THE ADVISABILITY OF APPELLATE ARBITRATION: PROPOSING AN EFFICIENT INSTITUTIONAL FRAMEWORK

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Abstract

The juridical roots of arbitration lie in freedom of contract. Yet, the existing scholarship, while opposing the appellate review of the arbitral awards, cites arbitral finality and efficiency to oppose a review on the substantive merits of the final award. This mechanism has already seen an increased demand among the business community owing to the pressing need of correcting substantive errors of the award, which cannot qualify as procedural improprieties to set aside the award. This article aims at settling this debate of the viability of appellate arbitration by reasoning and stressing the importance of an appellate mechanism in any dispute resolution mechanism, and then weighing the pros and cons with the adoption of appeals in arbitration. This cogitation would allude that contrary to popular beliefs, adoption of arbitral appeal mechanism would lead to increased finality and enforcement of arbitral awards. After establishing the desirability of appellate review of awards, the article will assess the existing appellate mechanism offered by arbitral institutions and proposed mechanisms by the existing scholarship. It will then propose a unique variant appellate framework which will be efficient and economical for parties to opt for.

I. Introduction

The notion of party autonomy, which is the contractual mandate of arbitration, has been considered as the *grundnorm* by courts all over the world.[1] Party autonomy is rooted in the freedom of contract, which is "*at the very core of how the law regulates arbitration,*" especially considering the absence of a supranational legislative or adjudicatory body in international commercial arbitration.[2] Additionally, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"] has mandated courts to adopt a *laissez-faire* approach in adjudication, ergo limiting the judicial scrutiny in the arbitration.[3] This has led to arbitrations culminating into a final award, which is free from any court's interference, except in case of gross procedural inequities in the arbitration or the award being contrary to public policy.[4] Consequently, this has

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1 Bharat Aluminium v. Kaiser Technical Services, (2016) 4 SCC 126 ¶ 10 (India); *see also* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57–58 (1995) (citing Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

2 Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1191–1193 (2003).

3 Ulrich Drobnig, *Assessing Arbitral Autonomy in European Statutory Law*, *in* LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT 195 (Thomas E. Carbonneau ed., 1998).

4 United Nations Comm'n on Int'l Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, art. 34(2), G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) [*hereinafter* "UNCITRAL Model Law"].

increased the popularity of arbitration among the business community, as it provides an efficient process and ensures finality of the award.[5]

The scholarship opposing appellate arbitration has been cueing arbitral finality as an obstacle for reviewing its substantive merits to increase its accuracy.[6] However, the scholarship that has advocated for appellate arbitration seems to have underemphasised the importance of party autonomy and contractual freedom in countering the opposition to appellate arbitration or any other novel supplement to the arbitral process.[7] Part II of this article fills that gap by pointing out the importance of appeal in any kind of dispute resolution process and settling the debate on the viability of appellate arbitration after assessing the arguments for and against appeals, and basing its desirability on the fundamental tenet of party autonomy. After assessing the existing and proposed appellate frameworks around the globe, Part III of this article will propose a unique framework for arbitral appeals, which should be considered for adoption by the Indian arbitration institutions.

II. The Rationale of Arbitral Appeals

Part II of this article endeavours to highlight the importance of an appellate review in any kind of dispute resolution system, and settle the debate on the viability of appellate arbitration, after critically analysing the arguments presented for and against the same. Additionally, the growing demand of appeal options in arbitration would also be highlighted to understand their desirability. After persuading the reader in favour of the viability and desirability of an appeal mechanism in arbitration, this part would form the foundation on which part III of the article proposes the precise standards of appellate review of arbitral awards.

A. The importance of appeal

i. History and significance of appellate review

The justice delivery system has, since time immemorial, provided an appellate mechanism to challenge the decision of a court in front of a higher authority.[8] This concept traces its roots in the Roman law procedure of *appellatio*, where a party aggrieved by a judgment could challenge it all the way up to the level of the monarch.[9] The reason such appellate review was offered is to account for the errors that can occur owing to the human fallibility of a judge.[10] Additionally, the greater

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5 THOMAS E. CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION 466–70 (3d ed. 2002).

6 William H Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT'L. ARB. 531, 563 (2000) [*hereinafter* "Knull & Rubins"]; Paul Bennett Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator*, 60 DISP. RESOL. J. 485, 486 (2005) [*hereinafter* "Marrow"]; Axay Satagopan, *Conceptualizing a Framework of Institutionalized Appellate Arbitration in International Commercial Arbitration*, 18 PEPP. DISP. RESOL. L.J. 325, 348–350 (2018) [*hereinafter* "Satagopan"]; Irene Ten Cate, *International Arbitration and the Ends of Appellate Review*, 41 N.Y.U. J. INT'L L. & POL. 1109, 1110–11 (2011) [*hereinafter* "Cate"]; *See also* Lord Dyson, *Lectures and Addresses: Finality in Arbitration and Adjudication The Eversheds Lecture 2000*, 66(4) INT'L J. ARB. MED. & DISP. MGMT. 288 (2000) ("The more generous the scope for challenging decisions by appeal or review, the greater the chance of eliminating error.").

7 *Id.*; *see also* Aashesh Singh & Swarna Sengupta, *Second Bite at the Arbitration Apple: Analysing the Applicability and the Utility of the Internal Appeal Mechanisms in Commercial Arbitrations in India*, 11 NUJS L. REV. 4 (2018).

8 Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 469–70 (1998) [*hereinafter* "Drahozal"].

9 BRYAN A. GARNER, BLACK'S LAW DICTIONARY 856 (8th ed. 2004).

10 Mateus Aimoré Carreteiro, *Appellate Arbitral Rules in International Commercial Arbitration*, 33 J. INT'L. ARB. 185, 189 (2016) [*hereinafter* "Carreteiro"].

experience and expertise of appellate judges and deliberative decision-making of the appellate benches would likely enable the appellate review to rectify substantive errors of the lower courts.[11]

However, this omnipotence of appeals in most jurisdictions does not evince in the form of a substantive uniformity across all legal systems. The function and purpose served by an appeal vary in civil law countries and common law countries. In common law jurisdictions, the appellate courts are entrusted with the purpose of substantive error correction and the development of the law.[12] However, error correction is the primary function of an appeal in a civil law court.[13] In addition to the purpose, the scope of an appeal is also moulded by reasons of appellate hierarchy, quality of adjudication, and specifically, the expertise of the court concerned.[14] This division of labour in adjudication leads to better collective decision-making and forms the backbone of an effective legal system.[15] Therefore, an appeal mechanism not only brings legal and factual accuracy to the decisions, but also improves the general legitimacy of decision-making by increasing the quality and quantity of adjudicators.

ii. Demand for appeal in arbitration

Arbitration has seen usage throughout our history and has been generally without any appellate mechanism.[16] This absence of an appellate review was reasoned on grounds such as arbitration being a genesis of the agreement between the parties, ensuring the finality of the award and efficiency in the process, and protecting the honour of the arbitrator.[17] This position of a systemic absence of arbitral appeal was codified in the New York Convention, which became the constitution of modern commercial arbitration.[18] Therefore, the modern arbitration ushered in an apparent paramountcy of arbitral finality.

However, the increase in the complexity of the transactions being arbitrated increased the possibility of errors in the awards.[19] The tolerance of errors in the name of arbitral efficiency also decreased as the amount in disputes started increasing, resulting in significant consequences for the parties.[20] This led to an increasing demand of appellate review in arbitration, which is evinced

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11 *Id.* at 190; *see also* Drahozal, *supra* note 8.

12 Carreteiro, *supra* note 10, at 190; Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 316–317 (2009) [*hereinafter* "Oldfather"]; *see also* Lester B. Orfield, *Appellate Procedure in Equity Cases: A Guide For Appeals At Law*, UNIV. PA. L. REV. 563, 563–654 (1942).

13 Carreteiro, *supra* note 10, at 196; PAUL CARRINGTON, DANIEL MEADOR & MAURICE ROSENBERG, JUSTICE ON APPEAL 3 (1976). *See also* Nina Nicholas Pugh, *The Structure and Role of Courts of Appeal in Civil Law Systems*, 35(5) LA. L. REV. 1163, 1199–1200 (1975).

14 Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 439–440, 443 (2004).

15 Carreteiro, *supra* note 10, at 190; David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 74 (2003).

16 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 80 (3d ed. 2020).

17 REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 528–529 (1996); Ivan Milotic, *Exclusion of Appeals Against Arbitration in Roman Law*, 20 CROAT. ARB. Y.B. 241(2013).

18 *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S 4739 [*hereinafter* "New York Convention"].

19 Knull & Rubins, *supra* note 6, at 540–541.

20 Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. DISP. RESOL. 343, 348 (1995); Tom Cullinan, *Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements*, 51 VAND. L. REV. 395, 400 (1998).

by its affirmation by leading practitioners.[21] Furthermore, few studies and surveys endorsed that there is an increasing demand for arbitral appeals by businesses.[22] This empirical endorsement adds up when seen in light of the fact that a few arbitration institutions have already started offering appeal options.[23] Therefore, it is clear that the objections on arbitral appeal mechanism are ignoring the direction where the arbitration community is moving towards.

B. Settling the debate on the appeal of arbitral appeal

i. Sacrificing "finality" for justice

When introducing the idea of arbitral appeals, scholarship object to it by stating that any attempt at meddling with arbitral finality would compromise arbitration's essence.[24] They stress that any kind of judicialization through an appellate review would stymie the arbitral process and make it similar to litigation.[25] Such objections are specious and have to be refuted by viewing the concept of finality in its historical context. The New York Convention aimed to bind its member states to recognise and enforce international arbitral awards and end the common "*second-guessing*" of arbitral awards by local courts,[26] which were obstructions to the seamless international trade and arbitration.[27] This culminated in the form of the principle of finality of arbitral awards, which is construed as a key principle of international arbitration.[28] However, it must be recognised here that it was the party autonomy and freedom of contract that gave birth to arbitration and ensured its finality. Therefore, arbitral finality was only a characteristic feature of arbitration, which was the

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21 Christopher R. Drahozal, *Of Rabbits and Rhinoceri: A Survey of Empirical Research on International Commercial Arbitration*, 20(1) J. INT'L ARB. 23 (2003).

22 David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*, Cornell/PERC Institute on Conflict Resolution (1998), at 26, *available at* https://ecommons.cornell.edu/handle/1813/76218; *see also* David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1(1) UNIV. PA. J. LAB. & EMP. L. 133, 148 (1998); CHRISTIAN BÜHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 107–08 (2d ed. 2006). *Contra* Bryan Cave Leighton Paisner, *Annual Arbitration Survey 2020, A right of appeal in International Arbitration – A second bite of the cherry: Sweet or Sour?* (2020), *available at* https://www.bclplaw.com/images/content/1/8/v2/186066/BCLP-Annual-Arbitration-Survey-2020.pdf.

23 *The Korean Commercial Arbitration Board: An Interview with Gary Born*, 4 KOR. ARB. REV. 50, 52 (2014).

24 Nana Japaridze, *Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration*, 36(4) HOFSTRA. L. REV. 1415, 1418; Hilary Heilbron, *Dynamics, Discretion, and Diversity: A Recipe for Unpredictability in International Arbitration*, 32(2) ARB. INT'L 261, 273 (2016); Caroline Larson, *Substantive Fairness in International Commercial Arbitration: Achievable through an Arbitral Appeals Process?*, 84(2) INT'L J.ARB., MEDIATION & DISP. MGMT. 104, 110 (2018) [*hereinafter* "Larson"].

25 Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147 (1997); Kevin A. Sullivan, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards under the Federal Arbitration Act*, 46(2) ST. LOUIS UNIV. L.J. 509, 511 (2002).

26 Amy J Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality through Functional Analysis*, 37 GA. L. REV. 123, 131(2002); Larson, *supra* note 24, at 107.

27 Hiro N Aragaki, *Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice,* 2016 (1) J. DISP. RESOL. 141, 153 (2016); *See also* THOMAS HALE, BETWEEN INTERESTS AND LAW: THE POLITICS OF TRANSNATIONAL COMMERCIAL DISPUTES 28 (2015).

28 GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 11 (2d ed. 2016).

result of an agreement between parties.[29] It follows that the demand for modifying the arbitral process cannot be objected on the status quo ground of arbitral finality.[30]

Further, as arbitration grew, it was realised that legal accuracy was being traded off for finality.[31] Commenting on this trade-off, it was stated that absolute arbitral finality can only be accepted if arbitrators are immune to human fallibility, they commit tolerable errors, and any attempt at error correction would be inefficient.[32] If any of these preconditions are absent, then the parties will be left with an erroneous award and limited recourse.[33] Additionally, it was also pointed out that the attraction of arbitration was not primarily owing to arbitral finality.[34] To the contrary, when arbitrating high-stakes disputes, it would be undesirable to trade finality for accuracy.[35]

Perhaps arbitration has to evolve and acknowledge that the risk in arbitrating highly complex and valuable international transactions must be offset with an appellate mechanism aimed to correct any substantive errors.[36] The desirability of such mechanism increases when we consider that it would improve the standards of arbitral adjudication and the long-term legitimacy of the whole system.[37] Therefore, recent trends in arbitration prompt us to not discard accuracy of justice because of arbitral finality, especially considering that the consumers of the modern arbitration regime demand both arbitral finality and arbitral justice, or sometimes only the latter.

ii. *Ineffectiveness of setting aside application*

One of the arguments against appellate arbitration is that recourse is available to an aggrieved party through a setting aside application or refusing enforcement at the local court. This argument is specious considering that the New York Convention has a pro-enforcement bias and only gross procedural improprieties or public policy concerns could set aside the award.[38] Therefore, the arbitrator's award essentially becomes free from any substantive review on merits.[39] The downside of this pro-enforcement regime is that the "*decisional sovereignty of the arbitrator is sometimes close to a*

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29 Jessica L. Gelander, *Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations*, 80(2) MARQ. L. REV. 625, 626 (1997) [*hereinafter* "Gelander"]; Rowan Platt, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?*, 30(5) J. INT'L. ARB. 531, 534 (2013).

30 Lord Mustill, *A Commercial Way to Justice*, 63(1) ARB.: INT'L J. ARB., MEDIATION & DISP. MGMT. 15, 17 (1997); Thomas J. Stipanowich, *Arbitration: The 'New Litigation'*, 2010(1) UNIV. ILL. L. REV. 1, 52 (2010) [*hereinafter* "Stipanowich"]; Di Jiang-Schuerger, *Perfect Arbitration = Arbitration + Litigation?*, 4 HARV. NEGOT. L. REV. 231, 246, 251 (1999).

31 Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2nd Cir. 1972) (U.S.); *see also* Knull & Rubins, *supra* note 6, at 540.

32 Knull & Rubins, *supra* note 6, at 541.

33 Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63(1) ALB. L. REV. 241 (1999); Margaret L. Moses, *Can Parties Tell Court What to Do? Expanded Judicial Review of Arbitral Awards*, 52 UNIV. KAN. L. REV. 429 (2004).

34 Martin Hunter, *International Commercial Dispute Resolution: The Challenge of the Twenty-first Century*, 16(4) ARB. INT'L 379, 382 (2000). *See also* AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740 (2011) (U.S.) (wherein the court commented that arbitral finality will not be suitable for disputes with very high stakes considering that the award would never be reviewed on its substantive merits.).

35 Mauro Rubino Sammartano, *The Fall of a Taboo: Review of the Merits of an Award by an Appellate Arbitration Panel and a Proposal for an International Appellate Court*, 20(4) J. INT'L ARB. 387, 388–390 (2003); Knull & Rubins, *supra* note 6, at 539–540.

36 Duncan Wallace, *Control by the Courts: A Plea for More, Not Less*, 6(3) ARB. INT'L. 253, 258 (1990); Marrow, *supra* note 6.

37 Satagopan, *supra* note 6, at 368; Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40(3) TEX. INT'L L. J. 449, 456–457 (2005).

38 REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 606, 642 (Alan Redfern, Martin Hunter, Constantine Partasides & Nigel Blackaby eds., 6th ed. 2015).

39 Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 397 (2009).

divine right."[40] The problems with an unchecked authority culminating into a final award (highlighted above in Part II.B.i of this article) are exacerbated by the fact that most arbitration clauses are considered boilerplate in commercial agreements signed by parties, with their implications not being deliberated enough on the negotiation table.[41] Therefore, parties who contently trust the arbitral process are hardly aware that the adjudication of the merits of their dispute can be a hostage to the idiosyncrasy of an arbitrator and without any review mechanism.

Furthermore, even if an aggrieved party is successful in setting aside the award through a competent court, it still does not resolve the dispute, and resets the dispute cycle.[42] Therefore, a setting aside application, despite being allowed in certain cases, proves to be futile and antithetical to the business interest involved. However, if an appeal mechanism is introduced, it would allow review of the award on procedure and merits, and save costs by correcting the award without court's interference, which would provide a solution to the futility of a setting aside application. This is important to maintain a fine balance between finality and justice through an appellate review.[43]

iii. Improved decision-making of arbitrators

Introducing appeals, apart from serving the purpose of error correction, would also serve a latent purpose culminating into better decision-making by the arbitrators. First, it has been observed that an appellate review performs a latent function of error avoidance in the dispute resolution system.[44] Error avoidance essentially means that owing to the possibility of an appellate review, the first instance adjudicator adopts a more cautious approach in the adjudication.[45] This is because there is a concern of reversal of their judgment, if it contains factual or legal inaccuracies.[46] This function has been observed uniformly in both civil and common law courts.[47] Therefore, it is likely that an arbitrator would draft their award prudently, and evince rationality in adjudication if there is a chance of reversal of the award by an appellate tribunal, as it happens in litigation.

Second, appellate reviews are generally assessed by a bench of multiple judges owing to the juridical belief that the number of judges would improve the decision-making of the court.[48] Two reasons have been put forth behind this belief. First, the statistical probability of an erratic decision is reduced by an increase in the number of judges.[49] Second, a bench of multiple judges will always decide after due deliberation among themselves, which is bound to remove individual

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40 Thomas E. Carbonneau, *The Revolution in Law through Arbitration*, 56 CLEV. ST. L. REV. 233, 266 (2008).

41 Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions Of attorneys And Business People: A Forced Rank Analysis*, 30(5) INT'L BUS. LAW. 203 (2002).

42 Antonio Sánchez-Pedreño Kennaird, *An Appellate Procedure in Arbitration? The Present State of Play*, *in* INTERNATIONAL ARBITRATION UNDER REVIEW: ESSAYS IN HONOUR OF JOHN BEECHEY 379 (Andrea Carlevaris, Laurent Lévy, Alexis Mourre & Eric A. Schwartz eds., 2015).

43 Gelander, *supra* note 29.

44 Cate, *supra* note 6, at 1110–11.

45 Oldfather, *supra* note 12.

46 David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56(1) VAND. L. REV. 57, 74 (2003).

47 Cate, *supra* note 6, at 1147; Mathilde Cohen, *Reason Giving in Court Practice: Decision-Makers at the Crossroads*, 14(2) COLUM. J. EUR. L. 257, 265–270 (2008).

48 Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61(6) VAND. L. REV. 1745, 1803–1806 (2008).

49 Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 THEORETICAL INQUIRIES IN L. 87, 88–89 (2002).

idiosyncrasies from the judgment.[50] Additionally, the exchange of viewpoints among the bench improves decision-making, especially for the legal issues concerned.[51] Similarly, the application of an appellate review mechanism in arbitration is likely to improve the quality of arbitral adjudication because of the combined effect of error avoidance and deliberative decision-making.

iv. A step towards systemic substitution of courts

An ideated object of arbitration is the substitution of courtrooms with arbitration rooms.[52] Arbitration is fairly popular among corporates for being an efficient mode of dispute resolution.[53] Yet, it is has faced certain shortcomings such as lack of qualified arbitrators, asymmetrical arbitral administrative standards, difficulties with arbitrator compromise, and absence of any appeal on substantive errors in the award.[54] These shortcomings should be taken care of so as to truly realise the object of systemic substitution of courts by arbitral tribunals. The part which can be played by appeal mechanisms is delineated herein.

1. Eliminating the Need of Contractual Expansion of Judicial Review of Awards

The lack of substantial review on merits of an arbitral award has prompted parties to proactively draft their arbitration agreement with an expanded scope of judicial review on the award.[55] The courts across the globe have taken different approaches when determining the validity of such agreements, with several jurisdictions holding such expansions as legally impermissible.[56] However, it has been argued that momentum is building in favour of their validity.[57] This momentum is an indication of the growing need for an appeal mechanism, which is required, since, a substantial review by court would be undesirable considering the lack of a supranational recognition of court orders setting aside awards, confidentiality concerns and the systemic deficiencies of litigation, including lack of party autonomy.[58] Therefore, if arbitral institutions start offering appeal mechanisms, it would eliminate the need for contractual expansion of judicial review and would aim at making the arbitral experience better for businesses.

2. Reduced Chances of Setting Aside Applications

Offering appeal mechanism will give a chance to the aggrieved party to be heard by a different tribunal, and it is very likely that after that appeal is dismissed, the party will have no choice but to

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50 Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81(1) CALIF. L. REV. 1, 51–56 (1993); Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97(8) MICH. L. REV. 2297, 2312–2333 (1999).

51 Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46(4) STAN. L. REV. 817, 848–849 (1994).

52 Stipanowich, *supra* note 30, at 36.

53 Fulbright & Jaworski L.L.P., *U.S. Corporate Counsel Litigation Trends Survey Findings*, (2004), at 10, *available at* http://www.fulbright.com/images/publications/15122612_1.PDF; Michael T. Burr, *The Truth About ADR: Do Arbitration and Mediation Really Work? (Corporate Legal Times)*, INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION (Feb. 1, 2004), *available at* https://www.cpradr.org/news-publications/articles/2004-02-01-the-truth-about-adr-do-arbitration-and-mediation-really-work-corporate-legal-times; John H. Henn, *Where Should You Litigate Your Business Dispute?*, 59(3) DISP. RESOL. J. 34, 36–38 (2004).

54 Charles E. Buffon & Joshua D. Wolson, *Antitrust Arbitration Counselling*, 19 ANTITRUST 31, 32–34 (2004).

55 *See* Leanne Montgomery, *Expanded Judicial Review of Commercial Arbitration Awards: Bargaining for the Best of Both Worlds*, 68 UNIV. CIN. L. REV. 529, 530 (1999) [*hereinafter* "Montgomery"].

56 Stipanowich, *supra* note 30, at 5.

57 Montgomery, *supra* note 55, at 554.

58 Knull & Rubins *supra* note 6, at 548.

trust the arbitral process. This is because the appeal will provide closure to the aggrieved party, which is a significant psychological advantage after the appellate arbitrator has modified or upheld the original award. This can lead to less setting aside applications, considering that in a single-tier arbitral process, the parties are simply willing to take a chance in a setting aside hearing.[59]

3. Strengthened Finality and Enforcement of Awards

The threat of the parties being left without any recourse or remedy after an incorrect award will not only create a disincentive for parties to choose arbitration, but also undermine the legitimacy of the whole system.[60] However, introducing the appeal mechanism will in turn increase the finality of the awards by ensuring a double check on the substance of the award. This can result in easy enforcement of the award, and will also strengthen the whole arbitration system.

III. Identifying the appropriate appellate mechanism

The only valid argument against an arbitral appeal could be that it will make the process costly and inefficient. This, however, can be ensured by tailoring an efficient arbitral appeal framework, which will also keep a tab on its costs. The existing institutions that offer a variant of arbitral appeal mechanisms are the International Institute for Conflict Prevention and Resolution ["**CPR**"],[61] JAMS,[62] American Arbitration Association ["**AAA**"],[63] and the European Court of Arbitration ["**ECA**"].[64] Additionally, some scholars have also proposed their own novel appeal mechanism.[65] This Part proposes a variant of such a framework, after critically analysing the existing and proposed arbitral appeal frameworks.

A. Agreement to appeal

An agreement to appeal would detail out the mode through which parties would be agreeing for arbitral appeal. The CPR,[66] JAMS[67] and AAA,[68] have a mechanism which requires the parties to expressly agree for an appeal. On the contrary, the ECA mandates that parties would have to expressly opt-out of the appeal mechanism; ergo, all their awards can be appealed unless the appeal has been waived through agreement.[69] Some authors have endorsed the approach of the ECA.[70]

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59 Devashish Bharuka, *Two-Tier Arbitration: Ensuring A Private Appellate Forum*, LIVELAW.IN (Mar. 2, 2020), *available at* https://www.livelaw.in/columns/two-tier-arbitration-ensuring-a-private-appellate-forum-153370.

60 Noam Zamir & Peretz Segal, *Appeal in International Arbitration—An Efficient and Affordable Arbitral Appeal Mechanism*, 35(1) ARB. INT'L 79, 79-93 (2019) [*hereinafter* "Zamir & Segal"].

61 International Institute for Conflict Prevention and Resolution (CPR), Appellate Arbitration Procedure 1999, *available at* https://www.cpradr.org/resource-center/rules/arbitration/appellate-arbitration-procedure [*hereinafter* "CPR Procedure"].

62 *See* JAMS, JAMS Optional Arbitration Appeal Procedure 2003, *available at* https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appeal_Procedures-2003.pdf [*hereinafter* "JAMS Procedure"].

63 American Arbitration Association (AAA), Optional Appellate Arbitration Rules 2013, *available at* https://www.adr.org/sites/default/files/AAA-ICDR_Optional_Appellate_Arbitration_Rules.pdf [*hereinafter* "AAA Rules"].

64 The European Court of Arbitration (ECA), Arbitration Rules of The European Court of Arbitration 2015, *available at* https://cour-europe-arbitrage.org/arbitration-rules [*hereinafter* "ECA Rules"].

65 Satagopan, *supra* note 6, at 370–389; Zamir & Segal, *supra* note 60, at 89–92.

66 *See* CPR Procedure, pt. I.

67 *See* JAMS Procedure, r. (b).

68 *See* AAA Rules, r. A-1.

69 *See* ECA Rules, art. 28.

70 *See* Zamir & Segal, *supra* note 60, at 90.

One scholar has devised his own Novel Appellate Arbitration Model ["**NAAM**"] for arbitral appeals.[71] This approach conditions permissibility of the appeal on the amount of the dispute. It provides that disputes below a certain threshold would not be permitted appeal, even if there is a contractual agreement to that effect. However, NAAM allows appeals above that threshold. The author has ramified this appealable threshold limit into two other thresholds, wherein, if the dispute comes below a certain amount, it would be appealable only if contractually agreed. Whereas, the disputes that are above that threshold would be mandatorily appealable unless parties expressly agree otherwise. The author has reasoned such a hybrid and paternalistic standard owing to little attention paid by parties to the dispute resolution clause, even in high-stake contracts.[72]

The approach adopted by the CPR, JAMS and AAA for an opt-in mechanism seems to defeat the very purpose of arbitral appeals because, generally, parties pay little to no attention to the dispute resolution clause when the deal is signed in the jovial atmosphere of the conference room.[73] At the other end, by allowing arbitral appeals through a blanket opt-in mechanism as practised by the ECA, is bound to increase the likelihood of arbitral award being appealed by the losing party and will thereby increase the costs involved. The approach adopted by NAAM seems to be the right combination of opt-in and opt-out mechanism in appeals. However, it fails to consider that benchmarking a threshold amount and basing the permissibility of an appeal on that is not only an impractical task, but also unfair to the parties in small disputes, who would want to arbitrate their dispute by an appellate tribunal, but fall short of the concerned quantitative limit of appealing. The author's concern for such parties arises due to two reasons. First, mandating such rules to permit a facility as important as appeal erodes the primacy of party autonomy by denying arbitral appeals to parties in small disputes, even after an agreement to that effect. Second, there are practical difficulties that will arise in setting an objective criterion based on the amount of the dispute for allowing arbitral appeals. Since it is difficult to ascertain an objective threshold amount that would justly qualify parties for appeal, it would be just to offer appeals, unless parties agree otherwise.[74] The solution to this problem is an appropriate appellate framework that would not only reduce the costs of an appeal, but also aim to deter and swiftly dismiss vexatious appeals. This would be ensured by the framework proposed in the following sub-parts. Thus, the only right way would be swallowing the bitter pill of adopting the opt-out mechanism in arbitral appeals.

B. The scope of appellate review

Both the CPR and AAA have a similar standard of review for allowing the appeal on facts and law. An appeal therein should involve a material error of law or an unsubstantiated factual determination.[75] However, perhaps a broader standard of review is recommended by JAMS, which offers the very standard of review that would have applied in the first-level appellate court of that jurisdiction.[76] Similarly, ECA provides for a de novo review of the whole dispute.[77] This substantial

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71 Satagopan, *supra* note 6, at 376.
72 *Id.* at 380–381.
73 John M. Townsend, *Drafting Arbitration Clauses: Avoiding the Seven Deadly Sins*, 58(1) DISP. RESOL. J. 28, 30 (2003).
74 To illustrate this point, we need to understand that the consumers of arbitration are increasing day by day and any threshold amount set can disqualify some parties with a 'relatively' small dispute to appeal their arbitrations.
75 *See* CPR Procedure, r. 8.2(a); AAA Rules, art. A-10.
76 JAMS Procedure, r. (d).
77 ECA Rules, art. 28.4.

scope of review has been endorsed by scholarship.[78] In contrast to this, NAAM has tried to balance the de novo review standard and the limited review standard.[79] This has been ensured by devising a two-step appellate review which would involve a *prima facie* review and an ensuing *detailed review*. The *prima facie* review will involve finding errors apparent on the face of the record that will allow it to go to the detailed review, which shall review of the merits of the case. Yet, this two-step requirement can be permitted to be converted into a detailed review by a contractual waiver. The object behind this hybrid standard is to save costs by dismissing vexatious appeals.[80]

The NAAM's process and standard of appellate review is a step in the right direction and can be procedurally modified to improve its efficiency. The author's proposal is that the *prima facie* review should be confined to written submissions by the parties, which would be reviewed by two arbitrators. These two arbitrators shall independently assess the written submissions and allow the appeal for a detailed review, or shall dismiss it at that stage itself. However, in case their decision is not unanimous, the appeal shall be automatically transferred for a detailed review, which may include oral hearings if the tribunal deems it fit. The reason for using written submissions is to improve efficiency, while the reason to use two arbitrators independently is to improve the quality of decision making. The following sub-part explains the importance of the composition of an appellate tribunal and proposes a suitable standard for such composition.

C. Appointment of appellate tribunal

The JAMS,[81] and CPR,[82] provide for a three-member appellate panel, unless the parties agree for a one-member tribunal. However, there are nuances regarding the procedure of such appointment. The CPR provides a list of candidates from which the parties will have to choose.[83] If the parties fail to agree on it, they have to submit a rank-ordered list of the CPR's candidates on whom they did not agree. Thereupon, the required number of candidates that have received the lowest combined score from the parties would be chosen. In case of a tie, the same shall be broken by the Institution. This is in contrast to the procedure in JAMS, where, in case of a deadlock persisting for more than a week, JAMS would proceed to appoint the tribunal.[84] The procedure in AAA is also similar, wherein, the AAA sends the parties a list of ten potential arbitrators.[85] The parties strike the names objected to, number the remaining names in order of preference, and return the list to the AAA. However, if this list is not returned by the party within the stipulated time period, all the names therein shall be deemed as acceptable to that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of the appeal tribunal to serve. Furthermore, AAA shall have the power to appoint the tribunal in case the parties are unable to agree on a composition, or for some other reasons due to which the tribunal could not be composed.[86] The ECA goes another step in restricting party autonomy by itself appointing the appeal panel

78 *See* Zamir & Segal, *supra* note 60, at 90.
79 Satagopan, *supra* note 6, at 385–86.
80 *Id.*
81 JAMS Procedure, r. (a).
82 CPR Procedure, r. 4.1.
83 *See* CPR Procedure, r. 4.2.
84 JAMS Procedure, r. (a).
85 *See* AAA Rules, r. A-5(a).
86 AAA Rules, r. A-5(b).

composed of three members.[87] Some authors have proposed the arbitral tribunal to be composed of two party-appointed arbitrators, so as to ensure trust in the process, and most importantly, reduce the costs.[88] Furthermore, they have also suggested that this even-numbered arbitral tribunal can be changed to an odd-numbered tribunal if the parties agree to do so. An addition to this abovementioned proposal, it is a suggestion that to avoid conflict of interest, it is proposed that these can be blindly appointed.

The mode of appointment of the appellate tribunal has to balance party autonomy and improve decision-making. This is because the high-handed approach of *sua sponte* appointment by the arbitral institution erodes party autonomy. However, giving complete freedom to the parties in appointing the appellate tribunal degrades the quality of decision-making because party-appointed arbitrators act as proxy counsel-arbitrators in the front of the presiding arbitrator during the tribunal's internal deliberations.[89] These diverging interests of party autonomy and the quality of arbitral decision-making have to be balanced while devising the appointment procedure. This can be assured if the two arbitrators during the *prima facie* review stage are appointed by the institution after considering the eligibility criteria mutually proposed by the parties. After their appointment, a detailed review shall be conducted by a panel presided by an arbitrator appointed mutually by the parties. In case of a deadlock, the institution would again have to appoint the presiding arbitrator after considering any eligibility criteria. Such restrictions might be antithetical to party autonomy, but would indeed be in the interest of the parties and lead to betted arbitral adjudication.

D. Miscellaneous considerations

In order to avoid uncertainty in the appeal process, it is necessary to provide for a time limitation to appeal, after which the appeal shall be considered as waived and the award of the first instance would become final. Only after the award has become final in this sense, it would be liable for enforcement or setting aside.

Another interesting consideration is with respect to the contents of the award—if appealed, an award would have two tribunals as its authors. The author proposes that in case the appeal is dismissed in the *prima facie* review stage, then the award of the first instance court would be considered final for setting aside and enforcement purposes. However, if the appeal goes into a full detailed review, then the appellate tribunal would be liable to issue an award on the dispute, which would be final for all fits and purposes in the court. Additionally, to prevent frivolous appeals, an appropriate authorisation to the appellate tribunal for imposing costs can also be made. These proposals, if applied after due consideration, have the potential to make appeals efficient.

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87 ECA Rules, art. 28.

88 Zamir & Segal, *supra* note 60, at 90.

89 Cate, *supra* note 6, at 1148–1151. It has been stated that party-appointed arbitrators in a tribunal are generally those with maximum predisposition towards the appointing party and minimum appearance of bias. Thus, this means that the party-appointed arbitrators would press their appointers' cause before the presiding member of the tribunal. This will affect arbitral decision-making, considering that only one independent mind of the presiding arbitrator would be adjudicating the dispute. *See also* Alan Scott Rau, *Integrity in Private Judging*, 38(2) S. TEX. L. REV. 485, 497–98 (1997).

IV. Conclusion

We have understood the omnipresence and importance of appellate review in a dispute resolution system, and have also acknowledged the arbitration-specific advantages of appeals. This settles the debate on the viability of the appeal mechanisms. The only remaining piece of the puzzle is maintaining efficiency and saving costs of the appellate review, which the proposed framework in this article endeavours to ensure to a significant extent. Thus, it is recommended that Indian arbitral institutions should deliberate on adopting such a system, which would make them the early innovators in the arbitration community, to open up their awards to appellate review. This would also offer numerous benefits such as channelling the demand of arbitral appeals to increase the arbitration tourism in India, increasing the legitimacy of arbitration by improved decision-making and reduction in the number of setting aside applications filed before Indian courts.