rules provide that the Answer to Request for Arbitration shall include a preliminary statement of any counterclaims or set offs.[48] If the dispute resolution provision is broad enough to include counterclaims within its ambit, the SCC Arbitration Rules allow for their admission.

It could be argued that SCC and ICC Arbitration Rules are generic for commercial arbitrations because in them, both the parties may submit disputes. However, this argument does not merit consideration, since arbitration rules play a subsidiary role regarding admission of host state counterclaims. Jurisdiction over counterclaims is determined primarily by the dispute resolution provision of the IIA.[49] Consequently, instead of the stringent requirements laid down under the ICSID Convention, the admission of counterclaims should be facilitated in a manner similar to the SCC or ICC Arbitration Rules. As long as the IIA provides for counterclaims, and the Respondent state satisfies the

43 UNCITRAL Arbitration Rules 2010, art. 21(3).
44 G.A. Res. 31/98, Arbitration Rules of the United Nations Commission on International Trade Law (Dec. 15, 1976) [hereinafter UNCITRAL Arbitration Rules 1976].
45 UNCITRAL Arbitration Rules 1976, art. 19(3).
46 Atanasova et al., *supra* note 4, at 10.
47 *See also* ICC Rules of Arbitration 2012, art. 5(5).
48 SCC Arbitration Rules 2017, art. 9(1)(iii).
49 *Amto*, ¶117-8.

necessary requirements under the IIA, the Arbitration Rules should not prescribe any additional requirements.

VII. Limited Locus Standi and Procedural Requirements

Numerous IIAs provide the investor with limited *locus standi* to initiate arbitration.[50] This limited *locus standi* is relevant when determining whether a tribunal has jurisdiction over counterclaims or not. As per Professor Kjos, limited *locus standi* in favour of the Claimant cannot act as a bar to the admissibility of the counterclaims as long as there is a broad *ratione materiae* provision which allows it.[51] This was the case in *Metal-Tech*,[52] where, in the presence of a limited *locus standi* but a broad *ratione materiae* provision, the tribunal allowed counterclaims. On the other hand, in *Rusoro*,[53] where the *rationae materiae* provision was not as broad, the counterclaims were rejected.

In addition to limited *locus standi*, some IIAs also lay down preliminary procedural prerequisites.[54] These may include, *inter alia*, attempts at negotiation, submission of dispute to domestic courts, and completion of a cooling-off period before a dispute is submitted to arbitration. However, to expect the Respondent to

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[50] Agreement between the Government of the State of Israel and the Government of the Republic of Uzbekistan for the Promotion and Reciprocal Protection of Investments, Isr.-Uzb., art. 8, July 7, 1994; Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, Can.-Venez., art. 12, July 1, 1996 [hereinafter Canada-Venezuela BIT]; Model Text for the Indian Bilateral Investment Treaty (2016), art. 16, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560 [hereinafter India Model BIT].

[51] HEGEL ELIZABETH KJOS, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW 201 (Oxford University Press 2013).

[52] Metal-Tech Limited v. The Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, ¶410 (Oct. 4, 2013) [hereinafter *Metal-Tech*].

[53] Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award, ¶627 (Aug. 22, 2016) [hereinafter *Rusoro*].

[54] Canada-Venezuela BIT, art. 12; India Model BIT, art. 16.

comply with all these requirements is unreasonable. Terming such a provision absurd in *Urbaser vs. Argentina*,[55] the tribunal stated thus:

> *Claimants also advance that Respondent failed to comply with the preliminary steps for negotiation and submission to the jurisdiction of local courts as provided in Article X (1) and (2) of the BIT. The position needs not to be explained in all parts of its absurdity. When Claimants had chosen to submit to ICSID arbitration, what would be the reason for requesting Respondent to suggest, and to submit to, a prior attempt for settlement, deferring the submission of any of its claim until after the six months' term had elapsed? What would have been the purpose of requiring submission of the Argentine Republic to domestic jurisdiction under Article X(2) when Claimants had failed to do so and did successfully argue before this Tribunal that this provision was not pertinent? How should the Tribunal understand Claimants' complaint that Respondent had not submitted to the procedure provided for in Article X (1) and (2) of the BIT, thus waiting a cumulative period of two years before being permitted to start arbitration, when in the same move, Claimants criticize Respondent heavily for not having raised its claims as soon as Claimants submitted to arbitration?*

A limited *locus standi* provision, coupled with unreasonable procedural requirements for the Respondents discourage the advancement of counterclaims. Hence, it is the authors assertion that these requirements should not be an impediment to the admission of counterclaims. Generally, it is only the investor who can initiate claims. It seems unfair to make the standard for counterclaims as stringent as it stands today.

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55 *Urbaser*, ¶1149.

VIII. Contemporary Approach to Host State Counterclaims in Investment Treaty Arbitration

The scope of investor's consent to counterclaims depends upon the language of the dispute settlement provision in the IIA.[56] An analysis of the various BITs and IIAs on the issue of counterclaims demonstrates the divergent approaches to the possibility of assertion of host state counterclaims in investor-state arbitration. Broadly speaking, there are three different approaches to this issue.

First, few treaties explicitly address counterclaims. For example, Article 28(9) of the COMESA provides thus:

> *A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages.*[57]

Article 13 of the COMESA obliges COMESA investors and their investments to comply with all applicable measures of the Member State in which their investment is made.[58] Further, Article 1(11) defines 'measures' to mean any legal, administrative, judicial or policy decision that is taken by a Member State, directly relating to and affecting an investment in its territory, after the Agreement has come into effect.[59] Thus, COMESA affords the host state an opportunity to bring a counterclaim against the

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[56] ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 256 (Cambridge University Press 2009).

[57] Investment Agreement for the COMESA Common Investment Area, art. 28(9), May 23, 2007 [hereinafter COMESA].

[58] *Id.* art. 13.

[59] *Id*. art. 1(10).

foreign investor for any alleged breach of its obligation under the agreement.

Second, some treaties do not expressly provide for the admission of host state counterclaims but impliedly allow it. Generally, in such treaties, the language of the dispute settlement provision is quite broad enough to include counterclaims within its ambit. For instance, the tribunals are conferred with the authority to hear "any dispute between an investor of one Contracting Party and the other Contracting Party relating to the investment"[60] or simply "any dispute". [61] Furthermore, other treaties exclude a particular type of counterclaims[62] giving rise to *a contrario* conclusion in favour of admissibility of other types of counterclaims.[63]

Third, some treaties do not provide for the admission of host state counterclaims, either implicitly or explicitly. Some IIAs uses restrictive language in the offer to arbitrate under their dispute settlement provision to limit the tribunals' jurisdiction to only hear disputes regarding the obligations of the Contracting Party under the IIA.[64] For example, in *Roussalis vs. Romania*, the tribunal

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60 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic, Neth.-Czech, art. 8, Apr. 4, 1991.

61 Agreement between the Government of New Zealand and the Government of the Republic of Chile the Promotion and Protection of Investment, N.Z.-Chile, art. 10, July 22, 1999.

62 *See* Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., art. 24(7), Nov. 11, 2005.

63 W Ben Hamida, *L'arbitrage Etat-investisseur cherche son équilibre perdu : Dans quelle mersure l'Etat peut introduire des demandes reconventionnelles contre l'investisseur privé?*, 7(4) INTERNATIONAL LAW FORUM DU DROIT INTERNATIONAL 261, 270 (2005); Helene Bubrowski, *Balancing IIA Arbitration Through the Use of Counterclaims, in* IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS 212, 222 (Armand de Mestral and Céline Lévesque eds., Routledge 2013).

64 Agreement between the Government of the Republic of France and the Government of the United Mexican States on the Reciprocal Promotion and Protection of Investments, Fr.-Mex., art. 9, Nov. 12, 1998.

dealt with a restrictive provision in Article 9(1) of the Greece-Romania BIT[65] which limited the scope of the 'dispute' to obligations of the host state.[66] Consequently, the tribunal refused to hear counterclaims against the foreign investor.[67] In such similarly drafted treaties, host states are not allowed to bring counterclaims against foreign investors.

In general, counterclaims in investment arbitrations usually fail.[68] Despite the reference to counterclaims in various arbitration rules,[69] often neither the substantive provisions nor the arbitration clauses in IIAs contain a valid basis for host states to bring claims against investors.[70] Hence, there is a need to provide a suitable legal framework for admissibility of host state counterclaims in investment treaty arbitration.

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65 Agreement between the Government of Romania and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, Rom.-Greece, art. 9, May 23, 1997.

66 *Roussalis*, ¶871-5.

67 *Id*. ¶876.

68 *See e.g.*, Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award, ¶378 (June 25, 2001); Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶358 (June 18, 2010); *Roussalis*, ¶876; *See also* Hege Elisabeth Veenstra-Kjos, *Counterclaims by Host States in Investment Treaty Arbitration*, 4(4) TDM JOURNAL 1 (2007); Pierre Lalive and Laura Halonen, *On the Availability of Counterclaims in Investment Treaty Arbitration, in* 2 CZECH YEARBOOK OF INTERNATIONAL LAW: RIGHTS OF THE HOST STATES WITHIN THE SYSTEM OF INTERNATIONAL INVESTMENT PROTECTION (Alexander J. Belohlável and Nadežda Rozehnalová eds., Juris Publishing Inc. 2011).

69 ICSID Convention, art. 46; UNCITRAL Arbitration Rules 2010, art. 21(3); SCC Arbitration Rules 2017, art. 9(1)(iii).

70 *See Roussalis*, ¶864-72.

IX. Indian Approach to Counterclaims in Investment Treaty Practice

Since until very recently, India's approach towards IIAs was based upon incentivisation and protection of foreign investment.[71] However, post *White Industries*,[72] India has changed its position vis-à-vis investment treaties. In the said case, the tribunal held that the judicial delays in the enforcement of an ICC Award between White Industries Australia Limited ('WIAL') and Coal India, an Indian government company, by the Indian courts constituted a breach of India's obligation to provide "effective means of asserting claims and enforcing rights" regarding WIAL's investment pursuant to Article 4(2)[73] of the Australia-India BIT.[74]

Over the past few years, a number of foreign companies have commenced arbitration proceedings under different BITs against the Indian Government.[75] In response, India brought in a new Model BIT[76] ('India Model BIT'), replacing the earlier 2003 Model BIT[77], which would serve as the basis for re-negotiation of existing BITs, negotiation of future BITs and formulation of

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71 *See* Rashmi Banga, *Impact of Government Policies and Investment Agreements on FDI Inflows* (Indian Council for Research on International Economic Relations, Working Paper No. 116, 2003).

72 White Industries Australia Limited v. The Republic of India, UNCITRAL, Final Award (Nov. 30, 2011) [hereinafter *White Industries*].

73 Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, Austl.-India, art. 4(2), Feb. 2, 1999.

74 *White Industries*, ¶16.1.1.

75 *See* Vodafone International Holdings BV v. Government of India [I], UNCITRAL, PCA Case No. 2016-35, Notice of Arbitration (Apr. 17, 2014); Cairn Energy PLC and Cairn UK Holdings Limited v. India, UNCITRAL, PCA Case No. 2016-7; Deutsche Telekom v. India, ICSID Additional Facility, Notice of Arbitration, (Sept. 2, 2013); Vedanta Resources PLC v. India, UNCITRAL, 2016; Nissan Motor v. India, UNCITRAL, 2017; Carissa Investments LLC v. India, UNCITRAL, 2017.

76 *See* India Model BIT.

77 India Model Text of Bilateral Investment Promotion and Protection Agreement (2003), https://www.italaw.com/sites/default/files/archive/ita1026.pdf.

interpretations on the existing BITs. Further, India unilaterally terminated 58 of its BITs, including 22 countries of the European Union.[78]

The India Model BIT is a significant departure from the earlier 2003 Model BIT. While the latter gave primacy to protection of foreign investor rights and their investments vis-à-vis host state's regulatory powers, the former dilutes the protections commonly given to foreign investors and provides increased protections to the host state.[79] These changes reflect a drive in India's approach towards increasing symmetry between host state control and the interests of investors.[80]

However, the India Model BIT does not permit host state counterclaims. Chapter IV of the Model BIT deals with the Settlement of Disputes between an Investor and a Contracting Party. The jurisdiction of the tribunal is only limited to disputes arising out of an alleged breach of an obligation of a State Party under Chapter II of the Treaty, other than the obligation under Articles 9 and 10 of this Treaty.[81] Chapter II of the Model BIT imposes certain obligations on the State Parties in relation to protection of investments. Thus, the Model BIT does not provide for the admission of host state counterclaims, either explicitly or implicitly.

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78 DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION, BILATERAL INVESTMENT TREATIES (2016), http://164.100.47.190/loksabhaquestions/annex/9/AU1290.pdf.

79 *See* NISHITH DESAI ASSOCIATES, BILATERAL INVESTMENT TREATY ARBITRATION AND INDIA: WITH SPECIAL FOCUS ON INDIA MODEL BIT, 2016 (2018), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Bilateral_Investment_Treaty_Arbitration_and_India-PRINT-2.pdf.

80 Robert Volterra and Giorgio Francesco Mandelli, *India and Brazil: Recent Steps Towards Host State Control in the Investment Treaty Dispute Resolution Paradigm*, 6(1) I.J.A.L. 90, 90 (2017).

81 India Model BIT, art. 13.2.

This position is at variance with the earlier position taken by India in the Draft India Model BIT[82] released in April 2015. Article 14.2(i) of the Draft India Model BIT, which is the dispute settlement provision, stipulates that it applies to a counterclaim brought by a State Party against an investor or the investment in an investment dispute.[83] Article 14.11 deals with counterclaims by State Parties and clearly provides that a State Party may initiate a counterclaim against the Investor or Investment for a breach of the obligations set out under Articles 9, 10, 11 and 12 of Chapter III of this Treaty before a tribunal established under this Article and seek as a remedy suitable declaratory relief, enforcement action or monetary compensation. [84]

It is surprising to note that the provisions relating to counterclaims under the Draft India Model BIT have been completely excluded from the revised version of the India Model BIT. Chapter III of the India Model BIT lays down certain investor obligations in relation to compliance with laws, regulations, administrative guidelines and policies of a State Party concerning the establishment, acquisition, management, operation and disposition of investments[85] and corporate social responsibility[86]. But, in the light of absence of a provision permitting host state counterclaims and presence of limited *locus standi* provision and a narrow definition of the material scope of the dispute, the said investor obligations cannot be enforced in case of their breach. Thus, the Model BIT imposes certain obligations on the foreign investors and creates certain rights in favour of the host state as a corollary. But, the host state does not

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82 Draft Model Text for the Indian Bilateral Investment Treaty (2015), https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf [hereinafter Draft India Model BIT].

83 Draft India Model BIT, art. 14.2(i).

84 Draft India Model BIT, art. 14.11.

85 India Model BIT, art. 11.

86 India Model BIT, art. 12.

have a remedy under the BIT to pursue their rights in case of their breach. This position frustrates the elementary principle of equity jurisprudence that there is no wrong without a remedy.[87]

X. Recent Decisions dealing with Counterclaims

The issue of whether or not an investor and a host state settle a dispute, and address counterclaims through arbitration, depends entirely on whether the investor consents to do so.[88] Hence, the scope of the dispute resolution provision of the IIA plays an important role in determining what can and what cannot be subject to arbitration between the parties. It is thus necessary to examine how arbitral tribunals have interpreted dispute resolution provisions of various IIAs in recent times. In the table below, we examine six recent decisions, which have diversely contributed to the growing jurisprudence of counterclaims in investor-state arbitration.

Arbitral Decision and Tribunal	**BIT and Article**	**Provision**	**Decision of the Tribunal**
Roussalis vs. Romania[89]	Article 9 of the Greece-Romania BIT	Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an	According to the tribunal, jurisdiction of the tribunal was limited to claims brought by an investor, concerning the obligations of the host state. Hence, counterclaims were not allowed.

[87] *See* Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Concurring and Dissenting Opinion of Gary Born, ¶32 (July 18, 2008); *See also* Ashby v. White, (1703) 92 Eng. Rep. 126.

[88] Hege Elisabeth Veenstra-Kjos, *Counterclaims by Host States in Investment Treaty Arbitration,* 4(4) TDM JOURNAL 9 (2007).

[89] *Roussalis*, ¶869.

Arbitral Decision and Tribunal	BIT and Article	Provision	Decision of the Tribunal
		investment of the former.	
Inmaris Perestroika v. Ukraine[90]	Article 11 of the Germany-Ukraine BIT	Disputes regarding investments between one of the Contracting Parties and a national or a company of the other Contracting parties […].	The Tribunal found that Article 11 conferred the tribunal with jurisdiction over counterclaims, as it concerned the claimant's investment, and the claimant had consented to arbitration. However, the counterclaims were rejected on merits.
Urbaser vs. Argentina[91]	Article X(1) of the Argentina-Spain BIT	Disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement shall, as far as possible, be settled amicably between the parties to the dispute.	The tribunal found that the BIT accepted a possibility for the Respondent to raise counterclaims. The tribunal's view was corroborated by Article X(3) of the BIT, which stipulates that in certain circumstances, the dispute may be submitted to an international arbitral tribunal "at the request of either party to the dispute".
Metal-Tech vs. Uzbekistan[92]	Article 8(1) of the Israel-Uzbekistan BIT	Each Contracting Party hereby consents to submit […] any legal dispute arising	The tribunal opined that Article 8(1) of the BIT was not restricted to disputes initiated by an investor against a Contracting Party.

90 Inmaris Perestroika Sailing Maritime Services GmbH v. Ukraine, ICSID Case No. ARB/08/8, Excerpts of Award, ¶432 (Mar. 1, 2012).

91 *Urbaser*, ¶1143.

92 *Metal-Tech*, ¶410.

Arbitral Decision and Tribunal	**BIT and Article**	**Provision**	**Decision of the Tribunal**
		between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.	It covered any dispute concerning an investment. However, the tribunal found that since it did not have jurisdiction over the primary claims (the claimant's investment did not fulfil the legality requirement under the BIT), it did not have jurisdiction over counterclaims as well.
Rusoro Mining Ltd. vs. Venezuela[93]	Article XII(1) of the Canada-Venezuela BIT	Any dispute between one Contracting Party and an investor of the other Contracting Party relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement […]	The tribunal held that it lacked jurisdiction over the counterclaims submitted by the Republic of Venezuela. The tribunal reiterated its position by asserting that Article XII (3) and (4) of the BIT provided limited locus standi to the investor.
Oxus Gold vs. Uzbekistan[94]	Article 8(1) of United the Kingdom-Uzbekistan BIT	Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the	The tribunal decided that it lacked jurisdiction over the counterclaims submitted by Uzbekistan. The tribunal opined that the language of the BIT clearly indicated that only the investor could bring claims concerning

93 *Rusoro*, ¶623.

94 Oxus Gold v. The Republic of Uzbekistan, UNCITRAL, Final Award, ¶948 (Dec.17, 2015).

Arbitral Decision and Tribunal	BIT and Article	Provision	Decision of the Tribunal
		latter under this Agreement in relation to an investment of the former […] be submitted to international arbitration if the national or company concerned so wishes.	obligations of the host state, and not vice-versa.

Two important recent decisions concerned with counterclaims were *Perenco*[95] and *Burlington Resources*.[96] However, they are not discussed under this table because the question of jurisdiction did not arise in either of those decisions.

XI. Suggestions and Conclusion

In conclusion, it is argued that host state counterclaims must be permitted in investment treaty arbitration for the various reasons mentioned in this paper. States must therefore endeavour to expressly include host state counterclaims within the ambit of the dispute settlement provisions of IIAs. A good example is Article 28(9) of the COMESA. Further, as provided in the paper, the criteria for admissibility of host state counterclaims must be liberally construed. In this context, the authors submit that the Draft India Model BIT of 2015 creates an equilibrium between the interests of the foreign investors and the host state by expressly permitting host state counterclaims for breach of the

95 *See Perenco.*
96 *See Burlington Resources.*

investor obligations provided under the treaty. The omission of the provision permitting counterclaims from the revised draft of India Model BIT is disappointing.

Hence, the authors would like to propose a model clause (similar to Article 28(9) of the COMESA and Article 14.11 of the Draft India model BIT) expressly permitting host state counterclaims in the context of investor-state arbitration:

> **Counterclaims by Parties:**
>
> A Party against whom a claim is brought by an investor under this Article may assert a counterclaim against the investor for a breach of its obligations set out under [provisions dealing with obligations of the investor including the obligation to comply with the domestic legal framework of the host state concerning the investment] of this Treaty before a tribunal established under this Article and seek as a remedy suitable declaratory relief, enforcement action or monetary compensation.

It is hoped that this paper encourages debate among the concerned stakeholders about the need to include counterclaims by the host state within the IIA.

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EMERGENCY ARBITRATION IN INDIA: A BELLWETHER FOR THE GRANT OF INTERIM RELIEFS

Aakanksha Luhach & Varad S. Kolhe[*]

Abstract

Although emergency arbitration has emerged as a turning tide for the grant of urgent interim reliefs globally, it has still not been able to develop a strong ground in many jurisdictions, including India. Many arbitral institutions have started providing for rules governing emergency arbitrations wherein the parties have an opportunity to seek interim relief prior to the constitution of the arbitral tribunal. This is done keeping in mind the needs of parties that require urgent interim relief, the issuance of which can be an important factor in the outcome of the arbitral proceedings. However, it is imperative to note that there still exists a large number of arbitral institutions which do not have any provisions for emergency arbitration, therefore compelling parties to seek such measures from the national courts.

This article strives to demonstrate how emergency arbitration is beneficial for parties by making an unbiased comparison of the grant of urgent relief by an emergency arbitrator and by national courts on various practical grounds. The research article dwells deep into the practical aspect of emergency arbitration by providing a comparative analysis of the emergency arbitration rules of various Indian and International arbitration institutions. An attempt is made to explain and examine the various legal obstacles, such as enforceability and recognition of the relief granted, surrounding emergency arbitration in India and thereafter provide solutions for the same.

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Introduction: Grant of Interim Measures and A Preface to Emergency Arbitration

In contemporary legal systems, arbitration as well as litigation is almost always underlined by the ability to seek safeguards to maintain status quo and to refrain from aggravating the dispute. Since it is utopian to expect a court or tribunal to render a judgment or award immediately on being seized of a dispute, in this vein, interim measures address an epistemological reality[1] considering that the process of decision making by human agents is time-consuming. Properly defined, interim measures are orders, awards or decisions rendered for protecting one or both of the parties from damage before the commencement of or during the conduct of arbitral proceedings. Interim measures are "*intended to preserve a factual or legal situation so as to safeguard rights, the recognition of which is sought from the tribunal having jurisdiction as to the substance of the case.*"[2] The standards to be applied in deciding whether such measures are to be granted and the scope of those measures have

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1 Donald Francis Donovan, *The Scope and Enforceability of Provisional Measures in International Commercial Arbitration A Survey of Jurisdictions, the Work of UNCITRAL and Proposals For Moving Forward*, in Albert Jan van den Berg (ed), 11 INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS, ICCA CONGRESS SERIES, 82, (Kluwer Law International 2008)

2 *Restatement (Third) U.S. Law of International Commercial Arbitration* § 1-1 comment q (Tentative Draft No. 2 2012) ("Ordinarily, interim measures are issued to preserve the status quo, to help secure satisfaction of an eventual award, or otherwise to promote the efficacy or fairness of the arbitral process."); *Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line*, Case No. C-391/95, [1998] E.C.R. I-7091, 7133 (E.C.J.). *See also Reichert & Klockner v. Dresner Bank*, Case No. C-261/90, [1992] E.C.R. I-20149, ¶34 (E.C.J.); *Judgment of 13 April 2010*, DFT 4A 582/2009, ¶2.3.2 (Swiss Federal Tribunal) ("Provisional or interlocutory measures are measures that a party may request to protect its rights on a provisional basis throughout the length of the proceeding on the merits and, in some cases, even before such proceeding begins."); Collins, *Provisional and Protective Measures in International Litigation*, 234 Recueil des Cours 9, 19-24 (1992), *see* also *Opinion of Advocate General Tesauro, The Queen v. Secretary of State for Transp., ex parte Factortame Ltd*, Case No. C-213/89, [1990] E.C.R. I-02433, ¶18 (E.C.J.)

either been codified in different jurisdictions or have evolved in the jurisprudence of the relevant court or tribunal.

In the Indian legal framework, section 9 and section 17 of the Arbitration and Conciliation Act, 1996 ("the Act") confer the powers upon national courts and arbitral tribunals respectively to grant interim reliefs to one or both the parties to the dispute.[3] On a plain reading of the relevant provisions, it becomes abundantly clear that arbitral tribunals can invariably grant interim reliefs to parties only during the conduct of the arbitral proceedings. Thus, in a scenario where the party requires any interim relief before the constitution of the arbitral tribunal, it is compelled to approach the national court having jurisdiction over the subject matter of the dispute.

It is here that the concept of emergency arbitration gains significant relevance. Historically, a party seeking urgent relief at the outset of the arbitration, prior to the constitution of the arbitral tribunal, only had recourse to the national courts. However, with numerous arbitral institutions relatively recently introducing emergency arbitration provisions in their rules, parties seeking to obtain interim measures may instead choose, or in certain jurisdictions may even be compelled, to turn to emergency arbitrators.[4]An emergency arbitrator is like a doctor who must operate in the emergency room. She must have the ability to quickly organize the procedure under tight time constraints, ensure fairness and efficiency, understand the issues,

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[3] § 9 and § 17 of the Indian Arbitration and Conciliation Act, 1996 are broadly derived from and based on Articles 9 and 17 of the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration, originally adopted by United Nations Commission on International Trade Law (UNCITRAL) in 1985.

[4] Philippe Cavalieros and Janet Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, in Maxi Scherer (ed), 35(3) JOURNAL OF INTERNATIONAL ARBITRATION 276 (2018).

and wisely make snap decisions that may have significant consequences.[5]

Arbitration, by nature, is founded in consent. It remains, as it always has been, a mechanism for dispute resolution agreed on between the parties, without recourse to courts of law.[6]Thus, at the outset, the authors seek to discuss certain practical factors which the parties need to analyse before exercising a choice of forum for grant of interim measures. (**I.**) In the second part of this note, the authors explore the readiness of the Indian legal framework with respect to emergency arbitration, providing a comparative analysis of the provisions in institutional rules for emergency arbitration. (**II.**) After a scrutiny of enforceability of emergency arbitrators' decisions in India, the authors conclude with suggestions and the way forward for emergency arbitration in India. (**III.**)

I. Concurrent Jurisdiction to Grant Emergency Reliefs: Emergency Arbitrators vs. Courts

For the purposes of granting interim relief prior to the constitution of the arbitral tribunal, there is an overlap of jurisdiction between the national courts of the concerned jurisdiction and emergency arbitrators. A party seeking urgent relief can either approach the court or seek the appointment of an emergency arbitrator. This section of the article evaluates the extent to which emergency arbitration can prove to be a substitute to obtaining urgent relief from national courts, by comparing both the options on various relevant factors.

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[5] Patricia Shaughnessy, *The Emergency Arbitrator*, in Patricia Shaughnessy and Sherlin Tung (eds), THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER, 339 Kluwer Law International 2017).

[6] ALAN REDFERN & MARTIN J. HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (4th ed., 2004)

A. CONFIDENTIALITY

Maintaining confidentiality to protect the commercial secrets and relationships is at times very crucial for the parties involved in the dispute. According to A. Yesilirmak, in the context of emergency arbitration, confidentiality may be of greater importance in order to avoid pre-judgment on the merits of the case.[7] While traditional litigation and its docket is public, arbitrations are usually private and confidential and the documents, filings and transcripts associated with it are very rarely made public. For this reason, a party may prefer to apply to an emergency arbitrator for interim relief rather than the national court where the proceedings are made public.[8]

B. ORDERS AGAINST THIRD PARTY

In certain circumstances, interim relief is sought against a third party which is not a signatory to arbitration agreement, for example, when it is necessary to protect the subject-matter of the dispute. Especially in shareholder litigation, it sometimes becomes inevitable to enforce interim injunctions against a non-signatory to prevent any harmful corporate actions from going forward. .[9] However, an arbitral tribunal's jurisdiction is limited in this context as it cannot pass any orders binding third parties.

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7 A. Yesilirmak, *Emergency Arbitral Provisional Measures*, in PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION, 12 International Arbitration Law Library ¶4–80 (Kluwer Law International 2005),

8 Philippe Cavalieros; Janet Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, in Maxi Scherer (ed), 35(3) JOURNAL OF INTERNATIONAL ARBITRATION, 275 (Kluwer Law International 2018).

9 Guy Loesch and Pol Thielen, *Interlocutory Injunctions in Luxembourg Shareholder Litigation: Are Emergency Arbitration Proceedings Better Suited than Proceedings before the Ordinary Courts?*, KLUWER ARBITRATION BLOG (November 19, 2013) available at: http://arbitrationblog.kluwerarbitration.com/2013/11/19/interlocutory-injunctions-in-luxembourg-shareholder-litigation-are-emergency-arbitration-proceedings-better-suited-than-proceedings-before-the-ordinary-courts/

C. EX-PARTE ORDERS

Sometimes, an advance notice regarding the proceeding might lead the respondent party to get rid of the assets from the concerned jurisdiction. Therefore, the availability of the option to obtain *ex-parte* interim orders can be of immense significance in such circumstances where an element of surprise is necessary. Indian courts have the power to grant *ex-parte* orders in some exceptional circumstances like few other jurisdictions.[10]

Whereas, on the other hand, arbitral tribunal cannot exercise this option as it is required to treat both the parties equally, and give them equal opportunity to present their case. Hence, emergency arbitrator is not in a position to pass an order on *ex-parte* basis.

D. SPEED

Since urgency is the edifice of the parties' run to attainment of interim reliefs, speed is a prominent concern which needs to be carefully addressed by the parties. While the ICC reported that its emergency arbitrations last on an average for sixteen days, the ICDR reported fourteen days,[11] and the SCC reported an average of five to eight days.[12] Hence, on an average, grant of interim reliefs by emergency arbitrators may take from a week to a fortnight.

Furthermore, the parties should also consider the time taken for enforcing the interim award in case of non-compliance by the other party.

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[10] Rishab Gupta, Aonkan Ghosh, *Choice Between Interim Relief from Indian Courts and Emergency Arbitrator*, KLUWER ARBITRATION BLOG (May 10, 2017), available at http://arbitrationblog.kluwerarbitration.com/2017/05/10/choice-between-interim-relief-from-indian-courts-and-emergency-arbitrator/.

[11] J. Brian Johns, *ICDR Emergency Arbitrations*, THE ICDR INTERNATIONAL ARBITRATION REPORTER 6 (Fall 2016).

[12] A. H. Ipp, *SCC Practice Note: Emergency Decisions Rendered 2015–2016*, 4 (June 2017).

E. COSTS

Sr. No.	Name of the Arbitral Institution	Fees and Expenses of the Emergency Arbitrator	Filing Fees/Administrative Expenses	Total Fees and Expenses of the Emergency Arbitrator Application
1.	Singapore International Arbitration Centre[13]	SGD 25,000	SGD 5,000	SGD 30,000
2.	Hong Kong International Arbitration Centre[14]	HKD 2,05,000	HKD 45,000	HKD 2,50,000
3.	Stockholm Chamber of Commerce[15]	EUR 16,000	EUR 4,000	EUR 20,000
4.	London Court of International Arbitration[16]	GBP 20,000	GBP 8,000	GBP 28,000
5.	International Chamber of Commerce[17]	USD 30,000	USD 10,000	USD 40,000

Since the abovementioned fees are not derived from the sum involved in dispute and are further required to be paid upfront in full, national courts steer the sail ahead here too.

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13 SIAC Arbitration Rules, in force as of 1 Aug. 2016, Sch. 1, ¶2, SIAC Schedule of Fees, in force as of 1 Aug. 2016.

14 HKIAC Administered Arbitration Rules, in force as of 1 Nov. 2013, Sch. 6 and HKIAC 2015 Schedule of Fees.

15 Arbitration Rules of the Arbitration Institute of the SCC, in force as of 1 Jan. 2017, App. II, Arts 10(1), (2).

16 LCIA Arbitration Rules, in force as of 1 Oct. 2014, Art. 9.5 and Schedule of LCIA Arbitration Costs, in force as of 1 Oct. 2014, s. 7.

17 ICC Arbitration Rules, in force as of 1 Mar. 2017, App. V, Art. 7(1).

II. Emergency Arbitration: Analysing and Comparing the Indian Scenario

A. EMERGENCY ARBITRATION IN INDIA: WHERE DO WE STAND?

The Indian Arbitration and Conciliation Act, 1996 does not contain any provisions in respect of an emergency arbitrator or an emergency orders or awards. The 246th Law Commission Report in 2014, on amendments to the Arbitration and Conciliation Act, 1996, made an attempt to legislatively recognize emergency arbitration in India. The report proposed the following amendment to Section 2(1)(d) of the Act. [18]

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

While it was expected that the Arbitration and Conciliation (Amendment) Act, 2015 would embrace this proposal and would be among the few progressive international jurisdictions to incorporate such provisions, it did not do so. Another opportunity arose by way of the proposed amendments in 2018 in the Arbitration and Conciliation Amendment Bill, 2018,[19] proliferated on the basis of the recommendations of the high-level committee[20] to review institutionalization of arbitration mechanism in India and revamp the traditional arbitration culture.

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[18] 246th Report of the Law Commission of India, Amendments to the Arbitration and Conciliation Act 1996, 37 (2014), available at: http://lawcommissionofindia.nic.in/reports/Report246.pdf (Sep 03, 2018, 10:05 AM)

[19] The Arbitration and Conciliation Amendment Bill, 2018, available at: https://www.prsindia.org/billtrack/arbitration-and-conciliation-amendment-bill-2018 (Sep 12, 2018, 08:05 AM)

[20] Report of the High Level Committee to the Institutionalization of Arbitral Mechanism in India, (30th July, 2017), available at: http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf (Sep 09, 2018, 22:05 PM)

However, that amendment also makes no provision for emergency arbitrators or emergency orders or awards.

B. AN OVERVIEW OF EMERGENCY ARBITRATOR PROVISIONS IN INSTITUTIONAL RULES

While emergency arbitrator provisions vary slightly from one arbitral institution to another, they are simultaneously based on the edifice that emergency arbitrators are appointed prior to the constitution of the arbitral tribunal and are only competent to decide on the grant of the urgent relief. At this stage, they have no authority or jurisdiction to decide on any substantive issues pertaining to the dispute. Once the arbitral tribunal is constituted, the emergency arbitrator is *functus officio*, and the decision issued by the emergency arbitrator may thereafter be reconsidered, modified or vacated by the arbitral tribunal.

The first institution to introduce procedures for emergency arbitration was the International Centre for Dispute Resolution (ICDR), the international arm of the American Arbitral Association (AAA), in 2006.The SCC introduced such procedures in its revised rules launched on January 1, 2010. The first Asian arbitral institution to introduce such procedures was the Singapore International Arbitration Centre (SIAC) on 1 July 2010. Thereafter, such procedures were introduced in the rules of several institutions such as the ICC in 2012, HKIAC in 2013 and, LCIA in 2014. Emergency arbitration procedures are now ubiquitous as part of the regulatory framework of arbitration institutes from Stockholm to Singapore, London to Kigali and Zurich to Beijing.

In India, arbitral institutions, such as the Mumbai Centre for International Arbitration (MCIA), Delhi International Arbitration

Centre (DIAC), also provide mechanisms for the appointment of an emergency arbitrator in their rules.[21]

The table below produces a comparative analysis of emergency arbitration provisions of several arbitral institutions including Mumbai Centre for International Arbitration and Delhi International Arbitration Centre:

Institution	**Year Introduced**	**Temporal Application**	**Timing of Application**	**Time required to appoint an EA**	**Time Frame to Grant Measures**	**Form of Measures**	**Access to Courts for the Grant of Interim Measures**	**Application Statistics**
ICDR	2006	Arbitration Agreements entered on or after 1 May 2006	With or after submission of notice of arbitration	Within 1 day of receipt	-	Order or Interim Award	At any time	70 (as of fall 2016)
SCC	2010	Any arbitration agreement referring to SCC Rules	Any time before referral to the tribunal (but commence arbitration within 30 days of decision)	Within 24 hours of receipt	No later than 5 days from referral	Order or Award	At any time	27 (As of June 2017)

[21] For a detailed analysis of the rules, refer to the table in (B.), in this section of the note.

SIAC	2010	Arbitrations commenced on after 1 July 2010	With or after submission of notice of arbitration	With in 1 day of receipt	Within 14 days of appointment of Emergency Arbitrator	Order or Award	At any time prior to the constitution of the arbitral tribunal or in exceptional circumstances thereafter	72 (As of December 2017)
ICC	2012	Arbitration agreements entered into on after January 2012	Anytime before constitution of Tribunal	With in 2 days of receipt	No later than 5 days from referral to Emergency Arbitrator	Order	At any time prior to making the EA application and in appropriate circumstance even thereafter	61 (as of August 2017)
HKIAC	2013	Arbitration agreements concluded on or after 1 November 2013	With or after submission of notice of arbitration	With in 2 days of receipt	Within 15 days from transfer of file to Emergency Arbitrator	Decision, Order or Award	At any time	8 (as of 2016)

LCIA	2014	Arbitration Agreements entered into after 1 October 2014	With or after submission of notice of RFA or response thereto	With in 3 days of receipt	No later than 15 days from appointment of Emergency Arbitrator	Order or Award	At any time before the formation of the arbitral tribunal	1 (as of April 2017)
MCIA [22]	2016	Any arbitration agreement referring to MCIA Rules	Anytime prior to constitution of Tribunal	With in 1 business day of receipt	No later than 14 days after the appointment of Emergency Arbitrator	Order or Award	At any time	-
DIAC [23]	2018	Any arbitration agreement referring to DIAC Rules	Anytime prior to constitution of Tribunal	With in 2 business days of receipt	No later than 7 days after the appointment of Emergency Arbitrator	Order or Award	At any time	-

[22] *See* Mumbai Centre for International Arbitration Rules, 2016, available at: http://mcia.org.in/mcia-rules/english-pdf/#mcia_rule14 (Sep 02, 2018, 11:08 AM)

[23] *See* Delhi International Arbitration Centre (Arbitral Proceedings) Rules, 2018, available at: http://www.dacdelhi.org/topics.aspx?mid=74 (Sep 02, 2018, 11:37 AM)

C. FREE CHOICE APPROACH VS. COURT-SUBSIDIARITY APPROACH[24]

This section of the article deals with the crucial question of allocation of authority for issuance of interim measures in arbitration. The authors seek to scrutinize how such allocation of authority streamlines itself when flowing back and forth between national courts and emergency arbitrators. While the conception of emergency arbitration is still in its nascent stage in India, a few questions deserve to be pondered over before the stage is finally set for perpetuation of emergency arbitration proceedings in the country:

a. Whether courts, tribunals, or both should have the power to order interim measures? Included within this question are two more questions: Whether the power of courts or tribunals to order interim measures should be subject to the agreement of the parties i.e. whether the parties should be permitted to ***opt out*** or ***opt in*** to some default arrangement in which courts and/or arbitral tribunals have the power to order such measures?

b. What is the scope of authority conferred on arbitral tribunals and national courts to grant interim measures? Whether courts and arbitral tribunals should have the power to order interim measures *suo motu*, and whether the issuance of interim measures by courts should be

[24] The terminologies of the approaches have been derived from Jan K. Schaefer, *New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared*, 2.2 ELECTRONIC J. COMP. L. (1998), available at <http://www.ejcl.org/22/art22-2.html>; which were further also employed by Donald Francis Donovan, *The Allocation of Authority Between Courts and Arbitral Tribunals to Order Interim Measures A Survey of Jurisdictions, the Work of UNCITRAL and a Model Proposal*, in Albert Jan van den Berg (ed), 203 12 NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND, ICCA CONGRESS SERIES, 203-241 (Kluwer Law International 2005)

preceded by a request from the arbitral tribunal seeking involvement of the court?

c. How national courts and emergency arbitrators exercise their authority in relation to one another?

The answer to these questions lies in the regime of arbitration a particular country adopts. It is interesting to note that jurisdictions such as United States, Brazil, Argentina and Chile continue to reflect unsettled approaches to the above questions, swaying with the wave of decisions of courts. Thus, they neither seem to embrace the free choice model nor the court-subsidiarity model but appear to be flexible according to the circumstances of the dispute.

In the free choice approach, courts and tribunals may simultaneously grant interim reliefs. However, neither the courts nor tribunals take precedence over each other in considering such requests for interim relief. Germany has adopted the free choice approach based on UNICTRAL Model Law, as adopted in 1985 and further amended in 2006, where both courts and arbitral tribunals have been empowered to order interim reliefs. However, there is no clear priority between these two forums as the parties have a free choice to approach any forum whatsoever.

On the other hand, jurisdictions such as England, Hong Kong, Singapore and Zimbabwe follow the court-subsidiarity approach where although powers to grant interim measures vest in both courts and tribunals, the courts have been assigned a subsidiary role thus setting up a hierarchy between courts and tribunals. It follows that parties to an arbitration should first apply for interim measures to the arbitral tribunal, and only where there is a need for measures exceeding the powers of the tribunal, or the tribunal is unwilling or unable to act, to the Court.

In India, we see a peculiar situation where both of the above mentioned approaches come to the fore, varying according to the

stage of the arbitral proceeding. For instance, post the 2015 amendment to the Act, during the operation of the mandate of the arbitral tribunal, India adopts the court-subsidiarity approach, wherein the parties are mandated to apply to the arbitral tribunal for seeking interim reliefs and only in cases where the circumstances render this remedy to be inefficacious, the parties may file an application before the courts under Section 9 of the Act. In all other scenarios, India follows the free choice approach while granting interim measures.

Limiting the powers of the court to grant interim measures and making arbitral tribunal the first port of call seems to be a better approach in order to minimize applications filed before the court. Moreover, since the range of measures ordered by courts and arbitral tribunals in India vary, ramifications of conflict between the both are slim.

Having seen how the allocation of authority to issue interim measures may proliferate vividly in different jurisdictions across the globe, it now becomes important to examine the enforceability of decisions, orders or awards by emergency arbitrators as against the enforceability of interim measures granted by national courts.

D. CONUNDRUM OF ENFORCEABILITY OF EMERGENCY ARBITRATOR DECISIONS/ ORDERS/AWARD

Although the emergency arbitrators have the authority to grant interim reliefs that are contractually binding upon the parties but most of the times, they lack the power to bring about the compliance of the decision. It is of no surprise that enforceability of awards passed by emergency arbitrators continue to remain a reason of concern for the parties. According to the 2015 International Arbitration Survey conducted by Queen Mary University, 46% of surveyed respondents indicated that they would rather seek emergency relief from domestic courts than

from emergency arbitrators, with 79% of respondents citing enforceability concerns as their main reason for preferring domestic courts. [25]

Enforceability of interim reliefs passed by emergency arbitrators, depends majorly on the national laws of the jurisdiction where enforcement is sought. As mentioned above, emergency arbitration has not been given recognition in India and the current situation is such that interim reliefs granted by an emergency arbitrator in arbitrations, seated within or outside India, conducted under institutional rules, are not enforceable under the Act.[26]

In addition, the parties that have obtained such urgent reliefs in a foreign-seated arbitration cannot enforce such orders or awards in India. This is because the Act does not contain provisions for the enforcement of interim relief granted by a foreign-seated arbitral tribunal. In this situation, the parties are compelled to take recourse to the Indian courts by filing an application under section 9 of the Act (by the virtue of it being applicable to foreign seated arbitrations), asking for similar interim relief as granted by the foreign seated arbitral tribunal or emergency arbitrator.

In the case of *Avitel*,[27] the Bombay High Court in a petition under Section 9 of the Act ordered the same relief based on the same cause of action that was brought before the emergency arbitrator. Even while allowing such relief under Section 9 of the Act, the Court clarified *"recourse to Section 9 of the Act is not available for the purpose of enforcing the orders of the arbitral tribunal; but that does not mean*

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[25] Queen Mary University of London, *International Arbitration Survey: Improvements and Innovations in International Arbitration* 27-28 (2015).

[26] Tejas Karia, Ila Kapoor & Ananya Aggarwal, *Post Amendments: What Plagues Arbitration in India?*5 INTERNATIONAL JOURNAL OF ARBITRATION LAW, 230-241 (2016).

[27] Avitel Post Studioz Limited and Others v. HSBCPI Holdings (Mauritius) Limited Arb. P. 1062 of 2012 Jan. 22, 2014 (Bombay High Court) (India).

that the court cannot independently apply its mind and grant interim relief in cases where it is warranted".

The Delhi High Court in the *Raffles Design*[28] case granted an interim order similar to that granted by the SIAC emergency arbitrator but clarified that that an emergency award in a foreign seated arbitration cannot be enforced in India under the Act.

Thus, in the absence of any statutory provision or a conclusive apex court precedent, the parties have to find a solution to fill this gap and bring about the enforcement of the relief granted by emergency arbitrator seated outside India. It appears that the parties are left with the option to indirectly enforce the interim relief in India, passed under a foreign seated arbitration by making an application under section 9 of the Act.

However, this is not a viable option since it requires parties to re-agitate the issue of interim relief before the Indian courts even though an emergency arbitrator may have considered the matter in detail, and granted the relief sought. It further adds to the potential delay in a party being able to utilize the relief it has already obtained from an emergency arbitrator. This roundabout process of enforcement may also further increase the risk of dissipation of assets by a recalcitrant party.

III. The Way Forward: Suggestions and Conclusion

The situations requiring emergency arbitration have been increasing globally in massive numbers, however, most of the jurisdictions have failed to cope up with the same. The uncertainty regarding the effectiveness of the interim measures issued by the emergency arbitrator has forced the parties to take recourse to the national courts for seeking urgent reliefs. This

[28] Raffles Design International India Pvt. Ltd. & Anr. v. Educomp Professional Education Ltd.& Ors. (MANU/DE/2754/2016)

essentially results in the loss of all the benefits that made the party choose arbitration over litigation.

The amendment to Section 2(1) (d) of Act proposed by the Law Commission of India would have brought Indian arbitration law in tandem with the global trend to enforce emergency awards by way of legislative amendment. The problem is more prevalent in foreign seated arbitrations as the domestic seated emergency orders can still be enforced under the amended Section 17(2) of the Act. But, in order to provide for the enforcement of emergency awards passed in foreign seated arbitrations, a provision similar to section 17 of the Act needs to be inserted in Part II of the Act.

There remain many more ambiguities with respect to India's take on emergency arbitration. For example, considering that emergency arbitration is workable only under the ambit of institutional arbitration, what will be the outcome when a party has chosen for ad-hoc arbitration instead of institutional arbitration, can the party invoke emergency arbitration using such agreement? In such a scenario, should the courts be conferred the power to appoint an emergency arbitrator? Will the parties have to enter into a separate agreement to choose arbitral institutions for providing an emergency arbitrator? In the absence of regulatory legislation governing this aspect and judicial clarification, answering such questions is certainly not easy.

With the amendments brought in the Act in 2015 and the Arbitration and Conciliation Amendment Bill of 2018 being silent about the various concerns regarding emergency arbitration, parties, for now, are without guidance as to how they wish to proceed with emergency arbitration if at all. However, it is pertinent to note that if Indian arbitration law does eventually embrace emergency arbitration, catch-all phrases in enumeration of interim measures granted by tribunals should be substituted

with a more illustrative rather than an exhaustive list similar to the English Arbitration Act, 1996.[29]

Considering that the concept of emergency arbitration is at a nascent stage, it certainly does not come without obstacles. But it is hoped that with the various arbitration institutions providing for emergency arbitration and the Government's push towards institutional arbitration as highlighted in the Arbitration Amendment Bill, 2018, the incorporation of provisions dealing with emergency arbitration in the Indian legislation will be encouraged in the near future.

[29] English Arbitration Act 1996 § 44.

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STANDARDS OF DISQUALIFICATION OF AN ARBITRATOR UNDER THE ICSID CONVENTION

*Sayak Chatterjee & Ankit Singh**

Abstract

The ICSID Convention provides a standard for disqualification of arbitrators for lack of qualities of independence and impartiality. However, jurisprudence on the standard of "manifest lack" of qualities in an arbitrator that the Convention envisages is not yet settled as it does not shed much light on what constitutes the terms "manifest lack". In the recent past, arbitrators have faced frequent challenges regarding their independence and impartiality in relation to the matter at hand. Owing to the absence of clarity in the Convention, this article lays emphasis on the various decisions that have contributed to the change in jurisprudence regarding the disqualification of arbitrators and have introduced a new dimension, akin to certain other arbitration rules. It discusses the three major standards laid down in these decisions for determining "manifest lack" of qualities in an arbitrator under ICSID, namely, the strict standard, the reasonable doubt standard and the very recent, the appearance of bias standard. Further, the article highlights a paradigm shift in the ICSID challenge jurisprudence from an initial stringent requirement of manifest lack towards a linear approach that has contributed to the divergence seen in recent challenge decisions. This article also advocates the need for certain uniform and unambiguous set of rules for effective adjudication of arbitrator challenges in ICSID.

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I. Introduction

The Convention on Settlement of Investment Dispute between States and Nationals of Other State ("ICSID Convention") was enforced in 1966 with the objective to promote economic development by providing a forum for settlement of investment disputes. To fulfil this objective the Convention established the International Centre for Settlement of Investment Disputes ("ICSID") as a forum for settlement of Investment disputes between contracting States and Nationals of other contracting States through the mechanism of dispute resolution.[1] It is pertinent to mention that while adjudicating these disputes, the party appointed arbitrators plays a vital role. Resultantly, they are duty bound to keep themselves free from any clout throughout the proceedings.[2]

The parties to the dispute are entitled *firstly*, to a fair-hearing[3], i.e., the dispute is heard by independent, impartial and competent arbitrators[4] and *secondly*, to have an arbitrator disqualified if he lacks these qualities.[5] Consequently, the ICSID Convention[6] under Article 14 protects the right of the parties by enunciating certain specific qualities that an individual must possess to get

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1 CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY ON THE CONVENTION OF THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 4-5 (2 ed. Cambridge University Press 2009).

2 William W. Park, *Arbitrator Bias*, TDM 15-18 (2015).

3 Federica Cristani, *Challenge and Disqualification of Arbitrators in International Investment Arbitration: An Overview*, 13 LAW & PRAC. INT'L CTS. & TRIBUNALS 153, 154 (2014).

4 E.E. GAILLARD AND J. SAVAGE (EDS.), FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 1021 (Kluwer Law International 1999); S. GREENBERG, C. KEE AND J. R. WEERAMANTRY, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA PACIFIC PERSPECTIVE 6.87 (Cambridge University Press 2011).

5 24 KAREL DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 218 (Kluwer Law International 2012).

6 Convention on Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), Mar. 18, 1965, 575 UNTS 159.

appointed as an arbitrator, failing which, pursuant to Article 57 of the ICSID Convention, the concerned party is entitled to propose disqualification of the arbitrator.

In the above backdrop, Part II of the article discusses the qualities required in an arbitrator under the ICSID Convention, the alleged lack of which factors in the challenge proposals. Part III discusses the threshold required to successfully disqualify an arbitrator. Part IV lays emphasis on the shift in jurisprudence on the standard of disqualification of an arbitrator. Part V concludes the article by suggesting incorporation of certain sets of rules that will pave the path for successful arbitrator challenges in ICSID.

II. Qualities in an arbitrator

Under the ICSID, the members of the arbitral Tribunal "shall be persons of *high moral character and recognized importance in the fields of law, commerce, industry or finance who may be relied upon to exercise independent judgment*".[7] The English and French versions of the ICSID Convention mention the quality of 'independence', whereas the quality of 'impartiality' is recognized in the Spanish version.[8] However, these qualities of 'independence' and 'impartiality' have usually been considered as two sides of the same coin[9] and have been used interchangeably.[10] A situation may arise where a person who is completely competent in exercising an independent judgment may be ineligible if he has some kind of conflict of interest in a particular case or *vice versa*.[11] Therefore,

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7 *Id.* art. 14.

8 Gabriel Bottini, *Should the Arbitrator Live on Mars – Challenge of Arbitrators in Investment Arbitration*, 32 SUFFOLK TRANSNAT'L L. REV. 341-342 (2009).

9 H. Warsame, *Law and Practice on Impartiality and Independence in International Investment Arbitration*, 8 (2016), (September 26, 2018, 12;01 PM), http://www.scriptiesonline.uba.uva.nl/en/scriptie/617809.

10 J. D. M. LEW, L. A. MISTELIS AND S. M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 255-273 (Kluwer Law International 2003).

11 SCHREUER, *supra* note 1, at 49.

the requirement of independence and impartiality is a subjective inquiry (ensuring arbitrator bias) based on external, objective facts and circumstances.[12]

The ICSID Rules of Procedure for Arbitration Proceedings ("ICSID Rules") serve to ensure that members of the Tribunal meet the test enshrined under Article 14 of the ICSID.[13] Pursuant to Rule 6(2), the arbitrators so appointed in a dispute shall sign a declaration as soon as the first session of the Tribunal is held. Such declaration ensures that the arbitrator is duty bound to *inter alia* act fairly, independently and impartially during the course of the arbitration process.[14] Under the declaration, the arbitrator shall disclose relevant information, i.e., his independence, impartiality, fairness and confidentiality in regard to the arbitral proceeding.[15] Consequently, under Rule 8(2), if the declaration is not filed after the first session of the Tribunal, the arbitrator shall be deemed to have resigned.[16]

It is necessary to acknowledge the fact that "independence and impartiality are states of mind".[17] Resultantly, it becomes difficult to examine the "inner workings of an arbitrator's mind with perfect accuracy" since only the conduct of the challenged

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12 James Ng, *When the Arbitrator Creates the Conflict: Understanding Arbitrator Ethics through IBA Guidelines on Conflict of Interest and Published Challenges*, 2 MCGILL J. DISP. RESOL. 23, 25 (2015-2016).

13 James Crawford, *Challenges to Arbitrators in ICSID Arbitration*, in PRACTISING VIRTUE INSIDE INTERNATIONAL ARBITRATION 596, 603 (Oxford University Press 2015).

14 Greg C. Nwakoby & Charles Emenogha Aduka, *Challenge of Arbitrator under ICSID*, 36 J.L. POL'Y & GLOBALISATION 171 (2015).

15 KRÖLL, *supra* note 10, at 264.

16 Nwakoby *supra* note 14, at 171.

17 Suez, Soceidad General de Augus de Barcelona S.A. and Vivindi Universal S.A v. Agentine Republic, ICSID Case No. ARB/03/17, Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19 AWG Group v. The Argentine Republic (UNCITRAL), Decision on the proposal for disqualification of a member of the arbitral tribunal, ¶28-30 (Oct. 22, 2007) ("Suez I"); William Park, *supra* note 2, at 20.

arbitrator can demonstrate such state of mind.[18] Irrespective of the safeguards provided by the Convention and Rules, aimed towards ensuring integrity in the arbitration process[19], it has been observed that the parties have time and again proposed disqualification of appointed arbitrators for lack of required qualities enshrined under Article 14 of the ICSID.[20] It is pertinent to mention that, the quality to render a decision independently and impartially, has been in the limelight in the proposals for disqualification.[21] Pursuant to Article 58 of the ICSID Convention, when only one member of the tribunal is challenged, the unchallenged arbitrators of the tribunal ("Co-arbitrators") are authorized to decide upon the disqualification proposal. However, in case of the majority of the tribunal is challenged the Chairman of the Administrative Council of ICSID ("Chairman") decides the challenge.

While, ICSID Convention entitles the parties to propose disqualification of an arbitrator by showing any facts indicating manifest lack of qualities[22] envisaged under Article 14[23], the ICSID Convention is silent on the circumstances that actually constitute "manifest lack" of qualities arbitrator. These standards have been discussed in the past decisions by the adjudicators of the disqualification proposals, i.e., *Co-arbitrators and Chairman*, and have subsequently contributed to the growth of challenge

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18 JEFFREY WAINCYMER, PROCDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 292-293 (Kluwer Law International 2012).

19 GB BORN, INTERNATIONAL COMMERCIAL ARBITRATION 463 (Kluwer Law International the Hague 2009).

20 Christine Meerah Kim, *Issue Conflict in Investor-State Dispute Settlement: Focusing on the Challenges against Professor Francisco Orrego Vicuna in CC/Devas et al. v. India and Repsol v. Argentina*, 27 GEO. J. LEGAL ETHICS 621, 624 (2014).

21 SCHREUER, *supra* note 1, at 1202; Audley Sheppard, *Arbitrator Independence in ICSID Arbitration* in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY 132 (C. Binder al ed. 2009).

22 WAINCYMER, *supra* note 18, at Pg. 292-293.

23 ICSID, *supra* note 6, art. 57.

jurisprudence under ICSID, i.e., the standard of "manifest lack" required to disqualify an arbitrator.[24]

III. Manifest Lack

The Convention and the Rules provide that to disqualify an arbitrator, the concerned party is required to file a disqualification proposal as soon as the concerned party becomes aware of grounds of possible disqualification.[25] The ground of possible disqualification pursuant to Article 57 is the "manifest lack" of qualities in the arbitrator as mandated under Article 14.

Article 57 plays an "evidentiary" role, i.e., it creates a "burden of proof on the challenging party" to prove the "manifest lack" of qualities.[26] Therefore, the standard of "manifest lack" is crucial because it brings effectiveness and legitimacy to the award rendered by the Tribunal[27], particularly when the challenges against arbitrators are on a rise.[28]

However, the standard for disqualifying an arbitrator under ICSID is a moot point[29], i.e., a lower standard of proof to show manifest lack makes it easier to disqualify an arbitrator, whereas a strict standard will make it relatively difficult to disqualify the arbitrator.[30] Moreover, the other question is whether "manifest" describes the seriousness of the lack of qualities enshrined under

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[24] Peter Horn, *A matter of Appearance: Arbitrator Independence and Impartiality in ICSID Arbitration*, 11 NYU J L.& BUS 356 (2014).

[25] ICSID, *supra* note 6, art. 57, Rules of Procedure for Arbitration Proceedings (Arbitration Rules) r.9(1).

[26] Peter Horn, *supra* note 24, at 356-357.

[27] MARIA NICOLE CLEIS, THE INDEPENDENCE AND IMPARTIALITY OF THE ICSID ARBITRATOR 31 (Brill 2017).

[28] Lars Markert, *Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines*, 3 CONTEMP. ASIA ARB. J. 237, 239 (2010).

[29] Baiju S Vasani & Shaun A Palmer, *Challenge and Disqualification of Arbitrators at ICSID: A new Dawn?*, 30(1) ICSID REV. 194, 200 (2015).

[30] DAELE, *supra* note 5, at 218.

Article 14 or describes the standard of proof required to establish such lack.[31]

Consequently, three major standards have been laid down with regard to the interpretation of Article 57 of the ICSID. *Firstly*, the strict proof indicating manifest lack or *Amco Asia* standard, *secondly*, reasonable doubt or *Vivendi* standard and *lastly*, disqualification on the appearance of bias or the *Blue Bank* standard.[32]

A. STRICT PROOF INDICATING MANIFEST LACK OR *AMCO* STANDARD

The strict standard of proof for establishing manifest lack of qualities in an arbitrator was laid down in the *Amco Asia*[33] case, the first case in arbitrator challenge[34] wherein the Co-arbitrators decided on the proposal to disqualify the Claimant appointed arbitrator.[35] In this case, the Respondent proposed disqualification on the grounds that *firstly*, the challenged arbitrator had advised the Claimant on tax matters a number of years prior to the current arbitration proceedings and *secondly*, the law firm of the challenged arbitrator had a profit sharing understanding with the Claimant's counsel and the premises of their office and administrative services were shared six months after the initiation of the proceedings. It was contended that on these grounds the challenged arbitrator lacks independence towards the Claimant[36] as it was sufficient to prove the

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31 Georgios Dimitropoulos, *Constructing the Independence of International investment Arbitrators: Past, Present and Future*, 36 NW. J. INT'L L. & BUS. 371, 398 (2016).

32 Horn, *supra* note 24, at 357.

33 Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on the Proposal to Disqualify Arbitrator (June 24, 1982) ("Amco Asia").

34 Meg Kinnear, *Challenge of Arbitrators at ICSID – An Overview*, 108 Am. Soc'y Int'l L. Proc. 412, 412-413 (2014).

35 Vasani, *supra* note 29, at 200.

36 CLEIS, *supra* note 27, at 32.

appearance of non-reliability from the perspective of a reasonable person.[37]

The Co-arbitrators while rejecting the challenge observed that pursuant to the dictionary meaning, the term 'manifest' may mean 'evident', 'obvious', 'plain'. Therefore, the facts indicating lack of qualities "have to indicate not a possible lack of qualities, but a quasi-certain, or to go as far as possible, a highly probable one".[38] Furthermore, it was observed that, existence of some relationship cannot stand as a ground to disqualify an arbitrator as the "party appointing system presumes some connection" between the appointed arbitrator and the party.[39]

Similarly, in *Suez II*[40], the Respondent challenged the independence and impartiality of the Claimant appointed arbitrator, on the basis of past appointments and relationship with the Claimants.[41] The Tribunal while dismissing the proposal relied on the strict standard and observed "that Article 57 places a heavy burden of proof on the challenging party to prove not only facts indicating lack of qualities, but also the lack is manifest or highly-probable and not just possible or quasi-certain".[42]

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37 Karel Daele, *Saint Gobain v. Venezuela and Blue Bank v. Venezuela – The Standard for Disqualifying Arbitrators Finally Settled and Lowered*, 29 No. 2 ICSID REV. 296, 297 (2014).

38 Amco Asia, *supra* note 33, at ¶29.

39 Horn, *supra* note 24, at 358.

40 Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19, Suez, Sociedad General de Aguas de Barcelona S.A., and Inter Aguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/2017, AWG Group Limited v. The Argentine Republic (UNCITRAL), Decision on a second proposal for disqualification of a member of the arbitral tribunal (May 12, 2008). ("Suez II").

41 Bottini, *supra* note 8, at 355-356.

42 Suez II, *supra* note 40, at ¶29.

Likewise, in *PIP*[43], the Claimant appointed arbitrator was challenged on the grounds of multiple appointments in ICSID against the Respondent in previous cases having similar set of facts.[44] The Chairman while rejecting the proposal placed reliance on the strict standard in *Suez II* and observed that "manifest lack" under Article 57 implies "clear or certain lack of qualities".[45]

Similarly, in *Universal Compression*[46], the Chairman while rejecting the challenge against majority of the Tribunal observed that Article 57 imposes a "high bar for disqualification" and a "heavy burden of proof on the challenging party to establish objective facts indicating that the independence and impartiality of the arbitrators are manifestly impacted".[47]

In *OPIC Karimum*[48], the challenging party contended that multiple appointments of the challenged arbitrator by a party or its counsel prejudice the independence or impartiality in the challenged arbitrator.[49] The Co-arbitrators while rejecting the challenge observed that, under Article 57, "it is not sufficient to establish an appearance of lack of qualities" but the challenging party is required to 'clearly' and 'objectively' establish manifest lack of independence.[50]

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43 Participaciones Inversiones Portuarias SARL v. Gabonese Re-public, ICSID Case No. ARB/08/17, Decision on Proposal for Disqualification of an Arbitrator, ¶22 (November 12, 2009). ("PIP").

44 Horn, *supra* note 24, at 361.

45 PIP, *supra* note 43 at ¶22.

46 Universal Compression International Holdings S.L.U v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify majority of the Arbitral Tribunal (May 20, 2011). ("Universal Compression").

47 *Id*. at ¶71-72.

48 OPIC Karium Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/14, Decision on proposal to disqualify member of Arbitral Tribunal (May 5, 2011). ("OPIC Karium").

49 CLEIS, *supra* note 27, at 37.

50 OPIC Karium, *supra* note 48, at ¶44-45.

Furthermore, in *Getma*[51], where the Claimant appointed arbitrator was challenged on the ground that the challenged arbitrator's brother was appointed as an arbitrator by the Claimant in another case having similar facts. The Chairman while rejecting the proposal observed that mere speculations, presumptions or beliefs are insufficient grounds to disqualify an arbitrator.[52]

Interestingly, in *Abaclat I*[53], where the Chairman considered the recommendation of the Secretary General of the Permanent Court of Arbitration, the strict standard was applied in a different context.[54] The Respondents challenged majority of the Tribunal on the ground of lack of independence.[55] It was observed that the *Amco* standard[56] shall be applicable if the party based its challenge on the wrongfulness of the award.[57]

Similarly in *Alpha*[58], the Respondent challenged the claimant appointed arbitrator on the basis of the challenged arbitrator's relation with the Claimant's counsel which began when they attended higher studies in same university at the same time.[59] The Co-arbitrators while rejecting the proposal relied on the dictionary meaning of the term "manifest"[60] and observed that

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51 Getma International and Ors. v. Republic of Guinea, ICSID Case No. ARB/11/29, Decision on Proposal to Disqualify arbitrator (June 28, 2012). ("Getma").

52 *Id.* at ¶58-60.

53 Abaclat & Ors. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Proposal to Disqualify majority of the Arbitral Tribunal (December 19, 2011). ("Abaclat I").

54 CLEIS, *supra* note 27, at 45, 46.

55 Abaclat I, *supra* note 53, at ¶46, 71, 86, 104.

56 Amco Asia, *supra* note 33.

57 CLEIS, *supra* note 27, at 46.

58 Alpha Projectholding Gmbh v. Ukraine, ICSID Case No. ARB/07/16, Decision on proposal to disqualify arbitrator (May 19, 2010). ("Alpha").

59 James D. Fry & Juan Ignacio Stampalija, *Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes*, 30 No. 2, Arb Int'l LCIA 189, 225 (2014).

60 Alpha, *supra* note 58, at ¶37.

Article 57 incorporates a "stringent requirement of manifest lack of qualities" provided under Article 14.[61]

In *Conoco I*[62], the Respondent challenged the Claimant appointed arbitrator in light of the relationship between the Claimant's counsel and the challenged arbitrator.[63] The co-arbitrators while dismissing the proposal observed that that the ICSID decisions recognizes "manifest" under Article 57 as "'obvious', 'evident', 'highly probable' not 'just possible' and imposes a relatively higher burden on the challenging party".[64] Additionally, they held that "manifest lack" of the qualities under Article 14(1) "must appear from objective evidence".[65] The Tribunal also distinguished the standards under external rules or guidelines (IBA Guidelines) with that under the ICSID Convention. It was held that *firstly*, the IBA guidelines "are not legal rules" and cannot "override any arbitral rules chosen by the parties", *secondly*, "conflict of interest" under standard 2(b) of the IBA guidelines, i.e., for disqualification of an arbitrator, there must be relevant facts and circumstances arising since the appointment of the arbitrator that give rise to "justifiable doubts from a reasonable third person's point of view" regarding the arbitrator's independence and impartiality[66], "is significantly different from that under Article 57 of the ICSID and can be easily satisfied".[67]

Therefore, as observed, under the strict standard the manifest nature of lack "relates to the ease, with which the alleged lack of qualities can be perceived", i.e., lack of qualities in an arbitrator

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61 DAELE, *supra* note 5, at 228.
62 Conoco Phillips Company et al. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on proposal to disqualify arbitrator (Feb. 27, 2012). ("Conoco I").
63 *Id.* at ¶1, 2, 6.
64 *Id* at ¶56
65 *Id.*
66 Bottini, *supra* note 8, at 347.
67 Conoco I, *supra* note 62, at ¶59.

will be manifest if it can be "discerned with little effort and without deeper analysis".[68]

B. REASONABLE DOUBT OR *VIVENDI* STANDARD

The second proposal[69] for disqualification of an arbitrator was filed in *Vivendi*[70], where the unchallenged arbitrator vehemently criticized the standard followed in *Amco Asia*, and laid down a new standard in determining manifest lack of qualities in an arbitrator.[71]

In the aforementioned case, Respondent challenged the Claimant appointed arbitrator on the basis of tax advice provided by the firm of the challenged arbitrator to the Claimant.[72] The unchallenged arbitrators while dismissing the proposal[73] initially adopted the "appearance of bias" test[74] and observed that *there might be circumstances which create "an appearance of lack of independence or impartiality" from the perspective of a reasonable person but do not do so manifestly*, i.e., an arbitrator could be said to lack independence or impartiality but such lack may not be manifest under Article 57.[75]

Finally, it was observed that, *firstly*, the challenging party must establish the factual basis of the challenge, i.e., challenge must not be based out of speculations or inferences.[76] *Secondly*, once such facts are established, the next step would be to see if there exists "a real risk of lack of impartiality based upon these facts which

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68 SCHREUER, *supra* note 1, at 938.
69 CLEIS, *supra* note 27, at 33;
70 Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on the Proposal to Disqualify President of the Tribunal (Oct. 3, 2001). ("Vivendi").
71 *Id.* at ¶22.
72 Bottini, *supra* note 8, at 348-349.
73 Loretta Malintoppi, *Independence, Impartiality, and Duty of Disclosure of Arbitrators* in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 796-797 (Oxford University Press 2015).
74 Bottini, *supra* note 8, at 349.
75 Vivendi, *supra* note 70, at ¶22.
76 CLEIS, *supra* note 27, at 33.

could be reasonably apprehended by either party"[77], i.e., even though Article 57 mandates that lack of qualities must be "manifest", often a "reasonable apprehension of bias" will be adequate.[78]

Similarly in *SGS vs. Pakistan*[79], the Respondent appointed arbitrator was challenged because the challenged arbitrator's firm was representing Mexico in another case where the counsel for Pakistan, has been appointed as an arbitrator[80] in that case.[81] The Co-arbitrators approved the point stated in *Vivendi I*, and took a clearer stand in this regard.[82] They held that an arbitrator can be challenged relying on an inference of lack of qualities from the perspective of a reasonable man on the basis of established facts and not on speculation.[83]

In *EDF*[84], Respondent challenged the Claimant appointed arbitrator on the basis of the challenged arbitrator economic interest in the outcome of the proceedings.[85] The Co-arbitrators while dismissing the proposal held that if reasonable doubt exists on reliability of the challenged arbitrator to exercise independent judgment then she should cease to serve in the proceedings.[86]

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77 Vivendi, *supra* note 70, at ¶25.
78 Fry, *supra* note 59, at 211.
79 SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Proposal to disqualify arbitrator (Dec 19, 2002). ("SGS").
80 Robert Azinian v. United Mexican States, ICSID Case No. ARB/97/2, Award (Nov 1, 1999).
81 SGS, *supra* note 79, at ¶10.
82 CLEIS, *supra* note 27, at 34.
83 SGS, *supra* note 79, at ¶20.
84 EDF International S.A., SAUR International S.A., Leon Participaciones Argentina S.A. v. Argentine Republic, ICISD Case No. ARB/03/23, Decision on proposal to disqualify members of the Arbitral Tribunal (June 25, 2008). ("EDF").
85 *Id.* at ¶12, 35.
86 *Id.* at ¶64.

In *Abaclat I*[87], it was observed that if a challenge is based on the wrongfulness of award or on procedural grounds, *Amco* standard would be followed otherwise, the two-fold test of reasonable doubt laid down in *Vivendi* would be relied upon.[88]

Similarly, in *Repsol*[89], Respondent challenged the President of the arbitral Tribunal based on the relationship which was formed with the counsel of the Claimant. Argentina also proposed disqualification of the Claimant appointed arbitrator on the grounds of multiple appointments against Argentina and that he was predisposed on the concerned issue because he authored an article where he provided his view on a similar issue.[90] The Chairman relying on the *Videndi* standard, rejected the challenge and held that to challenge an arbitrator, no strict proof of dependence or bias is required, but establishing an appearance of such state of mind from the perspective of a reasonable person would suffice.[91] In *Urbaser*[92], a similar view was taken by the Co-arbitrators while rejecting the challenge proposal.[93]

Interestingly, the Co-arbitrators in *Saint-Gobain*[94] observed (after considering both the *Amco* and *Vivendi* standard) that, there is "no unequivocal answer" to what amounts to manifest lack of independence and impartiality in an arbitrator.[95] However, they

87 Abaclat I, *supra* note at 53.
88 CLEIS, *supra* note 27, at 46.
89 Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic, ICSID Case No. ARB/12/38, Decision on the Proposal for the Disqualification of a Majority of the Tribunal (December 13, 2013).
90 Horn, *supra* note 24, at 384-385.
91 CLEIS, *supra* note 27, at 190.
92 Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26, Decision on proposal to disqualify arbitrator (Aug 12, 2010). ("Urbaser").
93 *Id.* at ¶20, 43.
94 Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/13, Decision on proposal to disqualify arbitrator (Feb 27, 2013). ("Saint-Gobain").
95 *Id.* at ¶57-59.

relied on the *Videndi* standard and rejected the proposal for disqualification.[96]

C. APPEARANCE OF BIAS OR *BLUE BANK* STANDARD

Dr. Jim Yong Kim, the current Chairman laid down this standard while accepting the proposal for disqualification of majority of the Tribunal.[97] The Respondent challenged Mr. Jose Maria Alonso[98]on the ground that the challenged arbitrator had a direct or indirect economic interest on the outcome of the present dispute.[99] On the contrary, the Claimants challenged the Respondent appointed arbitrator on the grounds of multiple appointments by the Respondent, however, he resigned after the Claimants submitted their proposal for disqualification.[100]

Dr. Kim, while deciding the challenge used four parameters to draw the conclusion.[101] *Firstly*, Article 57 and 14(1) of the ICSID Convention "do not require the proof of actual dependence or bias", rather, it is sufficient to "establish the appearance of dependence or bias"[102]. *Secondly*, the "applicable legal standard" under the ICSID Convention and "objective standard based on a reasonable evaluation of the evidence by the third party".[103] Further, Dr. Kim observed that, " the subjective belief of the party requesting the disqualification is not enough to satisfy the requirement of the Convention".[104]*Thirdly*, Dr. Kim observed, that manifest mean 'evident' or 'obvious' and " relates to the ease

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96 *Id.* at ¶60.
97 Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Decision on Proposal to disqualify majority of Tribunal (Nov 12, 2013). ("Blue Bank").
98 *Id.* at ¶22-32.
99 *Id.* at ¶27-31.
100 *Id.* at ¶45-54.
101 Vasani, *supra* note 29, at ¶199-202.
102 Blue Bank, *supra* note 102, at ¶59.
103 Blue Bank, *supra* note 102, at ¶60.
104 Blue Bank, *supra* note 102, at ¶60

with which the alleged lack of quality can be perceived".[105] *Lastly*, even though external rules and guidelines (IBA Guidelines) can serve as useful tools while deciding a challenge, nevertheless, challenge must be decided pursuant to the provisions envisaged under the ICSID Convention .[106] Similarly, Dr. Kim upheld the disqualification proposal in *Burlington Resources*[107] relying on the *Blue bank* standard.[108]

Another decision of importance in the ICSID challenge jurisprudence, where the Co-arbitrators for the first time upheld a proposal for disqualification of their co-arbitrator,[109]is Caratube[110], where Bruno Boesch was challenged by the Claimant on the grounds of multiple appointments in cases of similar facts and circumstances.[111] The Co-arbitrators upheld the challenge and placed reliance on the standard laid down in *Blue Bank* and held that, "Article 57 and 14(1) of the ICSID Convention does not mandate the requirement of strict proof".[112] Explaining it further, the Co-arbitrators held that, "Mr. Bosesch's objectivity and open mildness were fouled because of resemblance of issue and facts with the *Ruby Roze*".[113] The decision also prolonged it further, that "an arbitrator cannot be asked reasonably to maintain a 'Chinese Wall' in his mind".[114] Furthermore, on the question of multiple appointments, the Co-arbitrator held that,

105 Blue Bank, *supra* note 102, at ¶61.
106 Blue Bank, *supra* note 102, at ¶62.
107 Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on proposal to disqualify arbitrator (Dec 13, 2013). ("Burlington").
108 *Id.* at ¶79-80.
109 Vasani, *supra* note 29, at 204.
110 Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Decision on the proposal for disqualification of arbitrator. ("Caratube").
111 *Id.* at ¶24-27.
112 *Id.* at ¶57.
113 *Id.* at ¶90.
114 *Id.* at ¶75.

"third party would find an evident or obvious presence of disproportion within the tribunal".[115]

However, recently in *Raffeisen*[116], Respondent proposed disqualification of the Claimant appointed arbitrator on the grounds of multiple appointments, predisposition towards the issues in the current dispute and relationship with the Claimant's counsel because of appointments between them.[117] The Chairman while dismissing the challenge observed that, *firstly*, majority of the decisions have concluded that manifest means "evident" or "obvious"[118], *secondly*, the ICSID Convention doesn't "require proof of actual dependence or bias; rather, it is sufficient to establish the appearance of dependence or bias"[119] and *finally*, "the legal standard applied to a proposal to disqualify an arbitrator is an objective standard based on reasonable evaluation of evidence by a third party".[120]

Therefore, the trajectory of the decisions in *Amco, Vivendi* and *Blue Bank* depicts a radical shift in the standard for determining "manifest lack" of qualities in an arbitrator under ICSID. .

IV. Paradigm shift in challenge jurisprudence

In *Amco Asia*, the Tribunal rejected the reasonable doubt test contended by the Respondent and laid down the strict standard.[121] However, the strict standard has been heavily criticized as it imposes a higher burden of proof on the party proposing the disqualification in comparison to standards

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115 *Id.* at ¶95.
116 Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Arbitrator, (May 17, 2018). ("Raiffeisen Bank").
117 *Id.* at ¶16-36.
118 *Id.* at ¶79.
119 *Id.* at ¶83.
120 *Id.* at ¶84.
121 DAELE, *supra* note 5, at 297.

prevalent in other institutional arbitration system.[122] The ICSID Tribunal's or Administrative Council's traditional reluctance to disqualification of arbitrators is the reason for such high bar on disqualification.[123] It is pertinent to note that the ICSID Convention never intended to impose a particularly heavy burden of proof to establish lack of independence or predisposition[124] and by interpreting "manifest" under Article 57 as pertaining to seriousness of lack of qualities, the Tribunals may have drifted away from the true intentions of the ICSID Convention.[125] In the absence of any reference to an appropriate threshold to the burden of proof imposed by the ICSID Convention, it must be assumed that the requirement of standard indicating lack of qualities in an arbitrator is not increased under the ICSID Convention.[126] Nevertheless, majority of the decisions on disqualification in ICSID have relied upon the strict standard of "manifest lack".[127]

On the contrary, while laying down the reasonable doubt standard, the strict standard was heavily criticized in *Vivendi.*[128] The "reasonable doubt" test lowers the standard required for disqualifying an arbitrator in ICSID.[129] The fact that the "reasonable doubt" standard has been rejected and strict standard has been upheld[130] and *vice versa* shows that there is an

[122] Dimitropoulos, *supra* note 31, at 397-398; Federica Cristani, *supra* note 3 at 159.
[123] Vasani, *supra* note 29, at 197-200.
[124] CLEIS, *supra* note 27, at 17.
[125] Vasani, *supra* note 29, at 198.
[126] DAELE, *supra* note 5, at 233.
[127] Fábrica de Vidrios Los Andes, C.A. & Owens-Illinois de Venezuela, C.A. v. Bolvarian Republic of Venezuela, ICSID Case No. ARB/12/21, Reasoned Decision on the Proposal to disqualify arbitrator, ¶33 (Mar 28, 2016); Raiffeisen Bank, *supra* note 126, at ¶79.
[128] Vivendi, *supra* note 70.
[129] DAELE, *supra* note 5, at 225.
[130] Nations Energy, Inc. & Ors. v. Republic of Panama, ICSID Case No. ARB/06/19, Decision on proposal to disqualify arbitrator, ¶56 (Sept 7, 2011).

inconsistency in the interpretation of "manifest lack".[131] This inconsistency was however considered "as tracing an evolution" by the Co-arbitrators in *Simens vs. Argentina.*[132] Here, "manifest lack" was considered in terms of "justifiable doubt test" under the IBA guidelines by Judge Brower and Professor Bello Janeiro. They observed that the standard for disqualification of an arbitrator is not far from the standard prevailing under customary international law.[133] The paradigm shift[134] in the standard for disqualification of an arbitrator, evident from the transition to "reasonable doubt test" laid down in *Vivindi*, from the strict standard test laid down in *Amco Asia*, would be hugely beneficial to ICSID arbitration in general.[135]

Considering the strict standard usually followed for determining the standard to disqualify an arbitrator under the ICSID, the decision of Dr. Kim in *Blue Bank* was a bolt from the blue in the ICSID challenge jurisprudence.[136] It is also pertinent to note that, before *Blue Bank*, only one successful challenge in *Pey Casado vs. Chile* is recorded in the history of ICSID[137], after the decision of Dr. Kim, till date there has been three successful challenges in the decisions of *Big Sky*[138], *Caratube* and *Burlington*. The decision in *Blue Bank* further lowers the threshold required to challenge an arbitrator under the ICSID. Such shift is also indicative of the fact

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131 DAELE, *supra* note 5, at 223.

132 Siemens AG v Argentine Republic, ICSID Case No ARB/02/08, Decision on Proposal to Disqualify an Arbitrator (11 February 2005)

133 Sam Luttrell, *Testing the ICSID Framework for Arbitrator Challenges*, 31 No. 3 ICSID REV. 597, 602 (2016).

134 Kim, *supra* note 20, at 636; Dimitropoulos, *supra* note 31, at 374-375.

135 Vasani, *supra* note 29, at 196.

136 Luttrell, *supra* note 143, at 605.

137 Víctor Pey Casado and President Allende Foundation v. Republic of Chile (ICSID Case No. ARB/98/2), Decision on proposal to disqualify arbitrator (Feb 21, 2006). ("Pey Casado").

138 Big Sky Energy Corporation v. Republic of Kazakhstan (ICSID Case No. ARB/17/22), Decision on proposal to disqualify arbitrator (May 3, 2018).

that ICSID is shifting towards the "reasonable doubt test" followed in most commercial arbitration rules.[139]

However, on an analysis of the observations of Dr. Kim in *Blue Bank*, it is evident that there was a clear affirmation of the observations laid down in the past decisions pertaining to arbitrator challenges. *Firstly,* prior to *Blue* bank, in Urbaser, it was also observed that Article 57 doesn't require actual proof of bias, rather "an appearance of such bias from a reasonable and informed third person's perspective is sufficient to justify the doubts" regarding an arbitrator's independence and impartiality.[140] *Secondly,* the objective standard of reasonable evaluation of the evidence by a third party was also observed in *Suez I*.[141] *Thirdly*, even though Dr. Kim went on to accept the disqualification proposal but reliance on the much criticized literal interpretation of the term "manifest" which had set a high burden of proof in disqualification proposals under ICSID has been maintained by him.[142] On the contrary, Dr. Kim's reliance on an appearance of bias as opposed to the actual proof of bias is an indication that ICSID is inclining towards the "reasonable doubt" standard.[143] Thus, the paradigm shift is evident from the eventual contrast in the standard of disqualification of an arbitrator under the ICSID Convention, i.e., from an initial strict standard (*Amco Asia)* and a much appreciated reasonable doubt standard (*Vivendi)* to an altogether new standard (*Blue bank)* which takes a middle ground by accepting the reasonable doubt standard while maintaining the high threshold for determining "manifest lack" of independence and impartiality of an arbitrator in ICSID.

139 Vasani, *supra* note 29, at196.
140 Urbaser, *supra* note 92, at 43.
141 *Suez I, supra* note 17, at 39.
142 Vasani, *supra* note 29, at 201, 202.
143 Vasani, *supra* note 29, at 200.

V. Conclusion

The lack of uniformity in norms pursuant to the conflict of interest in the matter related to investment arbitration has always been a matter of great concern in the international arbitration community. Thus, it is necessary to keep arbitrator free from smear and prevent manoeuvres that cause prejudice to the proceedings. This might look simple but indeed it is not.

The integrity of the arbitrator is not only of importance to the cross-border trade and investment but also to the community which is directly or indirectly related by the arbitral process. Thus, the adjudicators of arbitration challenges should adopt a procedure which is in consonance with the public policy. The Co-arbitrators or the Chairman while deciding on a challenge should also keep in mind that the convention is around half a century old and interpretation of the term "manifest" should be in consonance with the present scenario and circumstances.

The scope of ambiguity in the standard of "manifest lack" required to disqualify an arbitrator under the ICSID makes it difficult for the parties to get an arbitrator disqualified. Dr. Kim has observed in *Blue* Bank that majority of the challenge decisions have relied on the strict standard of "manifest lack". However, the strict standard has a major drawback since it sets a high burden of proof on the challenging party to show "manifest lack" of independence and impartiality. Owing to this drawback, the reasonable doubt standard was laid down. The reasonable doubt standard is more party friendly since it significantly lowers the burden of proof on the parties to show "manifest lack" and this standard is also in consonance with the standards used in most arbitral tribunals and institutional arbitrations. Nevertheless, despite the paradigm shift, in the standard of disqualification, i.e., recent reliance on the "reasonable standard" and "appearance of bias" tests, the absence of the doctrine of *stare decisis* makes it uncertain as to what standard of "manifest lack" will be followed.

Further, a major concern with the paradigm shift in the disqualification standard is that it makes the process susceptible to frivolous challenges against an arbitrator on blatant, false and whimsical ground just to forestall the arbitral process. To prevent such instances, ICSID should adopt new set of guidelines such as:

a. Define the term "manifest lack": Since, there exists no definition of "manifest lack" in the ICSID Convention, varied interpretations of the term have led to the present ambiguity in arbitrator challenges under ICSID. By defining the term, ICSID will be able to resolve this existing ambiguity.

b. Setting up of a set of rules which would constitute as a test for determining conflict of interest in an arbitrator: These rules *inter alia* should include limitations regarding degree of relationship between the arbitrator and the appointing party, interest of the arbitrator in the subject matter of the dispute, multiple appointments, relationship between the members of the arbitral tribunal. Pursuant to the introduction of such rules a clear line can be drawn as to when one should challenge an arbitrator.

However, ICSID can only be amended if "all contracting states have ratified, accepted or approved the amendment". For this reason, amending the ICSID Arbitration Rules to incorporate such guidelines is the most feasible way to deal with this problem.

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