Indian Arbitration Law Review is an annual peer reviewed journal devoted to arbitration. The Journal is published by the students of the National Law Institute University and is supported by L&L Partners (formerly Luthra & Luthra Law Offices).

The Journal invites submissions of scholarly, original and unpublished written works from persons across the legal profession – students, academicians and practitioners. Such manuscripts should be sent in MS Word (.docx format) to ialr@nliu.ac.in. All citations and text conform to The Bluebook: A Uniform System of Citation (20th Ed.)

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Recommended Form of Citation

1 Ind. Arb. L. Rev. (2019)
It gives me immense pleasure to present to our readers the Inaugural Volume of the *Indian Arbitration Law Review*. The publication of this inaugural volume, IALR, is the result of the root competition & courses attended and organized by the students on this evolving subject matter. It is a reflection of their understanding, research and critical thinking over a period of time. The Journal is a fruition of the efforts by a group of students with a view to encourage scholarship in the field of arbitration law under the guidance of an NLIU alumnus, Mr. Prashant Mishra, Partner, L&L Partners, New Delhi. It intends to serve as a medium for students, practitioners and academicians, to express their views and thoughts on contemporary legal issues surrounding arbitration law.

I would like to thank and congratulate the student body, whose efforts have brought this Journal into existence. I wish them all the very best for the future and hope that this Journal will be useful addition to the existing literature on the subject and also serve the needs of the practitioners in the field as well.

(V. Vijayakumar)
MESSAGE FROM THE PATRON

I am delighted to present the first Volume of the *Indian Arbitration Law Review*. There is a need in India of more research and scholarship in the field of arbitration. The Journal is a welcome first step.

On this occasion, I would like to thank the students who have worked tirelessly to bring this publication and to congratulate the authors whose exceptional work has been finally incorporated in this Volume. I look forward to all future editions of the Journal. I am hopeful that this Journal will be helpful to the arbitration fraternity.

Mr. Prashant Mishra,
Partner, L&L Partners, New Delhi
This Inaugural Edition has been published due to the time and effort of the following persons:

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Arbitration law has grown from being a niche field of law to one of the mainstays of legal systems over the course of the past two decades. Its growing popularity has unsurprisingly resulted in significant academic discourse, be it in respect of highly specific procedural matters, or more far-reaching conceptual questions such as that of arbitrability.

This inaugural Volume of the Indian Arbitration Law Review aims to explore contemporary issues in domestic and international arbitration and study the dynamic confluence of the academic and transactional world presented by this field of law. We hope that the eleven articles in this Volume will satiate the readers’ thirst for knowledge and encourage them to delve deeper into arbitration law.

This Volume begins with the short article ‘Waiving the right to set aside an award’, which explores the issue of waiver of parties’ right to set aside an award. It discusses various issues of enforceability that may arise in different jurisdictions and explores the potential pitfalls of accepting such waivers from a policy perspective. In jurisdictions where the applicable law prevents an absolute waiver, the article discusses the viability of a two-tier/appellate arbitration clause, as an alternative.

‘The debate around applicability: An analysis of the Arbitration and Conciliation (Amendment) Act, 2015’ looks at the confusion surrounding the applicability of the 2015 Amendment to pending arbitral proceedings and arbitration related court proceedings during the period between the Arbitration and Conciliation (Amendment) Ordinance, 2015 and the 2015 Amendment. The authors also analyse the judiciary’s attempts to clarify the issue in
B.C.C.I vs. Kochi Cricket Pvt. Ltd, as well as that of the government in the 2018 Bill.

Next, in ‘The interim award puzzle in the Indian arbitration regime: Future course’ the author explores the exercise of discretion of courts in granting interim awards. The observations of the Supreme Court in the Bhadra Products case are analysed, and potential future prospects and scope for amendment are discussed in detail.

‘Is arbitration necessarily a human activity? – Technological disruption & the role of robots in arbitration’ ambitiously suggests a role for robots powered by Artificial Intelligence in arbitrating disputes. The author presents a stance on the viability of using robots as arbitrators, addressing questions of efficiency, confidentiality, and fairness, balanced against the human and humane approach of arbitrators.

The long article, ‘The public policy doctrine in arbitration: A primer on its effect on challenges and enforcement of awards’ is a comprehensive take on one of the more widely discussed issues in Indian arbitration. Tracing the development of the public policy doctrine in Section 34 of the Arbitration and Conciliation Act, 1996 and the UNCITRAL Model Law, it provides an in-depth analysis of the major judicial pronouncements on the issue.

In ‘Conflicting jurisprudence on the arbitrability of IP disputes in India: Navigating the journey forward’ the author discusses the possibilities of arbitration as a viable option in intellectual property disputes and the debate round the arbitrability of such disputes.

‘Mandatory rules and their effect on enforceability of arbitral awards: The ‘second look’ solution’ addresses the effect that mandatory laws in arbitration have on party autonomy and enforceability. The article
explores the ‘second look’ doctrine, which is often ignored by scholars, and advocates a liberal recourse to it.

The penultimate article in this Volume, ‘Emergency arbitration in India: A bellwether for the grant of interim reliefs’, demonstrates the benefits of emergency arbitration through a deep dive into the practical considerations at play in the rules of various Indian and international arbitration institutions. The legal obstacles and their potential solutions are also discussed.

Three articles in this Volume deal with contemporary issues in investor-state arbitration, a growing field of interest globally, as it provides foreign investors a mechanism to hold states accountable for breaches in investment treaties, transforming investment treaties from political declarations into easily enforceable rules to stabilise investor-state relations.

The short article, ‘Corruption defence and the doctrine of estoppel in investor-state disputes,’ delves into the traces of corruption found in investor-state transactions and its subsequent legal ramifications in investment arbitration. It analyses the defence of corruption as dealt with by investment arbitral tribunals and the applicability of the doctrine of estoppel in such cases.

In ‘Changing contours of host state counterclaims in investor-state arbitration: With special reference to the Indian position,’ the authors provide a thorough analysis of the legal conundrum regarding host State counterclaims in investment arbitration. Several international investment agreements are analysed, and the Indian approach is also delineated. The article proposes a model clause to resolve the situation.

The final article, ‘Standards of disqualification of an arbitrator under the ICSID Convention,’ discusses the jurisprudence on the standard of
'manifest lack' for disqualifying arbitrators, analysing the three major thresholds – strict standard, reasonable standard and the appearance of bias standard. Noting the shift in a paradigm from a strict approach to a more diverse and flexible standard, it advocates the need for new unambiguous rules.

We hope that the articles in this Volume will create meaningful debate and discourse to add to the knowledge base of arbitration in India and globally and aid practitioners as well as policymakers.

Editorial Board,
Indian Arbitration Law Review
WAIVING THE RIGHT TO SET ASIDE AN AWARD

Preena Salgia & Samhith Malladi*

Abstract

The need for disputing parties to waive their right to set aside an arbitral award primarily arises out of the necessity to achieve commercial certainty, especially in cases where the judicial system at the seat of arbitration is inefficient and inconsistent. However, various jurisdictions have taken differing positions on whether to allow parties to contractually waive their right to challenge an award, based on a need to either protect rights of disputing parties by providing for judicial review or allow disputing parties the autonomy to make an informed choice to waive their right to set aside an award. This paper discusses the reasons and motivations of parties in choosing to exercise such waiver and the differing issues of enforceability that arise in various jurisdictions. Further, the paper analyses the pitfalls of agreeing to such waivers from a policy perspective. The paper also briefly discusses the viability of a two-tier / appellate arbitration clause as an alternative to a waiving the right to set aside an award.

I. Introduction

Are all rights available to a person under a constitution, statute, contract or common law, capable of being waived? The answer to this varies with jurisdiction and the type of right sought to be waived. For instance, with respect to constitutional rights (including fundamental rights), while some jurisdictions hold on to the inalienable nature of these rights, on account of such rights being conferred on the public at large and not merely on an

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Waiving the Right to set aside an Award

individual,\(^1\) other jurisdictions uphold the autonomy of citizens to waive their constitutional rights, provided the different standards set by courts for achieving a valid waiver are met.\(^2\) With respect to statutory rights, some jurisdictions, such as the United States of America, invalidate agreements which waive substantive statutory rights but allow waiver of procedural statutory rights.\(^3\) In other jurisdictions, waiver of statutory rights by the person for whose benefit they have been enacted is recognized as long as it does not involve public interest.\(^4\) In relation to rights created by a contract, the position is more or less consistent in as much as the waiver of contractual rights is recognized by most jurisdictions.

In the context of settlement of legal disputes by way of arbitration, parties often wish to avoid protracted litigation in civil courts and, therefore, attempt to agree in advance that the arbitral award rendered in an arbitration would be final, binding and not subject to further challenge by either party. In this regard, parties may attempt to waive their right to approach an appropriate civil court to set aside an arbitral award, in the hope that such waiver will provide for commercial certainty and stability in relation to the contractual relationship entered into between the parties. However, parties may not always be permitted to do so and, as a result, the practice of international and domestic arbitration may

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\(^1\) For example, in India, fundamental rights cannot be waived by a party by agreement (Basheshar Nath v. Commissioner, AIR 1959 SC 149).


require stakeholders to devise alternative methods by which to achieve such a goal of commercial certainty.

At the outset, in Part II, this paper attempts to understand and describe the motivations and objectives of parties when agreeing, in advance, to waive their statutory right to set aside an award. Thereafter, in Part III, this paper highlights the issues in relation to enforceability that such clauses face in various jurisdictions.

Part IV of this paper analyses, from a policy perspective, why such waiver clauses should not be made enforceable and why a certain degree of judicial review of an arbitral award is necessary. Part V of this paper takes India as an example of a jurisdiction that restricts such waiver clauses from being enforced and suggests an alternative in the form of appellate arbitration clauses, that seek to achieve, in effect, the same objective sought to be achieved by the parties’ waiver of the right to challenge an award. Finally, Part VI concludes the analysis of such waiver clauses and briefly proposes a roadmap to increase efficiency of dispute resolution processes in this regard.

II. Parties’ Objectives in Waiving the Right to Challenge an Award

The major reason certain parties wish to opt for waiver of the right to set aside an award is to establish commercial certainty of the dispute within a reasonable period of time, especially in cases where the judicial system at the seat of arbitration is inefficient and plagued with delays, and to avoid double review of the award. To explain, the grounds for challenging enforcement of an arbitral award under Article V of the New York Convention are similar to the grounds for setting aside an arbitral award under Article 34 of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”). This would mean that an award can in parallel be challenged on similar grounds in different proceedings before different jurisdictions, giving rise to
double review of the award and the possibility of conflicting decisions. This could lead to anomalies such as:

While the validity of an award is upheld in setting aside proceedings at the seat of arbitration, the award maybe rendered invalid on similar grounds in enforcement proceedings in another jurisdiction. [For instance, in *Dallah Real Estate and Tourism Holding Co vs. The Ministry of Religious Affairs, Government of Pakistan*, while setting aside proceedings were pending in France, the English courts in enforcement proceedings invalidated the award. Soon thereafter, the French courts held the award to be valid.]

Similarly, a situation may arise where while setting aside proceedings are pending at the seat of arbitration, the other jurisdiction declares the award enforceable, and later the award is set aside at the seat. It must be noted that this situation would only arise in case setting aside proceedings are pending in a jurisdiction. If an award is already set aside, under Article V(1)(e) of the New York Convention, it automatically becomes unenforceable.

Several institutional arbitration rules have incorporated rules as to waiver of recourse against arbitral awards, for instance Article 26.8 of LCIA Rules, Article 32.11 of SIAC Rules, Article 35(6) of ICC Rules, Article 34.2 of HKIAC Rules and Article 30.12 of MCIA Rules. While in these rules, waiver is a built-in clause, the UNCITRAL Arbitration Rules provide an option to the parties to include a “possible waiver statement” in their arbitration agreements.

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III. Permissibility Under Applicable Law – Waiver of the Right to Challenge an Award

However, the inevitable question that follows is whether such rules can be contractually enforced? All the default waiver rules mentioned above provide that the rules would apply insofar as a waiver can be validly made. Thus, if a jurisdiction does not permit waiver, these clauses will take no effect.

Certain jurisdictions recognize waiver by enacting statutes allowing parties to waive right to set aside awards.7 These states provide greater significance to party autonomy in arbitration proceedings.8 They believe that sophisticated companies, being fully aware of the consequences of such waiver, can freely decide on the appropriate dispute resolution process applicable to them. For instance, Switzerland9, Belgium10 and Sweden11 allow parties which are not domiciled in or which do not have place of business in their territory, to exclude the jurisdiction of their courts to

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7 Such as: Turkish International Arbitration Law, Article 15(A)(2); Peruvian Arbitration Law, Article 63(8); Tunisian Arbitration Code, Article 78(6); Bahrain Legislative Decree No. 30, Article 25; Article 25 French Code of Civil Procedure, Article 25 [GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 3367 (2 ed. Kluwer Law International 2014)].
8 Id.
annul awards made in their respective countries. In 2016, the European Court of Human Rights rendered a decision where validity of Article 192 of the Swiss Law on Private International Law, which allows waiver of recourse against an arbitral award, vis-à-vis Article 6(1) of the ECHR, was questioned.\textsuperscript{12} The Court confirmed that such a provision did not violate ECHR provided the parties were free to choose arbitration over litigation in courts and the waiver was unequivocal.\textsuperscript{13} Even English courts allow waiver to some extent under Section 69(1) of the English Arbitration Act, 1996 whereby parties can choose to “opt out” of the appeal provision against the award.\textsuperscript{14} Certain other jurisdictions where the domestic statutes are silent as to validity of contractual waiver of judicial review, have also upheld such contracts through their judiciary.\textsuperscript{15} Most of the jurisdictions permitting waiver require that such a condition in the contract should be expressly and clearly mentioned.\textsuperscript{16} However, several other jurisdictions do not recognize such waivers and some go as far as to statutorily bar such contractual exclusion by parties.\textsuperscript{17} The Model Law too is silent on the issue of waiver, which has led to varied interpretations across the world. The primary reason behind this school of thought appears to be the states’ belief that some judicial control over the arbitration

\textsuperscript{12} Supra note 9.
\textsuperscript{13} Id.
\textsuperscript{14} Matt Marshall, Section 69 almost 20 years on….., KLUWER ARBITRATION, (Oct. 15, 2018), http://arbitrationblog.kluwerarbitration.com/2015/06/24/section-69-almost-20-years-on/.
\textsuperscript{15} Noble China Inc. v. Lei, [1998] O.T.C. LEXIS 2175 (Ontario Superior Court); Judgment of 18\textsuperscript{th} January 2007, Case No.4674 (Tunisian Cour de cassation) [GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 3368 (2 ed. Kluwer Law International 2014)].
\textsuperscript{16} Id. at pp. 3371-3374a.
\textsuperscript{17} Italian Code of Civil Procedure, Article 829(1); Portuguese Law on Voluntary Arbitration, 2011, Article 46(5); Egyptian Arbitration Law, Article 54(1). [GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 3368 (2 ed. Kluwer Law International 2014)].
process is indispensable in the interest of the parties themselves.\textsuperscript{18} In the event of arbitrator bias, incorrect application of governing law, irregularity in procedure, etc., such jurisdictions believe that the wronged party should have recourse to a higher neutral forum. Further, some states believe that the jurisdiction to set aside an award rests exclusively with the seat of arbitration, and by depriving the only competent court from exercising jurisdiction, the contract is contrary to public policy. This view could be motivated by the substantive laws of several states which invalidate any contract which places a blanket restriction on parties from approaching courts in that jurisdiction.\textsuperscript{19} For example, in India, Section 28 of the Indian Contract Act, 1872, renders void any agreement by which a party is restricted \textit{absolutely} from enforcing his rights under or in respect of any contract, by way of usual legal proceedings in courts or tribunals.

It can also be argued that institutional arbitration rules are merely required to govern the procedure of arbitration and not substantial issues related to the dispute. Thus, by including default provisions which abrogate statutory rights, it may be argued that the institutional arbitration rules go beyond their mandate. Further, in cases of standard form contracts ("SFC") which contain references to institutional arbitration rules, the courts of certain jurisdictions may interpret the condition against the drafter of the SFC and hence against waiver,\textsuperscript{20} or in the absence of a higher notice to the other party of such a term in the SFC (which leads to abrogation of a statutory right)\textsuperscript{21}, the courts may invalidate the waiver.

\textsuperscript{18} \textit{Id.} at pp. 3370-3371.
\textsuperscript{19} Such as: Indian Contract Act 1872 § 28; Malaysian Contracts Act 1950 § 29.
\textsuperscript{20} See the rule of \textit{contra proferentem}.
\textsuperscript{21} \textsc{Chitty on Contracts} §§12.0142-12.015 (7 ed.).
IV. Waiver of the Right to Challenge an Award – A Policy Perspective

In light of the above, the question arises as to whether, from a policy perspective, the applicable law should allow party autonomy to prevail and permit parties to waive their right to set aside an arbitral award. This paper would argue that, while an agreement to waive the right to challenge an award, ensconced in the arbitration agreement between the parties, has its merits in terms of reducing the court litigation that typically follows an award, from a policy perspective, the pitfalls appear to be greater.

While it is arguable that when determining their policy approach to allowing waiver of the right of disputing parties to set aside an award, every jurisdiction should be motivated by the specific contexts in which arbitrations are conducted in that jurisdiction, a premium on the correctness of arbitration awards should be placed and prioritized over the overall timeline within which an arbitration is completed. To this end, an award should be subject to a limited degree of judicial review to check lapses in procedure, illegality, arbitrator bias, incorrect application of the applicable law etc. This becomes especially important when the arbitrators are not trained in law, and more so in the law applicable to the dispute. Further, if the losing party has to question the validity of an award, it should not be compelled to wait until the winning party approaches courts in enforcement proceedings to raise its challenge to the award, especially in cases where the award may be enforced in more than one jurisdiction. In such cases, the losing party will have to challenge the validity of the award afresh in all the said jurisdictions, putting the losing party in greater distress. Further, every jurisdiction before which the award will sought to be enforced will apply its own standards for refusing to

enforce an award and inconsistent findings will be rendered across jurisdictions, especially when not all the jurisdictions involved are parties to the New York Convention. Thus, the same parties may end up with conflicting verdicts at the time of enforcement.

Such multiplicity of challenges in enforcement proceedings would be prevented, if a party were allowed to mount a challenge to an award at courts located in the seat of the arbitration and have the matter adjudicated at the seat itself. If the award is set aside at the seat of arbitration, every subsequent proceeding would be required to refuse enforcement, as the award then would become a nullity. As far as the parties’ apprehension of dilatory tactics is concerned, the parties may choose a seat where the process of setting aside is efficient and the grounds available for review are minimum.

V. Appellate Arbitration Clauses – An Alternative Mechanism for Early Settlement of Disputes

In jurisdictions such as India, where applicable law prevents parties from agreeing to a blanket restriction on initiating court proceedings against an arbitral award, a hybrid solution in the form of an appellate arbitration clause may be considered by disputing parties hoping to avoid protracted litigation in Indian courts. An appellate arbitration clause is, in essence, an arbitration clause that specifies a two-tier structure of resolution of disputes by way of arbitration, wherein the parties agree to refer to an appellate arbitral tribunal any outstanding issues or disputes in relation to the award rendered by the first arbitral tribunal.

While Indian law prevents parties from agreeing to an absolute restriction on the right to institute legal proceedings, such as by way of a binding waiver of the right to challenge an arbitral award,

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the Supreme Court of India has recognized the supremacy of the principle of party autonomy in *Centrotrade Minerals and Metal Inc. vs. Hindustan Copper Limited* and held that appellate arbitration clauses are permissible under Indian law (“Centrotrade”). In Centrotrade, the Supreme Court has expressly upheld the validity of two-tier/appellate arbitration clauses and, in effect, has blessed a structure wherein an unsuccessful party is prevented from challenging the award of the first tribunal in Indian courts and is required to refer disputes to an appellate arbitral tribunal. Thereafter, if a party is still dissatisfied with the award of the appellate arbitral tribunal, such party is free to challenge the second award in an appropriate civil court.

Appellate arbitration clauses are a viable alternative to clauses that attempt to waive the parties’ rights to challenge an award, as such appellate arbitration clauses have the impact of aligning the respective incentives of the parties to a dispute by keeping the disputes out of courts while having all possible disputes threshed out before more efficient arbitral tribunals. Further, as two-tier arbitration clauses will eventually be subject to limited judicial review by a court, it will not be hit by the bars under Section 28 of Indian Contract Act, 1872. Finally, it may also be argued that if a civil court is eventually faced with reviewing the arbitral award resulting from a two-tier arbitration mechanism, the fact that the said disputes between the parties have been scrutinized by two successive arbitral tribunals, may assuage any doubts the court may have in relation to any alleged infirmities in the second award.

Therefore, while two-tier arbitration mechanisms are yet to become commonplace in commercial contracts in India, the push towards speedier resolution of disputes by of arbitration may make parties see the aforementioned benefits of such a clause.

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VI. Conclusion

The law and practice of commercial arbitration, both international and domestic, is constantly evolving and newer and more nuanced structures of alternative dispute resolution are constantly being put to test at the altar of judicial review in various jurisdictions. As highlighted above, while most arbitral institutions and certain jurisdictions are accepting of the validity of an agreement to waive the right to challenge an arbitral award, such clauses may face enforceability issues in other jurisdictions such as India, and rightly so. While arbitration, as an alternative dispute resolution mechanism, must be the first port of call when disputes arise between parties to commercial contracts, there is still a case for limited judicial review by courts when arbitration fails to successfully resolve such disputes.

However, this does not mean parties are dispossessed of the contractual means to structure their dispute resolution mechanisms so as to reduce the possibility of arbitral awards eventually being challenged and set aside. In this regard, a two-tier arbitration mechanism is a structure that has the potential to alleviate parties’ concerns in relation to any infirmities that may afflict an award rendered in the first instance, while retaining the twin benefits of speedy resolution of disputes and cost efficiency. Only time will tell whether parties to international and domestic commercial contracts explore such nuanced means of resolving their disputes.
CORRUPTION DEFENCE AND THE DOCTRINE OF ESTOPPEL IN INVESTOR-STATE DISPUTES

Abhishar Vidhyarthi & Sikander Hyaat Khan*

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
commerce among nations.\textsuperscript{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.\textsuperscript{2} Bilateral Investment Treaties (BITs) between states have served the purpose of guiding investments on foreign soil.\textsuperscript{3} In fact, there has been a substantial spike in the number of investment treaties concluded in the last two decades.\textsuperscript{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.\textsuperscript{5}

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

\begin{itemize}
\item \textsuperscript{1} John R. Oneal et al., \textit{The Liberal Peace: Interdependence, Democracy, and International Conflict}, 1950-85, 33 J. OF PEACE RES. 11–28 (1996).
\item \textsuperscript{3} Helena Sprenger, \textit{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.
\item \textsuperscript{6} ZACHARY DOUGLAS, \textit{THE INTERNATIONAL LAW OF INVESTMENT CLAIMS} (2012).
\item \textsuperscript{7} Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction (April 29, 2004) ¶74.
\end{itemize}
In the nature of transactions between states and investors, there are more often than not traces of bribery or corruption.\textsuperscript{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.\textsuperscript{9} States often escape their liabilities under the BIT by claiming illegality of investment.\textsuperscript{10} The effect of such claim, if proved, renders ICSID tribunals to decline jurisdiction over the dispute.\textsuperscript{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.\textsuperscript{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.\textsuperscript{13} In certain cases, corruption may be


\textsuperscript{9} Ferry Ardiyanto, \textit{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.


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


\textsuperscript{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.\textsuperscript{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.

\textbf{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{17}

\textsuperscript{16} ICC Case No. 1110 of 1963.  
\textsuperscript{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. 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”. 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. The investor is simply unable to assert a claim in investment treaty arbitration by reason of his/her own misconduct. 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. 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. Not punishing the state, therefore, itself runs against the principle of 'nemo auditur

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).
22 World Duty Free Comp. v Republic of Kenya, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006), ¶162 & 179.
23 Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013) ¶389
24 Mark W Friedman, Corruption in International Arbitration: Challenges and Consequences, GLO. ARB. REV. (2017)
turpitudinem allegans\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{28}

\textsuperscript{24} Andrew Newcombe, \textit{The Question of Admissibility of Claims in Investment Treaty Arbitration}, KLUWER ARBITRATION BLOG (2010).


\textsuperscript{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.

\textsuperscript{27} Fraport AG Frankfurt Airport Services Worldwide v Philippines, ICSID Case No ARB/03/25.

\textsuperscript{28} Brody Greenwald, \textit{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. 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. 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. 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. 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. Therefore, there has been an ambivalent
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.\textsuperscript{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.\textsuperscript{35} The genesis of the doctrine lies in the established principle ‘\textit{nullus commodum capere de sua injuria propria}’ i.e. no one can be allowed to take advantage of his own wrong.\textsuperscript{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.\textsuperscript{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,

unconditional and authorized and is also relied on to the other party’s detriment.\textsuperscript{38}

Bribes are almost always concealed, and corruption is almost universally prohibited.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{41} In most cases, the officials indulge in corruption act outside the scope of their employment in pursuance of their personal interests.\textsuperscript{42} The 'scope of

\textsuperscript{38} Derek Bowett, \textit{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.


\textsuperscript{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.


employment' of the State officials cannot be extended to actions undertaken privately and for individual gains.\textsuperscript{43}

The idea behind holding the claimant liable is the principle of public policy, namely '\textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\section*{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.\textsuperscript{47} It is essential for tribunals to balance the risk between both the parties and accord equal treatment to them.\textsuperscript{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


\textsuperscript{44} Public Policy - General Principles: As to the first, in \textit{1 Chitty on Contracts} at \$17-007 (7th ed.).

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

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

\textsuperscript{47} Aloysis P. Llamzon, \textit{Corruption in International Investment Arbitration} (2014).

to its advantage.\textsuperscript{49} While investor must not be absolved of their wrongdoings, they should not be the only party bearing the brunt of the corrupt transaction.\textsuperscript{50} Despite not changing the practice, the \textit{Metal-Tech} tribunal did acknowledge that blanket immunity for the defendant party can lead to an unsatisfactory outcome in cases of corruption.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{50} Jason Summerfield, \textit{The Corruption Defence in Investment Disputes: A Discussion of the Imbalance Between International Discourse and Arbitral Decisions}, 7 TDM 1 (2009).
\item \textsuperscript{51} Metal-Tech Ltd v The Republic of Uzbekistan (ICSID Case No. ARB/10/3)
\end{itemize}
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.\textsuperscript{54} It is further against the principles of international law to allow the State to use its own wrongdoings to its advantage.\textsuperscript{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.\textsuperscript{56}

\textbf{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


\textsuperscript{56} World Duty Free Comp. v Republic of Kenya, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006), ¶162 & 179.

\textsuperscript{56} Metal-Tech v Uzbekistan: \textit{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.
THE DEBATE AROUND APPLICABILITY: AN ANALYSIS OF THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015

Vartika Tiwari & Pragya Dubey*

Abstract

On 23 October, 2015, with the intention of making India more arbitration-friendly, the President of India promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2015 (“Ordinance”). This Ordinance was finally enacted as The Arbitration and Conciliation (Amendment) Act, 2015 (“2015 Amendment”) by the Parliament on 31 December 2015. The period between the promulgation of the Ordinance and the enactment of the 2015 Amendment was marked with uncertainty as to the applicability of the amendments to pending arbitral proceedings and arbitration related court proceedings. This continuing confusion necessitated the incorporation of Section 26 in the 2015 Amendment to clarify the applicability of the 2015 Amendment. However, even Section 26 could not yield the desired results and varied interpretations provided by High Courts painted an inconsistent picture. Finally, the Hon’ble Supreme Court of India had to intervene and put the issue to rest in the matter of BCCI vs. Kochi Cricket Pvt. Limited (“BCCI Judgement”). Meanwhile, the Government of India via a press release dated 7 March, 2018 expressed its willingness to enact a certain Section 87 to the Arbitration and Conciliation Act, 1996 (“the Principal Act”) in order to clarify the issue, which was eventually incorporated in the Arbitration and Conciliation (Amendment) Bill, 2018 (“2018 Bill”). In this paper, the author seeks to discuss and analyse the issue of applicability of the 2015 Amendment. The paper has been divided into five parts - the first part provides a brief introduction to the debate; in the second part, the author discusses the conflicting interpretations of Section 26; in the third part, the author discusses the BCCI Judgement; the

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fourth part discusses the 2018 Bill and its implications and finally, in the fifth part, the author provides an in-depth analysis of the applicability provision.

I. Introduction to the debate

Disputes are inevitable. Right from evolution of human civilization, disputes and conflicts have been a part of human life. While initially disputes were resolved by war, with the passage of time, we developed sophisticated mechanisms of dispute resolution in the form of litigation, mediation, arbitration, negotiation, etc. Arbitration, which is a form of Alternative Dispute Resolution (“ADR”) is one of the oldest mechanisms of resolving conflicts.\(^1\) The Black’s Law Dictionary defines arbitration as "a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.\(^2\)

India introduced the Arbitration and Conciliation Act, 1940, in order to consolidate and amend the law relating to arbitration in India.\(^3\) This was later replaced by the Arbitration and Conciliation Act, 1996.\(^4\) The Principal Act was drafted largely along the lines of the UNCITRAL Model laws.\(^5\) In 2014, after less than a decade of the passing of the Principal Act, the Law Commission of India ("Commission") released its 246\(^{th}\) report,\(^6\) indicating the need to make the Principal Act more flexible and to further reduce the interference of judiciary in arbitral proceedings. The Commission

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\(^1\) Dhir and Dhir, *Evolution of Arbitration in India*, MONDAQ (Date Accessed Feb. 02, 2019, 8:41 PM), http://www.mondaq.com/india/x/537190/Arbitration+Dispute+Resolution/Evolution+Of+Arbitration+In+India.

\(^2\) BLACK’S LAW DICTIONARY 119 (9th ed., 2009).

\(^3\) The Arbitration and Conciliation Act 1940.

\(^4\) Supra note 1.


\(^6\) Id.
proposed amendments to the Principal Act which would facilitate and encourage ADR methods. The said amendments also sought to make arbitration in India more user-friendly, cost effective and to ensure expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.7

Amongst other things, the Commission, through its report, recommended a new Section 85A8 in the Principal Act.9 As per the proposed section, the amended act was supposed to apply prospectively, except in certain circumstances, which had been clearly mentioned in the proposed act itself.10 However, this recommendation by the Commission was not incorporated in the Ordinance and this led to a confusion with regard to applicability of the Ordinance. There was immense conundrum and different views were given by High Courts across the country with respect to applicability, due to which, a clarification was sought by the Madras High Court from the Central Government on the applicability of the Ordinance.11 Consequently, Section 2612 ("Section") was incorporated in the 2015 Amendment.

A cursory reading of the Section reveals that it has been divided into two parts, which differ significantly from each other even though they are parts of the same section. This difference emerges from the use of the phrase “arbitral proceedings” in the first part and the phrase “in relation to arbitral proceeding” in the second part.

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7 Board of Control For Cricket v. Kochi Cricket Pvt Ltd And Etc, AIR 2018 SC 1549, ¶3.
8 Supra note 5.
10 Supra note 5).
The distinction between the meaning of these two phrases was made evident in the case of *Thyssen Stahlunion GmBH vs. Steel Authority of India* ("Thyssen Case"). In this case, the Apex Court was confronted with the interpretation of the repeal clause in Section 85(2) of the Principal Act. The Court gave a liberal interpretation to the phrase and defined it to include not just arbitral proceedings but also court proceedings in relation to such arbitral proceedings. In addition to this, the Court said that the 1940 Act shall continue to apply in relation to arbitral proceedings that had commenced before the Principal Act was introduced. It was believed that an order to the contrary would not be in the interest of the parties who had no knowledge of the Act being repealed when they had commenced the proceedings.

II. **Stance of the High Courts**

The intention behind introducing Section 26 in the 2015 Amendment was to resolve the incertitude that had developed around the question of the applicability of the Ordinance. Instead, its inclusion fanned the confusion even further since there were disagreements among various High Courts on the question of its interpretation.

In the case of *Rendezvous Sports World vs. Board of Control for Cricket in India*, the Bombay High Court was confronted with a situation where proceedings under Section 34 of the Principal Act were
pending in the Court as on the date of the Ordinance. The Court followed the Thyssen Case and interpreted Section 26 literally by creating a distinction between the phrases “arbitral proceeding” and “in relation to arbitral proceedings.” On the basis of this distinction, the Court held that the 2015 Amendment shall apply prospectively to “arbitral proceedings” and retrospectively to proceedings “in relation to arbitral proceedings.” This would mean that any proceeding in relation to arbitral proceeding shall be governed by the 2015 Amendment Act, even if it was commenced before the Ordinance.

A different interpretation of the Section was given by the Delhi High Court in the case of *Ardee Infrastructure Pvt. Ltd. vs. Anuradha Bhatia (“Ardee case”).* Following the approach of the Apex Court in the Thyssen Case, the Court included court proceedings within the meaning of the phrase “in relation to arbitral proceeding.” A narrow interpretation of the phrase would mean that the Section is silent in respect of court proceedings under Section 34 (or any other section of the Principal Act) which were pending as on the date of the promulgation of the Ordinance. However, on the question of applicability, the Court held that the 2015 Amendment was applicable prospectively to both, arbitral proceedings and proceedings in relation to such arbitral proceedings, since a Court proceeding under Section 34 and Section 36 affects the accrued rights of the parties.

The decision of the Delhi High Court in the Ardee Case was reiterated by the Calcutta High Court in the case of *Braithwaite Burn & Jessop Co. Ltd. vs. Indo Wagon Engineering Ltd.* The Court

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20 Supra note 19, ¶23.
21 Supra note 19, ¶64-65.
23 Supra note 22, ¶34.
24 Supra note 22, ¶29.
25 Supra note 22, ¶34.
26 Braithwaite burn & Jessop Co. Ltd. v. Indo Wagon Engineering Ltd., AIR 2017 (NOC 923) 314, ¶130.
held that retrospective application of the 2015 Amendment to court proceedings in relation to arbitral proceedings which commenced prior to the Ordinance shall affect the vested rights of the parties. Therefore, it was held that unless agreed otherwise, the 2015 Amendment shall have prospective application with respect to court proceedings related to arbitral proceedings which commenced prior to the Ordinance.\(^{27}\)

**III. The Apex Court’s view**

After three years of confusion, the Hon’ble Supreme Court of India, in the BCCI Judgement\(^{28}\), interpreted Section 26 of the 2015 Amendment to finally put the issue to rest. The Court analysed Section 26 by segregating it into two distinct parts and observed that Section 26 of the 2015 Amendment had \textit{“departed somewhat”} from the proposed Section 85A of the Commission’s report, despite retaining the bifurcation into \textit{‘arbitration’} and \textit{‘court proceedings’}\(^{29}\). The Court went on to discuss the meaning of the terms \textit{“arbitral proceedings”} and \textit{“in relation to arbitral proceedings”} and concluded that while the former refers to proceedings before the arbitral tribunal, the latter refers to court proceedings in relation to arbitral proceedings.\(^{30}\) Thus, while the first part is controlled by the application of Section 21\(^{31}\) of the Principal Act, the second part is not.\(^{32}\)

On the issue of applicability, the Court held that the 2015 Amendment is prospective in nature and will apply to the arbitral proceedings and court proceedings that have commenced on or after the 2015 Amendment came into force.\(^{33}\) However, Section 36 of the Principal Act as substituted by the 2015 Amendment

\(^{27}\) \textit{Supra} note 26, ¶141.
\(^{28}\) \textit{Supra} note 7, ¶56.
\(^{29}\) \textit{Supra} note 7, ¶21.
\(^{30}\) \textit{Supra} note 7, ¶25.
\(^{32}\) \textit{Supra} note 7, ¶25.
\(^{33}\) \textit{Id.}
would be applicable even to the Section 34 applications that were pending on the date of commencement of the 2015 Amendment Act.\textsuperscript{34} That said, the Court also recognized the right of the parties to agree otherwise.\textsuperscript{35}

The Court further went on to discuss the proposed Section 87\textsuperscript{36} of the 2018 Bill. The Cabinet seeks to incorporate the said Section in the 2018 Bill to clarify that unless it has been otherwise agreed by parties, the 2015 Amendments would not apply to (a) Arbitral proceedings that have commenced before the 2015 Amendment, (b) court proceedings arising out of or in relation to such arbitral proceedings and shall apply only to Arbitral proceedings commenced on or after the commencement of the Amendment Act, 2015 and to Court proceedings arising out of or in relation to such Arbitral proceedings.\textsuperscript{37} Discussing the same, the Court opined that the proposed Section 87 is likely to put all the significant amendments made by the 2015 Amendment on a “back-burner.”\textsuperscript{38} This was especially true for the amendments made to Section 34\textsuperscript{39} since now, the 2015 Amendment will no longer be applicable to the Section 34 petitions filed after 23 October, 2015 but it will only be applicable to cases where the Arbitration proceedings have themselves commenced after 23 October, 2015.\textsuperscript{40} According to the Court, this would mean that the old law would continue to apply to all matters which are in the pipeline.

\begin{footnotes}
\footnote{Supra note 7, ¶39.}
\footnote{Supra note 7, ¶24.}
\footnote{The Arbitration and Conciliation (Amendment) Bill 2018 § 87.}
\footnote{Supra note 7, ¶57.}
\footnote{The Arbitration and Conciliation Act 1996 § 34.}
\footnote{Supra note 7, ¶57}
\end{footnotes}
and this would result in delay of disposal of arbitral proceedings by increasing the interference of Courts.\textsuperscript{41}

It cannot be denied that one of the most debated issues of recent times has been that of the applicability of the 2015 Amendment. While the Supreme Court tried its best to put the issue to rest, the judgment itself raised a lot of questions, like, assuming a petition were filed to challenge an award prior to the 2015 amendments but was pending on the date of the amendments, by virtue of the judgment, an automatic stay that was earlier effective would no longer apply.\textsuperscript{42} It would then be upon the award-creditor to apply for enforcement and the award-debtor would have to file a separate application for a stay (in which case a deposit of the award amount would be probable), thus taking away a benefit that a party had prior to the 2015 Amendment.\textsuperscript{43} This would thus create an environment of confusion which would not be conducive for Arbitration in India.

IV. The 2018 Amendment

On 30 July 2017, a high level committee headed by Justice B.N. Srikrishna\textsuperscript{44} submitted its report on the Principal Act and suggested the introduction of further changes to the same, in order to promote institutional arbitration in India.\textsuperscript{45} As a result of these recommendations, on 7 March, 2018, the cabinet gave approval to certain amendments that were to be introduced in the Principal Act\textsuperscript{46}, with the intention of streamlining the arbitration process in India.

\textsuperscript{41} Id.
\textsuperscript{42} Supra note 7.
\textsuperscript{43} Id.
\textsuperscript{44} Justice B.N. Srikrishna Committee, \textit{High Level Committee To Review The Institutionalisation Of Arbitration Mechanism In India}, (Jul 30, 2018).
\textsuperscript{45} Id.
Among other significant changes, the 2018 Bill\textsuperscript{47} includes the introduction of Section 87\textsuperscript{48} which is intended to settle the debate around applicability once and for all. As per the provisions of this section, the 2015 Amendment shall not apply to arbitral proceedings or court proceedings in relation to such arbitral proceedings which had commenced before 23 October, 2015, unless the parties have agreed otherwise.\textsuperscript{49} Meaning thereby that it shall only apply to arbitral proceedings and arbitration related court proceedings that have commenced after the enactment 2015 Amendment.\textsuperscript{50}

It is worth noting here that Section 87 was incorporated in the 2018 Bill despite a word of caution by the Hon’ble Supreme Court of India in the BCCI Judgement.\textsuperscript{51} Thus, it becomes rather imperative to bring about the difference between the position adopted by the Hon’ble Supreme Court in the BCCI Judgement and the position adopted by the legislature in Section 87 of the 2018 Bill. While the underlying principle in both the cases remains prospective application, the Supreme Court has carved out an exception for Section 34 applications that were pending before the Courts when the 2015 Amendment came into force.\textsuperscript{52} As per the Hon’ble Supreme Court, the 2015 Amendment would apply to court proceedings in relation to arbitral proceedings that have commenced after 23 October 2015.\textsuperscript{53} However, as per the 2018 Bill, the Principal Act would apply, unless otherwise agreed by the parties.\textsuperscript{54}

\textsuperscript{47} Arbitration and Conciliation (Amendment) Bill 2018, Bill No. 100 of 2018.
\textsuperscript{48} Supra note 36.
\textsuperscript{49} Id.
\textsuperscript{50} Supra note 7, ¶56.
\textsuperscript{51} Supra note 7, ¶57.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
V. Analysis and Suggestions

It is the Indian Government’s endeavour to bring the country at par with international standards for arbitration and to ensure speedy resolution of commercial disputes in order to make India an arbitration hub and a centre of robust ADR mechanism.\(^5\) In the light of the same, the Government of India seeks to bring about certain amendments in the Principal Act via the 2018 Bill. Amongst various other changes proposed by the 2018 Bill, the incorporation of Section 87 is debatably one of the most important ones. This is so because clarity in applicability of any act or amendment is foremost in order to achieve the objectives of the said enactment. It is clear from the discussion above that Section 87 of the 2018 Bill has been introduced with the intention of putting an end to the debate around the applicability of the 2015 Amendment, as under Section 26 of the said Amendment.

The major implications of Section 26 of the 2015 Amendment may be understood with respect to two sections of the Principal Act - that is, Section 34 and Section 36.\(^6\) These provide for a recourse to Courts in the event of dissatisfaction with the award. The 2015 Amendment brought about significant changes in both these sections by limiting the gamut of public policy under Section 34 and by removing the provision for an automatic stay under Section 36. Since the change is considerable, the applicability or non-applicability of the amended provisions is likely to affect the rights of the parties to a great extent.

After years of debate on applicability, the Hon’ble Supreme Court of India tried to put the issue to rest in the BCCI Judgement. The Court held that the 2015 Amendment will apply to the arbitral


\(^6\) The Arbitration and Conciliation (Amendment) Act 1996 § 36.
proceedings and court proceedings that have commenced after the 2015 Amendment came into force. The Court went on to say that the 2015 Amendment would also apply to the applications pending under Section 34 of the Principal Act. In the author’s opinion, the problem with such application is that it will not only create confusion and inconvenience to the parties, but also affect their rights substantially. For instance, if the award has been passed before 23 October 2015 but the application under Section 34 is pending before the Court on the day of enforcement, and the aggrieved party has challenged the award on the basis of the rules that have been applied to substance of dispute under Section 28 of the Principal Act, claiming that the terms of the contract have not been relied on by the tribunal. While under the Principal Act, this claim of the aggrieved party could have been maintained, the 2015 Amendment has brought about a change in the aforementioned provision and relaxed the said requirement. It is worth noting here that the claim, when the application was filed, was not bad in law. However, the claim would no longer stand if the new law is applied. As a result of this, it cannot be denied that the rights of the aggrieved party would be substantially affected. It will not be equitable for the Court’s to apply a certain law to the dispute that the parties did not know of at the time when the dispute arose.

Thus, in the author’s opinion, the 2015 Amendments should not apply to arbitral proceedings that have commenced before the 2015 Amendment and to court proceedings arising out of or in relation to such arbitral proceedings. At the same time, however, the discretion of parties should be maintained. Such an application would not cause unnecessary confusion and inconvenience and would thereby facilitate the Government’s objective of making India a hub for arbitration.
Finally, it becomes rather imperative for us to avoid such confusion in the future and in order to do the same, it is suggested that the provisions, especially the ones dealing with applicability, be drafted in a simple language and in such a way that it restricts the scope for conflicting interpretations. It is also suggested that the legislature redrafts the proposed Section 87 to provide clarification on whether arbitration agreements between the parties where it has been agreed to by the parties that they will be bound by the Principal Act “and any statutory modification thereof” would come under the ambit of “unless agreed to by the parties” or not.
THE INTERIM AWARD PUZZLE IN THE INDIAN ARBITRATION REGIME: FUTURE COURSE

Daksha Khanna*

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) 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”. 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, and interim in the sense that it is made at the interim stage 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. 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. 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, highlighting the need to exact its principles in the domestic

1 Arbitration & Conciliation Act 1996 § 2(1)(c).
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. 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 and Section 37 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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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.
The Interim Award Puzzle in the Indian Arbitration

arising out of, or relating to, the agreement.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{14}

\textit{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 \textit{NTPC vs. Siemens},\textsuperscript{15} the Supreme Court has recently ruled in \textit{M/s Indian Farmers Fertilizer Co. vs. M/s Bhadra Products},\textsuperscript{16} that an award on the issue of limitation is to be treated as an interim award and can be challenged under Section 34\textsuperscript{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

\textsuperscript{12} \textit{Id}.
\textsuperscript{14} Deepak Mitra v. D.J. Alld., AIR 2000 All 9.
\textsuperscript{15} National thermal Power Corporation Ltd. v. Siemens Atkiengesellschaft, (2007) 1 Arb LR 377.
\textsuperscript{16} M/s Indian Farmers Fertilizer Co. v. M/s Bhadra Products, 2018 SCC Online SC 38, ¶16, 29.
\textsuperscript{17} Arbitration & Conciliation Act 1996 § 34.
interim award binding on the parties\textsuperscript{18}. Further, the issue of limitation was distinguished from a \textit{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 \textit{Noida Toll Bridge Co. Ltd. vs. Mitsui Marubeni Corporation}\textsuperscript{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.\textsuperscript{20}

\textit{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.\textsuperscript{21} An interim award passed ostensibly under Section 17,

\begin{flushleft}
\textsuperscript{20} Id.
\end{flushleft}
but with no intention of providing protection of the subject matter, cannot be taken to be as an order of interim relief\textsuperscript{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).\textsuperscript{23} A mandatory award directing payment of certain sums by one party to the other based on a prima facie determination on the \textit{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).\textsuperscript{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.\textsuperscript{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 \textit{Bhadra Products}\textsuperscript{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.

\begin{itemize}
\item \textsuperscript{22} I A. WADHWA \& A. KRISHNAN, JUSTICE RS BACHAWAT’S LAW OF ARBITRATION 1686 (6 ed. Lexis Nexis 2018).
\item \textsuperscript{23} Asian Electronics Ltd. v. M.P. State Electricity Board, (2007) 3 MPLJ 203 (DB).
\item \textsuperscript{24} \textit{Supra} note 23.
\item \textsuperscript{25} Nand Singh v. Hazoor Singh, (1996) Supp Arb LR 453 (Del).
\item \textsuperscript{26} M/s Indian Farmers Fertilizer Co. v. M/s Bhadra Products, 2018 SCC Online SC 38, ¶20-28.
\end{itemize}
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. 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. 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. 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.

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

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/.
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. 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*, 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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32 V. Raghavan v. Dr. R. Venkitapathy, 2015 SCC OnLine Mad 8514.
Products case\textsuperscript{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.\textsuperscript{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

\textsuperscript{33} M/s Indian Farmers Fertilizer Co. v. M/s Bhadra Products, 2018 SCC Online SC 38, ¶29.

\textsuperscript{34} Supra note 6.
admissions under Order XII Rule 6 of the Code. In the Numero Uno 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. 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.

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 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
followed by the arbitral tribunal in conducting proceedings, the parties may choose to rule out an interim award by agreement.\textsuperscript{40}

Notwithstanding the above proposition, an interim award cannot go against the contract provisions.\textsuperscript{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.\textsuperscript{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 \textit{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

\begin{footnotes}
\item[40] I A. WADHWA & A. KRISHNAN, JUSTICE RS BACHAWAT’S LAW OF ARBITRATION 1682 (6 ed. Lexis Nexis 2018).
\item[41] Id.
\item[42] V.N. Krishna Rao v. Turnkey Constructions Pvt. Ltd., AIR 2004 NOC 350 (Kant).
\end{footnotes}
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.
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, 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. 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. 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. 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. 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.

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 hearings7 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-awareness9 for legal considerations of equity and due process.10

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).
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. Part II will weigh the benefits of and challenges to such a proposition concerning efficiency, confidentiality, and control of proceedings. 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.

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.

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. However, the relationship between ODR and technology is much deep-rooted. Conventionally used to resolve online trade disputes between traders such as eBay, 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).
11 Supra note 6, at 2.
12 Supra note 10, at 39.
13 Supra note 9, at 173.
15 Supra note 10, at 9.
between information technology and arbitration\footnote{Supra note 7.} 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.\footnote{Id. at 7.} 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 arbitrator\footnote{Supra note 8.} 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 \textit{Loomis} case\footnote{State v. Loomis, 881 N.W.2d 749, 66, 68 (Wis. 2016).}, 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.\footnote{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 \textit{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 \textit{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


\(^{22}\) \textit{Supra} note 11.

\(^{23}\) \textit{Supra} note 20.

\(^{24}\) \textit{Supra} note 11.

\(^{25}\) Gabrielle Kaufmann-Kohler, \textit{Arbitral Precedent: Dream, Necessity or Excuse?}, 23 \textsc{Arbitration International}, 357, 358 (2006).

\(^{26}\) \textit{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

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, 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. Such interests are often conveyed and fulfilled through the most widespread form of influence — bribery. 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. 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.\textsuperscript{34} However, the matrix of rights and duties\textsuperscript{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.

\textbf{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.\textsuperscript{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

\textsuperscript{33} Supra note 10, at 40.
\textsuperscript{34} Supra note 32.
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.\textsuperscript{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 \textit{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


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.
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

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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:

\[
\text{“V (2) - Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”}
\]

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 \textit{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.

\textit{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:

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\text{“…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).

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).
\(^9\) 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.\textsuperscript{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 \textit{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).\textsuperscript{11}

\textit{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

\textsuperscript{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.\(^\text{12}\) 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.\(^\text{13}\) 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.\(^\text{14}\)

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,\(^\text{15}\) the Supreme Court observed that "though the heads are not closed and though theoretically it might be permissible to


\(^\text{13}\) Arbitration and Conciliation Act 1996 § 48(2)(b).

\(^\text{14}\) Arbitration and Conciliation Act 1996 § 57(iii).

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,\textsuperscript{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,\textsuperscript{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,\textsuperscript{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,\textsuperscript{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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\textsuperscript{18} Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156, ¶92.
\textsuperscript{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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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. 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 and if the Public Policy that was being infringed upon, was the Public Policy of India and not of any other foreign country.

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.

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24 Id at ¶34 – 36.
25 Id at ¶66.
In *Konkan Railway*, 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* 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.*, 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.* 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. The court relied on section 28(1)(a) of the 1996

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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.
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*, 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. This line of reasoning has been repeatedly followed by subsequent judgements, thereby introducing a patent error of law under the head of patent illegality. Even if the courts

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38 *Id.* at ¶65.
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.\textsuperscript{40} Courts have preferred using the tests laid down in \textit{Saw Pipes} and \textit{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,\textsuperscript{41} or using the “\textit{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.\textsuperscript{42}

\textit{Western Geco: Defining Fundamental Policy of Indian Law}

The Supreme Court in \textit{Western Geco},\textsuperscript{43} after having considered the position established in \textit{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 \textit{Renuagar}. The Court in \textit{Western Geco} elucidated the ‘fundamental policy of law in India' to mean:

\begin{itemize}
  \item The undertaking of a fair, bona fide, reasoned and judicial approach by the Courts \textit{qua} the subject matter of the dispute;
  \item The compliance of the Court’s decision with principles of natural justice; and
  \item The compliance of the Court’s decision with the \textit{Wednesbury principles of reasonableness}.\textsuperscript{44}
\end{itemize}

\textsuperscript{40} In Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd., (2007) 8 SCC 466.
\textsuperscript{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 per verse 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.

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\(^{45}\) 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.\footnote{Id. at ¶32 – 34 & 52.}

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

The Supreme Court in *Hindustan Zinc*\footnote{Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445, ¶14.} 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*\footnote{Venture Global Engg. v. Satyam Computer Services Ltd, (2008) 4 SCC 190.} 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*,\footnote{Bharat Aluminium v. Kaiser Aluminium, (2012) 9 SCC 552.} 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*\footnote{Phulchand Exports Limited v. O.O.O. Patriot, (2011) 10 SCC 300, ¶16.} 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.
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 Geico 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

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\(^{53}\) 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.\textsuperscript{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\textsuperscript{56} dealt with the said issue, before it came up in appeal to the Supreme Court. The Madhya Pradesh High Court in \textit{Sasan}, under section 45 of the Act, refused to rely on the decision of the Supreme Court in \textit{TDM Infrastructure (P) Ltd. vs. UE Development India (P)},\textsuperscript{57} and the Bombay High Court in \textit{Addhar Mercantile Private Limited vs. Shree Jagdamba Agrico Exports Pvt. Ltd},\textsuperscript{58} and instead relied on \textit{Atlas Export Industries vs. Kotak & Company}.\textsuperscript{59}

In \textit{TDM Infrastructure}\textsuperscript{60} and \textit{Addhar Mercantile}\textsuperscript{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 \textit{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 \textit{ipso facto} does not become void for contravening Public Policy.\textsuperscript{62} The Madhya Pradesh High Court, concurring with the position taken in \textit{Atlas Export} held that merely because


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


\textsuperscript{60} TDM Infrastructure, (2008) 14 SCC 271 ¶23.

\textsuperscript{61} Addhar Mercantile, 2015 SCC OnLine Bom 7752 ¶8.

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{66}

Similarly, the Delhi High Court recently in \textit{GMR Energy Limited vs. Doosan Power Systems India Private Limited and Ors},\textsuperscript{67} also referred to the judgments in \textit{Sasan Power} and \textit{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

\begin{itemize}
  \item \textsuperscript{63} Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd, 2015 SCC Online M.P. 7417 ¶52.
  \item \textsuperscript{64} Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd, (2016) 10 SCC 813 ¶28 & 29.
  \item \textsuperscript{65} Id. at ¶29.
  \item \textsuperscript{66} Id. at ¶50.
  \item \textsuperscript{67} GMR Energy Limited v. Doosan Power Systems India Private Limited and Ors, 2017 SCC OnLine Del 11625 ¶31.
\end{itemize}
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\(^\text{68}\) 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*.\(^\text{69}\) However, this view seems to be far from being settled, as the Supreme Court of India in *Vedanta Limited vs. Shenzen Shandong Nuclear Power*\(^\text{70}\) 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

\(^{68}\) Venture Global Engineering LLC and Ors v. Tech Mahindra Ltd and Ors, (2017) 13 SCALE 91 (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.\footnote{Vedanta Limited v Shenzen Shandong Nuclear Power, 2018 SCC Online Del 10916.}

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\footnote{Arbitration and Conciliation Act 1996 § 2(1)(f).} 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
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.
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 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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time and cost - is central to the development of economy of India, and in shaping global views on the ease of doing business.  

Scholars have documented the need to build a robust domestic system for dispute resolution outside the traditional courts of the State.  

 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.

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, 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,
which preclude their jurisdiction over parties which do not consent, increased expenditure and suspect quality of arbitration.\textsuperscript{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 \textit{Eros International Media Ltd. vs. Telemax Links India Pvt. Ltd}\textsuperscript{7} and \textit{Indian Performers Right Society Limited vs. Entertainment Network Ltd.}\textsuperscript{8} This paper seeks to trace the disharmony in legal opinion on the arbitrability of IP disputes, especially in the Indian context.

\section*{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\textsuperscript{9} and the International Chambers of Commerce\textsuperscript{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 \textit{Ayyasamy vs. A. Paramasivam and Ors.}\textsuperscript{11} including

\begin{itemize}
\item \textsuperscript{7} Eros International Media Limited v Telemax Links India Pvt Ltd and Others (2016), SCC OnLine Bom 2179.
\item \textsuperscript{8} The Indian Performing Right Society Ltd v Entertainment Network (India) Ltd (2016) SCC OnLine Bom 5893.
\item \textsuperscript{9} Alternative Dispute Resolution, WIPO, www.wipo.int/amc/en/.
\item \textsuperscript{11} A Ayyasamy v. A Paramasivam and Others, (2016) 10 SCC 386.
\end{itemize}
'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. 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. The Bombay High Court, 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. 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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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.\textsuperscript{16}

\textit{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.\textsuperscript{17}

\textit{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 \textit{vis-à-vis} third parties, unlike rulings of Courts on rights \textit{in rem}. Arbitral awards cannot confer rights, nor impose obligations on third parties.\textsuperscript{18} Juxtaposing this argument against the monopoly nature of IP rights (them being rights against third parties), would prevent arbitration of IP disputes.

\textit{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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work public and this would in turn negatively impact welfare.\textsuperscript{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.

\textit{Booz Allen Hamilton Inc. vs. SBI Home Finance}\textsuperscript{20} put forth a possible \textit{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, \textit{Redfern & Hunter},\textsuperscript{21} and \textit{Karim Yousef}\textsuperscript{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’.\textsuperscript{23}

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

\textsuperscript{19} \textsc{Robert Merges}, Justifying Intellectual Property, 300-310 (2011).
\textsuperscript{20} \textit{Booz Allen Hamilton Inc. v. SBI Home Finance}, (2011) 5 SCC 532.
\textsuperscript{21} \textsc{Redfern & Hunter}, Law and Practice of International Commercial Arbitration, 154 (1999).
\textsuperscript{22} \textsc{Karim Yousef}, The Death of Inarbitrability in L. Mistelis ed. Arbitrability: International & Comparative Perspectives, 47-48 (2009).
\textsuperscript{23} \textit{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.  

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. Naturally, an arbitral tribunal cannot register copyright, or quash a patent in general for that would impact the rights of the public. 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.

25 MATHEW, supra note 15 at 7.
26 GARY BORN, NON-ARBITRABILITY AND INTERNATIONAL ARBITRATION AGREEMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION, 991-993 (2009).
II. The Arbitrability of IP Disputes in India: Questions of Nature and Relief

In Booz Allen, 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 inarithmeticable. However, Booz Allen 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. 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 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.

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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
Arbitrability of IP Disputes in India

_Eros Media_, 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_ 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. 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. _Booz Allen_ 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.* 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), 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* 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.

**B. A ‘RELIEF’ BASED DETERMINATION OF ARBITRABILITY**

In *Booz Allen,* 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.
40 Diamond Apartments v. Abanar Marketing, GA No. 1343 of 2015 (Calcutta High Court).
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 assignment45 and compulsory licensing46 (for example, questions of royalty refunds emerging from the licence) and disputes enlisted under Section 6 of the Copyright Act47 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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45 Copyright Act 1957 § 19A.
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\textsuperscript{49} read Section 62(1) of the Copyright Act\textsuperscript{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 \textit{in personam} suits) and runs contrary to the logic of the Arbitration Act.\textsuperscript{51} In the view of the author, \textit{Eros Media}\textsuperscript{52} subscribes to a sound approach, balancing IP laws with that of the Arbitration Act. \textit{Eros Media}\textsuperscript{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 \textit{Booz Allen},\textsuperscript{54} questions of infringement of IP are suits \textit{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 \textit{in rem} and therefore are hit by the bar of subject matter inarbitrability. Questions of nature also however fall foul of \textit{Booz Allen}’s reliefs test. For instance, Section 124 of the Trademarks Act, 1999 establishes the Intellectual Property Appellate Board\textsuperscript{55} to exclusively adjudicate upon issues of invalidity of trademarks that have been statutorily registered. Notwithstanding there being no explicit bar against such

\textsuperscript{49} Mundipharma AG v. Wockhardt, ILR (1991) 1 Delhi 606.
\textsuperscript{50} Copyright Act, 1957 § 62(1).
\textsuperscript{51} SRIVASTAVA, supra note 11 at 641-642.
\textsuperscript{52} EROS, supra note 5.
\textsuperscript{53} Id.
\textsuperscript{54} Booz Allen, supra note 18.
\textsuperscript{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*, 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. 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 and Belgium, 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. The middle of the scale is representative of those jurisdictions (Italy, Germany, Portugal and perhaps India), which allow arbitration of IP

61 MATHEW, supra note 17 at 7-8.
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.\(^{64}\)

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### 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

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 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.

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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.

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(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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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


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.”\(^\text{7}\) 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.”\(^\text{8}\) 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.\(^\text{9}\) 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


applied, they do not represent a challenge to the existence of mandatory laws per se.\textsuperscript{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”.\textsuperscript{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.”\textsuperscript{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 \textit{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.”\textsuperscript{13}

\textsuperscript{10} Id.
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.” Furthermore, “[d]etermining the source of applicable mandatory rules [by the arbitrator] is a matter of controversy.” 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. 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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to the interests of the legal system and the society as a whole, as compared to national courts.\textsuperscript{17}

This argument is very much true as all mandatory laws are foreign mandatory laws to arbitrators who do not have a \textit{lex fori}.\textsuperscript{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.\textsuperscript{19} While, both arbitrators as well as an international judge do not have a \textit{lex fori} and there is a possibility that arbitrators may put themselves in position of judges to override the \textit{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

\textsuperscript{17} Doug Jones, \textit{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).


\textsuperscript{19} See Maniruzzaman, \textit{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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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 arbitrable23 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

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


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.\textsuperscript{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.”\textsuperscript{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....”\textsuperscript{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:

\textsuperscript{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).
\textsuperscript{27} Greenawalt, supra note 13, at 118.
\textsuperscript{28} Lorenzo, supra note 8, at 88.
An 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.  

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.”

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.

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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leniency, there is a chance that arbitrators will ‘fool’ the courts that the mandatory rule is applied.\textsuperscript{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....”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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

\textsuperscript{32} See Guzman, supra note 20, at 1310-15.


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

aside an arbitral award.\textsuperscript{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.\textsuperscript{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....”\textsuperscript{38}

Some scholars have opined that by expanding scope of arbitrability, the courts have impliedly agreed to consequences of non-application of mandatory laws.\textsuperscript{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


\textsuperscript{38} Villiers, supra note 5, at 180.

for such a de novo review should be provided by the party seeking such clarification.\textsuperscript{40}

\textbf{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.

\textsuperscript{40} See Kleinheisterkamp, \textit{supra} note 3, at 116.
CHANGING CONTOURS OF HOST STATE COUNTERCLAIMS IN INVESTOR-STATE ARBITRATION: WITH SPECIAL REFERENCE TO THE INDIAN POSITION

Palada Dharma Teja & Shashwat Bhaskar

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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4. See DAFINA ATANASOVA, CARLOS ADRIAN MARTINEZ BENOIT AND JOSEF OSTRÁNSKÝ, *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. Consequently, it is not feasible for a host state to bring counterclaims, let alone a primary claim. 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, 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. This is one of the important benefits of permitting host state counterclaims in investor-state arbitration.

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

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

9 Id. at 475.

10 Kryvoi, supra note 3, at 221.

duplication and inefficiency, which is contrary to the objectives of international investment law.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{15}

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

\textsuperscript{13} Bjorklund, supra note 1, at 476.


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”). As established in Amto, 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. 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. Investor-state arbitration, however, unlike commercial arbitration, is quite complex in this regard.

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19 See ANDREA M. STEINRUBER, CONSENT IN INTERNATIONAL ARBITRATION (Oxford University Press 2012).
IIAs are triangular in nature. 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. It is in this context that the requirement of consent must be examined.

It is well established in a number of arbitral decisions that the scope of consent emanates from the text of the IIA in investor-state arbitration. 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. States have occasionally initiated arbitration against an investor based on contract, but fail to do so under investment treaties. 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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21 Id. at 354.
23 Atanasova et al., supra note 4, at 13.
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. 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. It is thus required under every legal system that a counterclaim has a close connection with the subject matter of the primary claim. 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. 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

30 Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskiaia 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.\textsuperscript{31}

In \textit{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.\textsuperscript{32} The said requirement was subsequently affirmed in \textit{Paushok}\.\textsuperscript{33} However, the legal connection requirement is an extremely stringent standard, which has been widely criticised.\textsuperscript{34} Moreover, in recent times, it is observed that arbitral tribunals are taking a less restrictive approach towards the connection requirement.\textsuperscript{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.\textsuperscript{36} It is opined that such a stringent connection requirement makes the admissibility of any counterclaim near impossible.\textsuperscript{37} Hence, the tribunals must not adopt a stringent approach of the legal symmetry test.

\textsuperscript{32} \textit{Saluka}, ¶76.
\textsuperscript{33} \textit{Paushok}, ¶693.
\textsuperscript{34} ZACHARY DOUGLAS, \textsc{The International Law of Investment Claims} 260 (Cambridge University Press 2009).
\textsuperscript{35} \textit{Urbaser}, ¶1151.
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\textsuperscript{38} and its accompanying arbitral rules or pursuant to the UNCITRAL Arbitration Rules\textsuperscript{39}. Thus, one possible source of a tribunal’s authority to hear counterclaims is the arbitration’s procedural rules.\textsuperscript{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”.\textsuperscript{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”.\textsuperscript{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

\begin{footnotesize}
\begin{enumerate}
\item 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].
\item G.A. Res. 65/22, UNCITRAL Arbitration Rules as revised in 2010 (Jan. 10, 2011) [hereinafter UNCITRAL Arbitration Rules 2010].
\item Bjorklund, supra note 1, at 471.
\item ICSID Convention, art. 46.
\end{enumerate}
\end{footnotesize}
counterclaim [...] provided that the arbitral tribunal has jurisdiction over it.\textsuperscript{43} The 2010 Rules brought about a shift from the 1976 UNCITRAL Rules\textsuperscript{44}, which required that the counterclaim arose out of the same contract.\textsuperscript{45} The present rules enables the tribunal to assert jurisdiction over counterclaims, considering the circumstances relevant to each case.\textsuperscript{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.\textsuperscript{47} The SCC Arbitration Rules provide that the Answer to Request for Arbitration shall include a preliminary statement of any counterclaims or set offs.\textsuperscript{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.\textsuperscript{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

\textsuperscript{43} UNCITRAL Arbitration Rules 2010, art. 21(3).
\textsuperscript{45} UNCITRAL Arbitration Rules 1976, art. 19(3).
\textsuperscript{46} Atanasova et al., supra note 4, at 10.
\textsuperscript{47} See also ICC Rules of Arbitration 2012, art. 5(5).
\textsuperscript{48} SCC Arbitration Rules 2017, art. 9(1)(iii).
\textsuperscript{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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\(^{51}\) 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*, 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. 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:

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

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. 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. Thus, COMESA affords the host state an opportunity to bring a counterclaim against the

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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” or simply “any dispute”. Furthermore, other treaties exclude a particular type of counterclaims giving rise to a contrario conclusion in favour of admissibility of other types of counterclaims.

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. 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.
Host State Counterclaims in Investor-State Arbitration

dealt with a restrictive provision in Article 9(1) of the Greece-Romania BIT\textsuperscript{65} which limited the scope of the ‘dispute’ to obligations of the host state.\textsuperscript{66} Consequently, the tribunal refused to hear counterclaims against the foreign investor.\textsuperscript{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.\textsuperscript{68} Despite the reference to counterclaims in various arbitration rules,\textsuperscript{69} often neither the substantive provisions nor the arbitration clauses in IIAs contain a valid basis for host states to bring claims against investors.\textsuperscript{70} Hence, there is a need to provide a suitable legal framework for admissibility of host state counterclaims in investment treaty arbitration.

\begin{itemize}
\item \textsuperscript{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.\textsuperscript{65}
\item \textsuperscript{66} Roussalis, ¶871-5.
\item \textsuperscript{67} Id, ¶876.
\item \textsuperscript{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. Belohláve and Nadežda Rozehnalová eds., Juris Publishing Inc. 2011).
\item \textsuperscript{69} ICSID Convention, art. 46; UNCITRAL Arbitration Rules 2010, art. 21(3); SCC Arbitration Rules 2017, art. 9(1)(iii).
\item \textsuperscript{70} See Roussalis, ¶864-72.
\end{itemize}
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


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


\(^{74}\) *White Industries*, ¶16.1.1.


\(^{76}\) *See* India Model BIT.

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.]


\(^{80}\) 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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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.

<table>
<thead>
<tr>
<th>Arbitral Decision and Tribunal</th>
<th>BIT and Article</th>
<th>Provision</th>
<th>Decision of the Tribunal</th>
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<tbody>
<tr>
<td><strong>Roussalis vs. Romania</strong>89</td>
<td>Article 9 of the Greece-Romania BIT</td>
<td>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</td>
<td>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.</td>
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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.


89 Roussalis, ¶869.
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<tr>
<td><strong>Inmaris Perestroika Sailing Maritime Services GmbH v. Ukraine</strong>&lt;sup&gt;90&lt;/sup&gt;</td>
<td>Article 11 of the Germany-Ukraine BIT</td>
<td>Disputes regarding investments between one of the Contracting Parties and a national or a company of the other Contracting parties […]</td>
<td>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.</td>
</tr>
<tr>
<td><strong>Urbaser vs. Argentina</strong>&lt;sup&gt;91&lt;/sup&gt;</td>
<td>Article X(1) of the Argentina-Spain BIT</td>
<td>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.</td>
<td>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”.</td>
</tr>
<tr>
<td><strong>Metal-Tech vs. Uzbekistan</strong>&lt;sup&gt;92&lt;/sup&gt;</td>
<td>Article 8(1) of the Israel-Uzbekistan BIT</td>
<td>Each Contracting Party hereby consents to submit […] any legal dispute arising</td>
<td>The tribunal opined that Article 8(1) of the BIT was not restricted to disputes initiated by an investor against a Contracting Party.</td>
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<sup>90</sup> Inmaris Perestroika Sailing Maritime Services GmbH v. Ukraine, ICSID Case No. ARB/08/8, Excerpts of Award, ¶432 (Mar. 1, 2012).

<sup>91</sup> Urbaser, ¶1143.

<sup>92</sup> Metal-Tech, ¶410.
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<th>Decision of the Tribunal</th>
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</thead>
<tbody>
<tr>
<td>Rusoro Mining Ltd. vs. Venezuela93</td>
<td>Article XII(1) of the Canada-Venezuela BIT</td>
<td>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 […]</td>
<td>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.</td>
</tr>
<tr>
<td>Oxus Gold vs. Uzbekistan94</td>
<td>Article 8(1) of United the Kingdom-Uzbekistan BIT</td>
<td>Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the</td>
<td>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</td>
</tr>
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93 Rusoro, ¶623.
94 Oxus Gold v. The Republic of Uzbekistan, UNCITRAL, Final Award, ¶948 (Dec.17, 2015).
Two important recent decisions concerned with counterclaims were *Perenco*\(^\text{95}\) and *Burlington Resources*.\(^\text{96}\) 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

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\(^{95}\) *See Perenco.*

\(^{96}\) *See Burlington Resources.*
Host State Counterclaims in Investor-State Arbitration

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.
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.

* The authors are students at ILS Law College, Pune.
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 reality¹ 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


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. 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. 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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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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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. 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.

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. However, an arbitral tribunal’s jurisdiction is limited in this context as it cannot pass any orders binding third parties.

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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.\(^\text{10}\)

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,\(^\text{11}\) and the SCC reported an average of five to eight days.\(^\text{12}\) 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.


\(^{11}\) J. Brian Johns, *ICDR Emergency Arbitrations*, THE ICDR INTERNATIONAL ARBITRATION REPORTER 6 (Fall 2016).

## E. COSTS

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Name of the Arbitral Institution</th>
<th>Fees and Expenses of the Emergency Arbitrator</th>
<th>Filing Fees/Administrative Expenses</th>
<th>Total Fees and Expenses of the Emergency Arbitrator Application</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Singapore International Arbitration Centre(^{13})</td>
<td>SGD 25,000</td>
<td>SGD 5,000</td>
<td>SGD 30,000</td>
</tr>
<tr>
<td>2.</td>
<td>Hong Kong International Arbitration Centre(^{14})</td>
<td>HKD 2,05,000</td>
<td>HKD 45,000</td>
<td>HKD 2,50,000</td>
</tr>
<tr>
<td>3.</td>
<td>Stockholm Chamber of Commerce(^{15})</td>
<td>EUR 16,000</td>
<td>EUR 4,000</td>
<td>EUR 20,000</td>
</tr>
<tr>
<td>4.</td>
<td>London Court of International Arbitration(^{16})</td>
<td>GBP 20,000</td>
<td>GBP 8,000</td>
<td>GBP 28,000</td>
</tr>
<tr>
<td>5.</td>
<td>International Chamber of Commerce(^{17})</td>
<td>USD 30,000</td>
<td>USD 10,000</td>
<td>USD 40,000</td>
</tr>
</tbody>
</table>

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.


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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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.\footnote{For a detailed analysis of the rules, refer to the table in (B.), in this section of the note.}

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:

<table>
<thead>
<tr>
<th>Institution</th>
<th>Year Introduced</th>
<th>Temporal Application</th>
<th>Timing of Application</th>
<th>Time required to appoint an EA</th>
<th>Time Frame to Grant Measures</th>
<th>Form of Measures</th>
<th>Access to Courts for the Grant of Interim Measures</th>
<th>Application Statistics</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICDR</td>
<td>2006</td>
<td>Arbitration Agreements entered on or after 1 May 2006</td>
<td>With or after submission of notice of arbitration</td>
<td>With in 1 day of receipt</td>
<td>-</td>
<td>Order or Interim Award</td>
<td>At any time</td>
<td>70 (as of fall 2016)</td>
</tr>
<tr>
<td>SCC</td>
<td>2010</td>
<td>Any arbitration agreement referring to SCC Rules</td>
<td>Any time before referral to tribunal (but commencement arbitration within 30 days of decision)</td>
<td>With in 24 hours of receipt</td>
<td>No later than 5 days from referral</td>
<td>Order or Award</td>
<td>At any time</td>
<td>27 (As of June 2017)</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Year</td>
<td>Arbitration Agreements Entered into After</td>
<td>Timeframe</td>
<td>Order or Award</td>
<td>Timeframe</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>--------------</td>
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<td>-----------</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SIAC</td>
<td>2010</td>
<td>After 1 July 2010</td>
<td>With or after submission of notice of arbitration</td>
<td>Within 14 days of appointment of Emergency Arbitrator</td>
<td>At any time prior to the constitution of the arbitral tribunal or in exceptional circumstances thereafter</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ICC</td>
<td>2012</td>
<td>After January 2012</td>
<td>Anytime before constitution of Tribunal</td>
<td>No later than 5 days from referral to Emergency Arbitrator</td>
<td>At any time prior to making the EA application and in appropriate circumstances even thereafter</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>HKIAC</td>
<td>2013</td>
<td>After 1 November 2013</td>
<td>With or after submission of notice of arbitration</td>
<td>Within 15 days from transfer of file to Emergency Arbitrator</td>
<td>At any time</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(As of December 2017)
## Emergency Arbitration in India

<table>
<thead>
<tr>
<th>Organization</th>
<th>Year</th>
<th>Agreement</th>
<th>With or After Notice of RFA or Response Thereto</th>
<th>With in 3 Days of Receipt of Notice of Arbitral Tribunal</th>
<th>No Later Than</th>
<th>Order or Award</th>
<th>At Any Time Before</th>
<th>Or at Any Time After</th>
<th>Format of the Arbitral Tribunal</th>
</tr>
</thead>
<tbody>
<tr>
<td>LCIA</td>
<td>2014</td>
<td>Arbitration Agreement entered into after 1 October 2014</td>
<td>Anytime prior to constitution of Tribunal</td>
<td>Anytime prior to constitution of Tribunal</td>
<td>Anytime prior to constitution of Tribunal</td>
<td>Anytime prior to constitution of Tribunal</td>
<td>Anytime prior to constitution of Tribunal</td>
<td>Anytime prior to constitution of Tribunal</td>
<td>Anytime prior to constitution of Tribunal</td>
</tr>
<tr>
<td>MCIA</td>
<td>2016</td>
<td>Any arbitration agreement referring to MCIA Rules</td>
<td>Anytime prior to constitution of Tribunal</td>
<td>Anytime prior to constitution of Tribunal</td>
<td>Anytime prior to constitution of Tribunal</td>
<td>Anytime prior to constitution of Tribunal</td>
<td>Anytime prior to constitution of Tribunal</td>
<td>Anytime prior to constitution of Tribunal</td>
<td>Anytime prior to constitution of Tribunal</td>
</tr>
<tr>
<td>DIAC</td>
<td>2018</td>
<td>Any arbitration agreement referring to DIAC Rules</td>
<td>Anytime prior to constitution of Tribunal</td>
<td>Anytime prior to constitution of Tribunal</td>
<td>Anytime prior to constitution of Tribunal</td>
<td>Anytime prior to constitution of Tribunal</td>
<td>Anytime prior to constitution of Tribunal</td>
<td>Anytime prior to constitution of Tribunal</td>
<td>Anytime prior to constitution of Tribunal</td>
</tr>
</tbody>
</table>

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22. See [Mumbai Centre for International Arbitration Rules, 2016](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](http://www.dacdelhi.org/topics.aspx?mid=74) (Sep 02, 2018, 11:37 AM)
C. FREE CHOICE APPROACH VS. COURT-SUBSIDIARITY APPROACH

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

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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.  

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.

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, 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

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 Design28 case granted an interim order similar to that granted by the SIAC emergency arbitrator but clarified 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.
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.

* The authors are students at the School of Law, University of Petroleum and Energy Studies (UPES), Dehradun.
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 \emph{firstly}, to a fair-hearing\(^3\), i.e., the dispute is heard by independent, impartial and competent arbitrators\(^4\) and \emph{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


\(^5\) 24 KAREL DAELLE, 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”. 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. However, these qualities of ‘independence’ and ‘impartiality’ have usually been considered as two sides of the same coin and have been used interchangeably. 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. Therefore,

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7 Id. art. 14.
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.\textsuperscript{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.\textsuperscript{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 \textit{inter alia} act fairly, independently and impartially during the course of the arbitration process.\textsuperscript{14} Under the declaration, the arbitrator shall disclose relevant information, i.e., his independence, impartiality, fairness and confidentiality in regard to the arbitral proceeding.\textsuperscript{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.\textsuperscript{16}

It is necessary to acknowledge the fact that "independence and impartiality are states of mind".\textsuperscript{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

\textsuperscript{12} James Ng, \textit{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).


\textsuperscript{15} Kröll, supra note 10, at 264.

\textsuperscript{16} Nwakoby \textit{supra} note 14, at 171.

arbitrator can demonstrate such state of mind. Irrespective of the safeguards provided by the Convention and Rules, aimed towards ensuring integrity in the arbitration process, 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. 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. 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 envisaged under Article 14, 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 standards.
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 Tribunal27, particularly when the challenges against arbitrators are on a rise.28

However, the standard for disqualifying an arbitrator under ICSID is a moot point29, 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

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.
30 DAELE, supra note 5, at 218.
Article 14 or describes the standard of proof required to establish such lack.\textsuperscript{31}

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

\textbf{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 \textit{Amco Asia}\textsuperscript{33} case, the first case in arbitrator challenge\textsuperscript{34} wherein the Co-arbitrators decided on the proposal to disqualify the Claimant appointed arbitrator.\textsuperscript{35} In this case, the Respondent proposed disqualification on the grounds that \textit{firstly}, the challenged arbitrator had advised the Claimant on tax matters a number of years prior to the current arbitration proceedings and \textit{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\textsuperscript{36} as it was sufficient to prove the

\begin{footnotesize}
\begin{enumerate}
\item Horn, \textit{supra} note 24, at 357.
\item 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”).
\item Vasani, \textit{supra} note 29, at 200.
\item CLEIS, \textit{supra} note 27, at 32.
\end{enumerate}
\end{footnotesize}

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”.\footnote{Amco Asia, \textit{supra} note 33, at ¶29.}  \footnote{Horn, \textit{supra} note 24, at 358.} 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.\footnote{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”).}

Similarly, in \textit{Suez II}\footnote{Bottini, \textit{supra} note 8, at 355-356.} the Respondent challenged the independence and impartiality of the Claimant appointed arbitrator, on the basis of past appointments and relationship with the Claimants.\footnote{Suez II, \textit{supra} note 40, at ¶29.} 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”.\footnote{Suez II, \textit{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.


\(^{47}\) *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


\(^{52}\) 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 Projektholding Gmbh v. Ukraine, ICSID Case No. ARB/07/16, Decision on proposal to disqualify arbitrator (May 19, 2010). (“Alpha”).


\(^{60}\) Alpha, *supra* note 58, at ¶37.
Article 57 incorporates a “stringent requirement of manifest lack of qualities” provided under Article 14.\textsuperscript{61}

In \textit{Conoco I}\textsuperscript{62}, the Respondent challenged the Claimant appointed arbitrator in light of the relationship between the Claimant’s counsel and the challenged arbitrator.\textsuperscript{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”.\textsuperscript{64} Additionally, they held that “manifest lack” of the qualities under Article 14(1) “must appear from objective evidence”.\textsuperscript{65} The Tribunal also distinguished the standards under external rules or guidelines (IBA Guidelines) with that under the ICSID Convention. It was held that \textit{firstly}, the IBA guidelines “are not legal rules” and cannot “override any arbitral rules chosen by the parties”, \textit{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\textsuperscript{66}, “is significantly different from that under Article 57 of the ICSID and can be easily satisfied”.\textsuperscript{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

\textsuperscript{61} DAELE, \textit{supra} note 5, at 228.

\textsuperscript{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”).

\textsuperscript{63} \textit{Id.} at ¶1, 2, 6.

\textsuperscript{64} \textit{Id} at ¶56

\textsuperscript{65} \textit{Id.}

\textsuperscript{66} Bottini, \textit{supra} note 8, at 347.

\textsuperscript{67} Conoco I, \textit{supra} note 62, at ¶59.
will be manifest if it can be “discerned with little effort and without deeper analysis”.\textsuperscript{68}

\section*{B. REASONABLE DOUBT OR \textit{VIVENDI} STANDARD}

The second proposal\textsuperscript{69} for disqualification of an arbitrator was filed in \textit{Vivendi}\textsuperscript{70}, where the unchallenged arbitrator vehemently criticized the standard followed in \textit{Amco Asia}, and laid down a new standard in determining manifest lack of qualities in an arbitrator.\textsuperscript{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.\textsuperscript{72} The unchallenged arbitrators while dismissing the proposal\textsuperscript{73} initially adopted the “appearance of bias” test\textsuperscript{74} and observed that \textit{there might be circumstances which create \textquotedblleft an appearance of lack of independence or impartiality\textquotedblright\ 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.\textsuperscript{75}

Finally, it was observed that, \textit{firstly}, the challenging party must establish the factual basis of the challenge, i.e., challenge must not be based out of speculations or inferences.\textsuperscript{76} \textit{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

\textsuperscript{68} SCHEUER, supra note 1, at 938.
\textsuperscript{69} CLEIS, supra note 27, at 33;
\textsuperscript{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). (\textquoteleft\textquoteleft Vivendi\textquoteright\textquoteright).\textsuperscript{71}
\textsuperscript{71} \textit{Id.} at ¶22.
\textsuperscript{72} Bottini, supra note 8, at 348-349.
\textsuperscript{74} Bottini, supra note 8, at 349.
\textsuperscript{75} Vivendi, supra note 70, at ¶22.
\textsuperscript{76} CLEIS, supra note 27, at 33.
could be reasonably apprehended by either party”\textsuperscript{77}, i.e., even though Article 57 mandates that lack of qualities must be “manifest”, often a “reasonable apprehension of bias” will be adequate.\textsuperscript{78}

Similarly in \textit{SGS vs. Pakistan}\textsuperscript{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\textsuperscript{80} in that case.\textsuperscript{81} The Co-arbitrators approved the point stated in \textit{Vivendi I}, and took a clearer stand in this regard.\textsuperscript{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.\textsuperscript{83}

In \textit{EDF}\textsuperscript{84}, Respondent challenged the Claimant appointed arbitrator on the basis of the challenged arbitrator economic interest in the outcome of the proceedings.\textsuperscript{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.\textsuperscript{86}

\textsuperscript{77} Vivendi, \textit{supra} note 70, at ¶25.
\textsuperscript{78} Fry, \textit{supra} note 59, at 211.
\textsuperscript{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”).
\textsuperscript{80} Robert Azinian v. United Mexican States, ICSID Case No. ARB/97/2, Award (Nov 1, 1999).
\textsuperscript{81} SGS, \textit{supra} note 79, at ¶10.
\textsuperscript{82} CLEIS, \textit{supra} note 27, at 34.
\textsuperscript{83} SGS, \textit{supra} note 79, at ¶20.
\textsuperscript{84} EDF International S.A., SAUR International S.A., Leon Participaciones Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Decision on proposal to disqualify members of the Arbitral Tribunal (June 25, 2008). (“EDF”).
\textsuperscript{85} Id. at ¶12, 35.
\textsuperscript{86} Id. at ¶64.
In *Abaclat*¹⁸⁷, 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.¹⁸⁸

Similarly, in *Repsol*¹⁸⁹, 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.¹⁹⁰ The Chairman relying on the *Vivendi* 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.¹⁹¹ In *Urbaser*¹⁹², a similar view was taken by the Co-arbitrators while rejecting the challenge proposal.¹⁹³

Interestingly, the Co-arbitrators in *Saint-Gobain*¹⁹⁴ 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.¹⁹⁵ However, they

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¹⁸⁷ *Abaclat I*, *supra* note at 53.
¹⁸⁸ *CLEIS*, *supra* note 27, at 46.
¹⁹⁰ *Horn*, *supra* note 24, at 384-385.
¹⁹¹ *CLEIS*, *supra* note 27, at 190.
¹⁹³ *Id.* at ¶20, 43.
¹⁹⁴ *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*”).
¹⁹⁵ *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 Alonso98 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.
98 Id. at ¶22-32.
99 Id. at ¶27-31.
100 Id. at ¶45-54.
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”.\textsuperscript{105} \textit{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.\textsuperscript{106} Similarly, Dr. Kim upheld the disqualification proposal in \textit{Burlington Resources}\textsuperscript{107} relying on the \textit{Blue bank} standard.\textsuperscript{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,\textsuperscript{109} is \textit{Caratube}\textsuperscript{110}, where Bruno Boesch was challenged by the Claimant on the grounds of multiple appointments in cases of similar facts and circumstances.\textsuperscript{111} The Co-arbitrators upheld the challenge and placed reliance on the standard laid down in \textit{Blue Bank} and held that, “Article 57 and 14(1) of the ICSID Convention does not mandate the requirement of strict proof”.\textsuperscript{112} Explaining it further, the Co-arbitrators held that, “Mr. Boesch’s objectivity and open mildness were fouled because of resemblance of issue and facts with the \textit{Ruby Roze}”.\textsuperscript{113} The decision also prolonged it further, that “an arbitrator cannot be asked reasonably to maintain a ‘Chinese Wall’ in his mind”.\textsuperscript{114} Furthermore, on the question of multiple appointments, the Co-arbitrator held that,

\begin{itemize}
  \item \textsuperscript{105} \textit{Blue Bank}, \textit{supra} note 102, at ¶61.
  \item \textsuperscript{106} \textit{Blue Bank}, \textit{supra} note 102, at ¶62.
  \item \textsuperscript{107} \textit{Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on proposal to disqualify arbitrator (Dec 13, 2013). (“Burlington”).
  \item \textsuperscript{108} \textit{Id.} at ¶79-80.
  \item \textsuperscript{109} \textit{Vasani, supra} note 29, at 204.
  \item \textsuperscript{110} \textit{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”).
  \item \textsuperscript{111} \textit{Id.} at ¶24-27.
  \item \textsuperscript{112} \textit{Id.} at ¶57.
  \item \textsuperscript{113} \textit{Id.} at ¶90.
  \item \textsuperscript{114} \textit{Id.} at ¶75.
\end{itemize}
“third party would find an evident or obvious presence of disproportion within the tribunal”\textsuperscript{115}

However, recently in \textit{Raffeisen}\textsuperscript{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\textsuperscript{117}. The Chairman while dismissing the challenge observed that, \textit{firstly}, majority of the decisions have concluded that manifest means “evident” or “obvious”\textsuperscript{118}, \textit{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”\textsuperscript{119} and \textit{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”\textsuperscript{120}

Therefore, the trajectory of the decisions in \textit{Amco, Vivendi} and \textit{Blue Bank} depicts a radical shift in the standard for determining “manifest lack” of qualities in an arbitrator under ICSID.

\section*{IV. Paradigm shift in challenge jurisprudence}

In \textit{Amco Asia}, the Tribunal rejected the reasonable doubt test contended by the Respondent and laid down the strict standard\textsuperscript{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

\textsuperscript{115} \textit{Id.} at ¶95.


\textsuperscript{117} \textit{Id.} at ¶16-36.

\textsuperscript{118} \textit{Id.} at ¶79.

\textsuperscript{119} \textit{Id.} at ¶83.

\textsuperscript{120} \textit{Id.} at ¶84.

\textsuperscript{121} DAELLE, \textit{supra} note 5, at 297.
prevalent in other institutional arbitration system.\textsuperscript{122} The ICSID Tribunal’s or Administrative Council’s traditional reluctance to disqualification of arbitrators is the reason for such high bar on disqualification.\textsuperscript{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\textsuperscript{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.\textsuperscript{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.\textsuperscript{126} Nevertheless, majority of the decisions on disqualification in ICSID have relied upon the strict standard of “manifest lack”.\textsuperscript{127}

On the contrary, while laying down the reasonable doubt standard, the strict standard was heavily criticized in \textit{Vivendi}.\textsuperscript{128} The “reasonable doubt” test lowers the standard required for disqualifying an arbitrator in ICSID.\textsuperscript{129} The fact that the “reasonable doubt” standard has been rejected and strict standard has been upheld\textsuperscript{130} and \textit{vice versa} shows that there is an

\begin{flushright}
\textsuperscript{122} Dimitropoulos, \textit{supra} note 31, at 397-398; Federica Cristani, \textit{supra} note 3 at 159.
\textsuperscript{123} Vasani, \textit{supra} note 29, at 197-200.
\textsuperscript{124} Cleis, \textit{supra} note 27, at 17.
\textsuperscript{125} Vasani, \textit{supra} note 29, at 198.
\textsuperscript{126} DAELE, \textit{supra} note 5, at 233.
\textsuperscript{128} Vivendi, \textit{supra} note 70.
\textsuperscript{129} DAELE, \textit{supra} note 5, at 225.
\textsuperscript{130} Nations Energy, Inc. \& Ors. \textit{v. Republic of Panama}, ICSID Case No. ARB/06/19, Decision on proposal to disqualify arbitrator, ¶56 (Sept 7, 2011).
\end{flushright}
inconsistency in the interpretation of “manifest lack”.\textsuperscript{131} This inconsistency was however considered “as tracing an evolution” by the Co-arbitrators in Simens vs. Argentina.\textsuperscript{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.\textsuperscript{133} The paradigm shift\textsuperscript{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.\textsuperscript{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.\textsuperscript{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\textsuperscript{137}, after the decision of Dr. Kim, till date there has been three successful challenges in the decisions of Big Sky\textsuperscript{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

\textsuperscript{131} DAELE, supra note 5, at 223.
\textsuperscript{132} Siemens AG v Argentine Republic, ICSID Case No ARB/02/08, Decision on Proposal to Disqualify an Arbitrator (11 February 2005)
\textsuperscript{133} Sam Luttrell, Testing the ICSID Framework for Arbitrator Challenges, 31 No. 3 ICSID REV. 597, 602 (2016).
\textsuperscript{134} Kim, supra note 20, at 636; Dimitropoulos, supra note 31, at 374-375.
\textsuperscript{135} Vasani, supra note 29, at 196.
\textsuperscript{136} Luttrell, supra note 143, at 605.
\textsuperscript{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”).
\textsuperscript{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.\footnote{Vasani, supra note 29, at 196.}

However, on an analysis of the observations of Dr. Kim in \textit{Blue Bank}, it is evident that there was a clear affirmation of the observations laid down in the past decisions pertaining to arbitrator challenges. \textit{Firstly}, prior to \textit{Blue bank}, in \textit{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.\footnote{Urbaser, supra note 92, at 43.} \textit{Secondly}, the objective standard of reasonable evaluation of the evidence by a third party was also observed in \textit{Suez I}.\footnote{\textit{Suez I}, supra note 17, at 39.} \textit{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.\footnote{Vasani, supra note 29, at 201, 202.} 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.\footnote{Vasani, supra note 29, at 200.} 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 (\textit{Amco Asia}) and a much appreciated reasonable doubt standard (\textit{Vivendi}) to an altogether new standard (\textit{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.
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.