ARBITRATION VERSUS WRIT PETITION AGAINST THE STATE ENTITIES IN INDIA: HOW TO RESOLVE THE JURISDICTIONAL CONUNDRUM?

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Abstract

Imagine two different forums with two independent bases of jurisdiction, governing two different obligations between the same parties, and granting the same remedy. This exact situation lies at the heart of the unique interplay between writ petitions and arbitration clauses in the contracts with State entities in India. The jurisdictional overlap between writs and arbitral tribunals is the root of various problems explored in this article. To avoid this jurisdictional overlap, it is argued that the Courts entertaining writ petitions must create an objective criterion to differentiate between contractual and constitutional claims. They must refer the parties to arbitration in case of contractual claims while reserving the writ remedies for constitutional cases. In order to achieve the abovementioned objective, this article builds upon a solution from practice in investment arbitration and proposes a two-step test whereby the focus would not only be on the foundation of the obligation allegedly breached by the state entity but also on the object of the claim of the private party. This test will allow Courts to effectively enforce arbitration clauses as well as preserve the sanctity of the writ jurisdiction.

I. Introduction

Arbitrating with State entities remains a highly analysed subject, particularly from a foreign investment law perspective. However, a recent judgment of the Supreme Court of India[1] ["**Supreme Court**"] has triggered the discussion on the interplay between commercial arbitration with State entities and constitutional law. While related issues have been dealt with in numerous cases before,[2] the issue of whether to entertain writ petitions[3] against state entities despite the presence of an arbitration clause has returned to the spotlight with this judgment.

At the outset, this article outlines and analyses the recent Supreme Court ruling, which purports that the existence of an arbitration clause in a contract with a state entity does not oust the writ jurisdiction of the High Court under Article 226 of the Constitution of India **[Part II]**,[1] post which the nature and scope of writ petitions in India is discussed **[Part III]**. It then outlines the types of state-related contracts in India **[Part IV]**, and discusses the relevance of Section 8(1) of the Arbitration and Conciliation Act, 1996 ["**Act**"] vis-à-vis writ petitions **[Part V]**. The article then evaluates the potential issues related to the discussed ruling, such as the lack of the doctrines of *lis*

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1 Unitech Ltd. v. Telangana State Indus. Infrastructure Corp., (2021) SCC OnLine SC 99 (India) [*hereinafter* "Unitech"].

2 State of Uttar Pradesh v. Bridge & Roof Co., (1996) 6 SCC 22 (India) [*hereinafter* "Bridge & Roof"]; Harbanslal Sahnia v. Indian Oil Corp., (2003) 2 SCC 107 (India) [*hereinafter* "Harbanslal Sahnia"]; ABL Int'l Ltd. v. Export Credit Guar. Corp. of India, (2004) 3 SCC 553 (India) [*hereinafter* "ABL Int'l"]; Union of India v. Tantia Constr., (2011) 5 SCC 697 (India) [*hereinafter* "Tantia Const."]; Joshi Tech. Int'l v. Union of India, (2015) 7 SCC 728 (India)[*hereinafter* "Joshi Technologies"]; Ram Barai Singh v. State of Bihar, (2015) 13 SCC 592 (India) [*hereinafter* "Ram Barai Singh"]; State of Uttar Pradesh v. Sudhir Kumar Singh, (2020) SCC OnLine SC 847 (India) [*hereinafter* "Sudhir Kumar Singh"].

3 A writ petition is an action against the state/state entities filed before the Supreme Court or any High Court to enforce constitutional rights and fundamental rights or to seek redress against any injury or illegality caused due to contravention of the ordinary law. *See* DURGA DAS BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 133 (20th ed. 2011) [*hereinafter* "DURGA DAS BASU"].

pendens and *res judicata* **[Part VI],** as well as the overlap between contractual claims and constitutional law claims **[Part VII]**. Finally, the article outlines a potential solution in the form of a two-step test to resolve the jurisdictional overlap and streamline the claims **[Part VIII]** before concluding **[Part IX].**

II. Supreme Court: Arbitration clauses do not oust the writ jurisdiction

The question of whether the writ jurisdiction under Article 226 of the Constitution of India ["**Constitution**"] can survive alongside an arbitration agreement has been the subject of intricate judicial scrutiny over the years.[4] However, the issue persists and manages to reach the Supreme Court time and again. The Supreme Court recently dealt with this issue in *UNITECH Ltd.* v. *Telangana State Industrial Infrastructure Corporation (TSIIC)* ["**Unitech case**"], which led to a curious outcome.[5]

The factual matrix of the Unitech case emanates from a Development Agreement between a real estate development company, *UNITECH Ltd.* ["**Petitioner**"], and *Andhra Pradesh State Industrial Infrastructure Corporation*, which later became the *Telangana State Industrial Infrastructure Corporation* ["**Respondent**"], an entity of the State of Telangana.

According to the Development Agreement, the Respondent was required to allot plots of land to the Petitioner in order to carry out infrastructure development. The Petitioner was also required to make payments pursuant to the Development Agreement in order to obtain the plots of land. The Petitioner made the required payments at the specified intervals. However, the Respondent was unable to allot the land because the said land was tied up in litigation, which the state consequently lost. The tender released by the respondent prior to the signing of the Development Agreement explicitly stated that if the respondent could not allot the requisite land, the received contractual payments would be returned but without interest.[6]

The Petitioner then filed a writ petition under Article 226 of the Constitution requesting the single bench of the High Court to order the respondent to refund the contractual payments made together with the interest. Among other things, the respondent argued that there was an alternative remedy in the form of an arbitration clause in the Development Agreement, making the writ petition unmaintainable. The Respondent's argument was rejected, and the single bench held that the writ petition seeking *mandamus*[7] was maintainable.[8] On appeal, the division bench of the High Court reached the same conclusion.[9]

The Supreme Court agreed with the single and division bench of the High Court and held that the presence of an arbitration clause does not oust the writ jurisdiction under Article 226 of the Constitution.[10] The Supreme Court, further, held that whether public remedy would be suitable in the private law matters should be decided on a case-by-case basis. Finally, it was held that the

4 Bridge & Roof, (1996) 6 SCC 22 (India).
5 Unitech, (2021) SCC OnLine SC 99 (India).
6 *Id.*
7 A writ of mandamus is issued by a court to "compel performance of a particular act by a lower court or a governmental officer or body." *See* HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY 1113 (4th ed. 1968).
8 Unitech Ltd. v. Telangana State Indus. Infrastructure Corp., (2018) SCC OnLine Hyd 1921, ¶ 59 (India).
9 Telangana State Indus. Infrastructure Corp. v. Unitech Ltd., (2019) SCC OnLine TS 3424, ¶ 14 (India).
10 Unitech, (2021) SCC OnLine SC 99, ¶ 41 (India).

respondent as a state entity was always under the obligation of fairness and equality under Article 14 of the Constitution, which it did not fulfil.

The Supreme Court relied on a number of precedents stating that the arbitral jurisdiction and writ jurisdiction are not mutually exclusive because the obligation under Article 14 of the Constitution to be enforced through the writs, is independent and separate from the obligations enshrined in the contract.[11]

III. Nature and scope of writ jurisdiction in India

The term "*writ*" is defined as "*a court's written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing some specified act*."[12] In India, writ petitions are a public law litigation framework that enable the enforcement of the duties of the State or State entities, constitutional rights, and fundamental rights, etc.[13]

Writs are a common law construct originating in England. As noted by the Supreme Court in the case of *Rupa Ashok Hurra* v. *Ashok Hurra*,[14]

> "*In English law there are two types of writs - (i) judicial procedural writs like writ of summons, writ of motion etc. which are issued as a matter of course; these writs are not in vogue in India and (ii) substantive writs often spoken of as high prerogative writs like writ of quo warranto, habeas corpus, mandamus, certiorari and prohibition […] [that] are frequently resorted to in Indian High Courts and the Supreme Court.*"[15]

The writ jurisdiction in India emanates from two separate provisions of the Constitution. Article 32 of the Constitution governs the writ jurisdiction of the Supreme Court, and Article 226 governs the writ jurisdiction of the High Courts. The scope of the Supreme Court's writ jurisdiction under Article 32 is limited and enables parties to approach the Supreme Court for the enforcement of rights conferred by Part III of the Constitution, which concern the fundamental rights, including the Right to Equality (Articles 14–18), the Right to Freedom (Articles 19–22), etc.

On the other hand, the scope of the High Courts' writ jurisdiction under Article 226 is broader than the Supreme Court's jurisdiction under Article 32. Under Article 226, the High Courts can issue writs not only to enforce the rights conferred by Part III of the Constitution but also "*for any other purposes*." The phrase "*for any other purpose*s," entails a wide range of matters, including the possibility for the parties to seek "*redress against any injury or illegality caused due to contravention of the ordinary law.*"[16] Therefore, for issuing a writ under Article 226 of the Constitution, there need not necessarily be a breach of a specific constitutional or fundamental right. Any injury inflicted by the State or a State entity in the breach of ordinary law would be enough for the issuance of the writ.[17] It is interesting to note that this broad jurisdiction of the High Courts under Article 226 to issue

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11 *Id.*; Harbanslal Sahnia, (2003) 2 SCC 107 (India); ABL Int'l, (2004) 3 SCC 553, ¶ 52 (India); Ram Barai Singh, (2015) 13 SCC 592 (India); Sudhir Kumar Singh, (2020) SCC OnLine SC 847 (India).

12 *See* HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY 1784 (4th ed. 1968).

13 *See generally* Roychan Abraham v. State of Uttar Pradesh, (2019) SCC OnLine All 3935 (India).

14 Rupa Ashok Hurra v. Ashok Hurra (2002) 4 SCC 388, ¶ 6 (India); *See generally* Christopher Forsyth & Nitish Upadhyaya, *The Development of the Prerogative Remedies in England and India: The Student Becomes the Master?*, 23(1) NAT'L L. SCH. INDIA REV. 77 (2011).

15 *Id.*

16 DURGA DAS BASU, *supra* note 3.

17 ERBIS Eng'g Co. Ltd. v. State of West Bengal, 2011 SCC OnLine Cal 835, ¶ 9 (India).

writs for "*any other purposes*" would entail several different legal issues, which might not exclusively be public law matters and could have a mixed public-private character.[18]

In terms of potential respondents in writ petitions, the Supreme Court has clarified that writ petitions can be entertained against entities that constitute State under Article 12 of the Constitution,[19] which states:

> "*In this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.*"[20]

The phrase "*other authorities*" brings various state-related entities under the ambit of writ jurisdiction. To determine whether a particular entity is the "State" under Article 12 and consequently amenable to writ jurisdiction, the Supreme Court has outlined various factors to be considered, such as: (i) whether the entire share capital of the corporation is held by the Government; (ii) whether the financial assistance of the State is so much as to meet almost entire expenditure of the corporation; (iii) whether the corporation enjoys a monopoly status which is State-conferred or State-protected; (iv) whether there exists deep and pervasive State control; (v) whether the functions of the corporation are of public importance and closely related to governmental function; and (vi) whether a department of the Government has been transferred to a corporation.[21]

In summation, it can be said that writ jurisdiction in India provides a unique public law remedy to private individuals against the State or State entities, which enables the private individuals to enforce their fundamental rights, the State's duties or even seek redressal against the violation of ordinary law by the State or State entity.

IV. Types of state-related contracts in India

Before diving deeper into the issues relating to the overlap between arbitral jurisdiction and writ jurisdiction, it is essential to outline the kinds of State-related contracts that exist in India. There are three kinds of contracts in India that involve State or State entities – constitutional contracts, statutory contracts, and purely commercial contracts. The constitutional contracts (government contracts) are governed by Article 299 of the Constitution and are "*made in the exercise of the executive power*" of the Union of India or the relevant State governments.[22] Since the formal and substantive basis of the constitutional contracts is the Constitution, actions such as writ petitions are maintainable in relation to disputes arising out of such contracts.[23]

Statutory contracts are contracts made in the exercise of the power conferred upon a specific governmental authority under a statute. Additionally, such contracts incorporate the specific terms

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18 Example of cases involving public–private character are writ petitions against private institutions discharging public functions. *See* S.C. Sharma v. Union of India, 2007 SCC OnLine Del 1403, ¶ 16 (India).

19 Pradeep Kumar Biswas v. Indian Inst. of Chemical Biology, (2002) 5 SCC 111, ¶ 71 (India); Fed. Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733 (India).

20 INDIA CONST., art. 12.

21 Ramana Dayaram Shetty v. Int'l Airport Auth. of India, (1979) 3 SCC 489 (India); GM, Kisan Sahkari Chini Mills Ltd. v. Satrughan Nishad, (2003) 8 SCC 639 (India).

22 INDIA CONST., art. 299.

23 Joshi Technologies, (2015) 7 SCC 728, ¶¶ 57, 59 (India).

and conditions specified in the relevant statute.[24] In the case of statutory contracts, if the State entity breaches the terms of the contract, it would mean that it has breached the obligations conferred by the statute. Since the statute is a public law instrument, in case of breach of a statutory obligation, a public law remedy through a writ petition would be maintainable.[25]

Finally, there are purely commercial contracts between the State/State entities and private parties, where the terms of the contracts govern the rights and liabilities of the parties.[26] While the article attempts to focus on the third kind, i.e., the purely commercial contracts between the State/State entities and the private parties; it is worth highlighting that the lines between the abovementioned kinds of contracts have constantly been blurring.[27] The characterisation is often influenced by the Court's perception of the kind of contract that the State has executed and would depend upon the facts of each case. In other words, in the process of characterising the contract, there is no straitjacket formula to determine whether the contract or the dispute arising out if it inherently involves a public law element.[28] Therefore, sometimes it is challenging to precisely define the kind of contract, i.e., subject to litigation through the writ petition as the characterisation is fact-intensive.

V. Relevance of Section 8(1) of the Indian Arbitration Act vis-à-vis writ petitions

At the outset, it is worth exploring the relevance of Section 8 of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"], which is based on Article 8 of the United Nations Commission on International Trade Law ["**UNCITRAL**"] Model Law on International Commercial Arbitration ["**Model Law**"]. Section 8(1) of the Arbitration Act states that:

> "*A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.*"

The necessary elements for the application of Section 8(1) are: (i) an action before a judicial authority; (ii) which is subject to an arbitration agreement; and (iii) request for referral to arbitration is filed before the date of submitting the first statement of substance on the dispute.

The term "*judicial authority*" is quite broad and could extend its umbrella over all the Courts, including the Supreme Court and High Courts (collectively referred to as "Constitutional Courts"), and bring them under the ambit of Section 8(1). Similarly, the term "*action*" is broad and encompasses any action, including a lawsuit and a writ petition.[29] The indication provided by such analysis is that a request for referral to arbitration may be made in the subsistence of a writ action. However, no reference to such request for referral has been made in the Unitech case despite its

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24 India Thermal Power Ltd. v. State of Madhya Pradesh, (2000) 3 SCC 379, ¶ 11 (India); Jaypee Kensington Boulevard Apartments Welfare Ass'n v. NBCC (India) Ltd, (2021) SCC OnLine SC 253 (India).

25 Verigamto Naveen v. Gov't of Andhra Pradesh, (2001) 8 SCC 344, ¶ 21 (India).

26 Radhakrishna Agarwal v. State of Bihar, 1977 AIR 1496, ¶ 12 (India) [*hereinafter* "Radhakrishna"]; Noble Resources Ltd v. State of Orissa, (2006) 10 SCC 236, ¶ 16 (India).

27 *See generally* Ravindra Kumar Singh, *Adjudicating the Public–Private Law Divide: The Case of Government Contracts in India*, 50(1) VERFASSUNG UND RECHT IN ÜBERSEE LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA 54 (2017).

28 Gopal Glassworks Ltd. v. Union of India, (Gujarat HC) Special Civil Application No. 11916 of 2012, ¶ 10.5 (India).

29 *Action*, BLACK'S LAW DICTIONARY 49 (4th ed. 1968).

potential potency in supporting the respondents' arguments regarding the maintainability of the writ petition. Consequently, neither the High Court nor the Supreme Court discussed the application of Section 8(1) to the case at hand, making it unclear whether a different outcome could have been expected if reliance were placed on this provision to enforce the arbitration agreement.

Having stated the above, the interplay between Section 8(1) and writ petitions is unclear. As such, Section 8(1) is primarily directed towards actions filed before domestic civil/commercial courts. Therefore, it is worth considering the interaction between Section 8(1) and domestic civil/commercial courts. It is worth pointing out that Section 8(1) applies to claims where the judicial authority and the arbitral tribunal have *prima facie* concurrent jurisdiction over the matter. This is apparent from the language of Section 8(1), which states that "*an action*" before a judicial authority must be "*[…] brought in a matter which is the subject of an arbitration agreement […]*" and that application for referral to arbitration has to be filed "*[…] not later than the date of submitting his first statement on the substance of the dispute […]*." It has been held that the first statement on the substance in this context, would be the written statement.[30] The obligation, as well as the timeline to file the written statement, is triggered only when summons are issued against the defendant.[31] In turn, the summons can be issued only after the proper institution of the lawsuit,[32] which is further dependent upon the plaintiff satisfying *prima facie* jurisdictional parameters.[33] Hence, the first statement on the substance of the dispute cannot be filed without the court being satisfied of the *prima facie* jurisdiction. Therefore, the judicial authority approached under Section 8(1) and the arbitral tribunal will naturally have *prima facie* concurrent jurisdiction.

On the other hand, the settled position of law as reiterated in the *Unitech* case, is that the writ jurisdiction exists independently of the arbitration agreement.[34] Therefore, it is hard to imagine how Section 8(1) will apply to the writ petition, given that there is no *prima facie* concurrent jurisdiction between the arbitral tribunal and the Constitutional Courts. Simply put, writ jurisdiction is anchored to the constitution and governs the constitutional obligations as well as public law obligations. On the contrary, the arbitral jurisdiction is anchored to the arbitration agreement and exclusively governs the obligations relating to and arising out of the contract.

There appears a presumption that if writ jurisdiction under Article 226 of the Constitution has been preferred, then there must have been a breach of an obligation originating in the Constitution. In other words, in the *Unitech* case, when the Supreme Court answered in the affirmative the question of maintainability of the writ petition in the presence of an arbitration agreement, reliance was exclusively placed on the origin of the obligations of the State/State entity, which was found to be constitutional.[35]

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30 Sharad P. Jagtiani v. Edelweiss Securities Ltd., (2014) SCC OnLine Del 4015, ¶ 15 (India). Under Indian law, the written statement means the statement of defence.

31 CODE CIV. PROC., No. 5 of 1908, Order VIII, r. 1 (India) [*hereinafter* "CODE CIV. PROC."].

32 *Id.* Order V, r. 1.

33 *Id.* § 16; *Id.* Order IV, r. 1; *Id.* Order VII, r. 11. Under Indian law, the plaint means the statement of claim. *See also Plaint*, BLACK'S LAW DICTIONARY 1308 (4th ed. 1968).

34 Unitech, (2021) SCC OnLine SC 99 (India).

35 *Id.*

Interestingly, in various cases, including the *Unitech* case, the scope of Article 226 of the Constitution was the issue in question and yet only the breach of constitutional obligations was argued and ruled upon.[36] This is particularly noteworthy because, as mentioned above, the scope of the High Court's writ jurisdiction under Article 226 of the Constitution goes beyond the Constitution and empowers the High Courts to redress "*any injury or illegality caused due to contravention of the ordinary law*."[37] Therefore, while the scope of Article 226 is being scrutinised constantly, the impact of arbitration clauses on the broad jurisdiction conferred by Article 226 remains uncertain.

In any case, the approach of solely considering the obligations of the respondent in establishing jurisdiction could result in the enforcement of contractual claims under the garb of breach of constitutional obligations. In order to avoid such issues, there is a need to independently and objectively identify whether the relief requested by the private party through a writ petition would remedy the contractual breach.

It is a well-recognized principle that writs are an extraordinary remedy and must be exercised judiciously.[38] Allowing contractual breach claims relying on the breach of constitutional law obligations through writs could become a slippery slope and unleash a barrage of proxy constitutional claims for remedying the contractual breach. This issue has been discussed in detail in the latter part of the article (see Part VII below).[39]

VI. *Lis pendens* and *res judicata* vis-à-vis arbitration and writ petition

While the Supreme Court ruled that the presence of an arbitration clause in a contract with a state entity does not oust writ jurisdiction,[40] it did not deal with the effects of the interplay between both the forums. The ruling could have far-reaching effects in terms of exposing the State/State entities to multiple parallel claims.

Let us consider the following scenarios:

(i) An arbitral tribunal constituted prior to filing the writ petition (simultaneous arbitration and writ petition).

(ii) An arbitral tribunal constituted after filing the writ petition (simultaneous arbitration and writ petition).

(iii) An arbitral tribunal constituted after the decision on the writ petition.

(iv) A writ petition filed after the rendering of the arbitral award.

In scenarios (i) and (iii), it is not clear how the issue of parallel or simultaneous proceedings is to be dealt with in the case of arbitration and writ petition. A flurry of practical questions emerges in this context, such as – should either forum exercise any deference towards another? Should the High Court hearing a writ petition filed under Article 226 of the Constitution evaluate whether

36 ABL Int'l, (2004) 3 SCC 553 (India); Sudhir Kumar Singh, (2020) SCC OnLine SC 847 (India); Unitech, (2021) SCC OnLine SC 99 (India).
37 DURGA DAS BASU, *supra* note 3.
38 Indian Tobacco Corp. v. State of Madras, AIR 1954 Mad 549, ¶ 6 (India).
39 *See* discussion *infra* Part VII.
40 *Id.*

there is a constitutional law obligation at stake in the case, given that the arbitral tribunal is already constituted? Is the arbitral tribunal required to exercise any deference to the fact that the claim was initially filed before the High Court or the Supreme Court?

All of the above questions are tough to answer, because of the lack of clarity on whether there is a concept of *res sub judice* or *lis pendens*[41] between the courts and arbitration. This is because arbitration is detached from local litigation and civil procedure framework governing civil court practices that generally provide for the application of doctrines of *res judicata* and *lis pendens*.[42] From a practical standpoint, one way around this issue could be for one of the parties to get an anti-arbitration injunction or an anti-suit injunction. This would exclude the parallel proceedings before their germination.

However, this leads to a bigger question – whether anti-suit injunctions can oust the writ jurisdiction of the Constitutional Courts, particularly given that anti-suit injunctions are enforceable against the party and not the forum?[43] Moreover, an anti-suit injunction can be applied only when two forums share concurrent jurisdiction,[44] which is not the case with writ petitions and arbitration. Additionally, since writ remedies are anchored to the Constitution, even when a writ petition is filed after the arbitral tribunal is constituted, arguably, the Constitutional Courts may still evaluate issues pertaining to constitutional obligations of the State entity. Furthermore, in the case of an India-seated arbitration, it is unlikely that an Indian trial court will grant an injunction at the outset and restrain a party from filing or pursuing a writ petition, given that writ remedies are a cornerstone of the Indian constitutional system.[45]

A further problem arises when an arbitral tribunal is constituted after the writ petition has been filed. The key question in this context is whether the arbitral tribunal should take a deferential view since the action is pending before the Supreme Court or the High Court? Arguably, since an Arbitral Tribunal's jurisdiction emanates from the arbitration agreement, it does not necessarily have to exercise any deference as long as the jurisdictional requirements of the arbitration agreement are fulfilled. Since neither of the fora is required to defer to another, the situation appears to be a fertile ground for parallel proceedings.

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41 *Lis pendens* is a civil law principle which refers to a lawsuit currently under consideration before a forum. The common law equivalent of *lis pendens* is *res sub judice*, which is codified under Section 10 of the CODE CIV. PROC. The doctrine of *res sub judice* provides that "if an issue is already pending before a judicial authority, the same issue, if it comes subsequently before another judicial authority, should not be proceeded with." *See* Sidharth Sharma, *The Chief Justice's Power to Appoint Arbitrators Under the Indian Arbitration Act*, 23(5) J. INT'L ARB. 467 (2006); *See also* AARON FELLMETH & MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW 179 (2009) [*hereinafter* "FELLMETH & HORWITZ"].

42 Arbitration and Conciliation Act, No. 26 of 1996, § 19(1) (India) [*hereinafter* "Arbitration Act"]; CODE CIV. PROC., §10 (India). The current legal position can be contrasted with the older position. Section 41 of the Arbitration Act 1940 stated that the CODE CIV. PROC. shall apply to all arbitration-related court proceedings. The Supreme Court had interpreted this provision broadly and held that CODE CIV. PROC. would apply to arbitral proceedings as well. *See* K.V. George v. Sec'y to Govt., Water & Power Dep't, (1989) 4 SCC 599 (India) [*hereinafter* "K.V. George"]. While various aspects of K.V. George have been referred and relied upon by the Delhi High Court in a recent case, the High Court specifically reiterated the principles of Section 19(1) of the Arbitration and Conciliation Act, 1996 that CODE CIV. PROC. does not apply to the arbitral proceedings. *See* Gammon India v. National Highways Auth., (2020) SCC OnLine Del 659 (India) [*hereinafter* "Gammon India"]. Therefore, the K.V. George precedent on CODE CIV. PROC.'S applicability to arbitration proceedings can be considered overruled *sub silentio.*

43 BLACK'S LAW DICTIONARY (11th ed. 2019).

44 Modi Entm't Network v. WSG Cricket, 2003 AIR SC 1177, ¶ 10 (India).

45 Nirmalendu Bikash Rakshit, *Right to Constitutional Remedy: Significance of Article 32*, 34 ECON. POL. WKLY. 2379 (1999).

At the same time, it is necessary to examine – to what extent are the arbitral and writ proceedings parallel? Arbitral proceedings, like civil trial procedures, include evidentiary proceedings involving detailed consideration of both documentary and oral evidence. On the other hand, writ petitions rarely involve any evidentiary proceedings and operate mainly on the basis of affidavits and counter affidavits[46] submitted by the parties.[47] Therefore, arbitral proceedings and writ proceedings can be simultaneous but not parallel as the procedural scope of both the proceedings is different.

From a policy perspective, there is an argument to be made in favour of dismissing a writ petition when arbitration has been initiated on the grounds that an arbitral tribunal is in a better position to appreciate the factual nuances of the case and is, therefore, a more appropriate forum for adjudication of fact-intensive issues emanating from a commercial contract. Such an argument would also be in line with the general legal principle that writ petitions should not be entertained in cases that "*demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed.*" [48]

Let us move to scenario (iii) and take the recent *Unitech* case as an example.[49] In the *Unitech* case, the Court, by allowing the writ petition, essentially ordered the State entity to repay the contractual money with interest since the contract was repudiated. If the Court had rejected the writ petition, would the petitioner still be entitled to arbitrate? Conversely, should the respondent State entity be allowed to go to arbitration after an adverse decision against it, under the writ petition? There are no clear-cut answers because there is no doctrine of *res judicata*[50] operating in cases where the matter has been decided by the Court and the arbitral tribunal has been constituted subsequently.[51] Although it is worth pointing out that under Indian law that "*the principles of res judicata apply to the arbitral proceedings.*"[52] However, this *res judicata* effect is purported to operate between two different arbitral tribunals. There is a lack of clarity on the issue of *res judicata* effect between an arbitral tribunal and a judicial Court.

Separately, under scenario (iv), if the writ petition is filed after the rendering of an arbitral award, there is a further point of concern. What if one of the parties lose in arbitration and then try to relitigate the issues before the Constitutional Courts by filing a writ petition? In such a case, the Courts would need to balance the constitutional remedies with the annulment remedy provided under Section 34 of the Arbitration Act to avoid re-litigation of the same issues. A similar situation

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46 Affidavits are a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths. BLACK'S LAW DICTIONARY 80 (4th ed. 1968). A counter affidavit is an affidavit made to contradict and oppose another affidavit. *Id.* at 419.

47 N.S. Bindra, *Writ of Mandamus: Disputed Question of Fact*, 2 SCC (JOUR) 24 (1972); Bharat Singh v. State of Haryana, 1988 4 SCC 534 (India).

48 Thansingh Nathmal v. Superintendent of Taxes, 1964 AIR SC 1419 (India); *See also* Gunwant Kaur v. Bhatinda Municipality, (1969) 3 SCC 769 (India).

49 Unitech, (2021) SCC OnLine SC 99 (India).

50 *Res judicata* is a principle whereby a matter upon which a final and binding judgment has already been passed is precluded from further re–litigation to avoid conflicting judgments on the same matter. The doctrine bars the "same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been—but was not—raised in the first suit." BLACK'S LAW DICTIONARY 1470 (4th ed. 1968); *See also* FELLMETH & HORWITZ, *supra* note 41, at 252.

51 *Contra,* discussion *supra* note 42.

52 Gammon India*,* (2020) SCC OnLine Del 659, ¶ 35 (India).

arose in the recent case where the Supreme Court took an arbitration-friendly approach and refused to entertain the writ petition.[53]

It is emphasised that these issues have a significant impact on dispute resolution with State entities as a whole. The absence of the doctrines of *lis pendens* and *res judicata*, together with the existence of the possibility of filing a writ petition to obtain a contractual remedy, would not only give private parties multiple bites at the cherry, but also expose the State entities to simultaneous claims.

On the other hand, there is an argument to be made that even if there were the concepts of *lis pendens* and *res judicata* between courts and arbitral tribunals, these issues would not arise as the proceedings before both the forums have separate origins and independent legal existence. For an action to be excluded on the grounds of *lis pendens* or *res judicata*, it has to satisfy the triple identity test, i.e., the identity of the parties (*persona*), the identity of the object (*petitum*), and the identity of the ground (*causa petendi*) need to be the same.[54] Given the separate origins of the writ jurisdiction and arbitration, the *causa petendi* would be different, and therefore, the triple identity test will not be satisfied. Hence, there is no possibility of *res judicata* and *lis pendens* between the matters pending before or decided by the Constitutional Courts and arbitral tribunals.

However, there is a potential for significant overlap between the remedies that could be granted in a writ and obtained from an arbitral tribunal. In fact, the Supreme Court has previously ruled that contractual matters are not barred from writ jurisdiction if they are sufficiently justified.[55] These overlaps are particularly concerning because the private parties would have the opportunity to obtain the same remedy twice, separately from different forums. Such overlaps, if not addressed, would defeat the overarching purpose of *lis pendens* and *res judicata*.

VII. Overlap between contractual remedies and writ remedies

Under Indian law, there is a duality of substantive standards governing State entities acting in a commercial capacity. According to the settled legal position,[56] State entities are, essentially, subject to dual standards of accountability, i.e., contractual standard and administrative/constitutional standard for the same relationship.

It is interesting to compare the abovementioned Indian legal position with French administrative law, under which State entities cannot arbitrate.[57] Therefore, as a general rule, private parties need to approach the designated administrative courts to resolve contractual disputes with the State entities under French law.[58] However, it is worth mentioning that State entities with industrial or commercial character or undertaking a professional activity can be permitted to arbitrate through a decree or a statutory provision.[59] Furthermore, French law recognizes two separate bodies of

53 Bhaven Constr. v. Sardar Sarovar Narmada Nigam, (2021) SCC OnLine SC 8, ¶ 26 (India).

54 CODE CIV. PROC., §§ 10, 11 (India); Andanur Kalamma v. Gangamma, (2018) 15 SCC 508, ¶ 21 (India); Kristomonee Dossee v. Denobundhoo Chowdhry, (1877) ILR 2 Cal 153, ¶ 6 (India); Harshad Pathak & Pratyush Panjwani, *Parallel Proceedings in Indian Arbitration Law: Invoking Lis Pendens*, 34(3) J. INT'L ARB. 509, 539 (2017).

55 ABL Int'l, (2004) 3 SCC 553, ¶ 52 (India); K. N. Guruswamy v. The State of Mysore, 1954 AIR 592, ¶ 17 (India).

56 Unitech, (2021) SCC OnLine SC 99 (India).

57 CODE DE PROCEDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE], art. 2060(1) (Fr.) [*hereinafter* "CODE DE PROCÉDURE CIVILE"]; PHILLIPE FOUCHARD & BERTHOLD GOLDMAN, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 313–314 (Emmanuel Gaillard & John Savage eds., 1999).

58 Kyum Lee, Florian Dessault, Aida Taban & Pierre Tricard, *The Dispute Resolution Review: France*, THE L. REV. (Feb 17, 2022), *available at* https://thelawreviews.co.uk/title/the-dispute-resolution-review/france.

59 CODE DE PROCEDURE CIVILE, art. 2061 (Fr.).

contract law—Administrative Contract Law and Private Contract Law.[60] The identity of the State entity as a party to the contract results in the application of Administrative contract law and excludes the application of Private contract law.[61] Therefore, even when the State entities are allowed to arbitrate, the arbitral tribunal must apply the administrative contract law.[62] Hence, the forum (arbitral tribunal or administrative courts) does not affect the law governing the obligation of the State entity under French law.

On the other hand, as mentioned earlier, under Indian law, there is a dual standard of accountability for State entities entering a contract with private parties. It is argued that this dichotomy of standards governing the accountability of the state entity is conceptually rooted in the modern-day Indian legal system's formative reliance on English law.[63] Under English law, unlike French law, there is no separate body of government or administrative contract law.[64] Therefore, all contracts, private and public, are governed by the same private contract law.[65] Consequently, under English law, the jurisprudence of judicial review (akin to writ petitions in India) developed independently alongside arbitral jurisprudence.[66]

Be that as it may, the juxtaposition of French law with Indian law reasserts a critical feature of State entity contracts. The State/State entities entering commercial contracts act in a hybrid capacity, with one foot in the public law sphere and another in the private law sphere. This brings back the practical dilemma and a long-standing conflict to the fore.[67] While there is a need to maintain oversight on the State entities through constitutional law, the law cannot close its eyes towards the State entities' freedom of contract.[68] The possibility of choosing a contractual dispute resolution forum such as arbitration for disputes arising out of this hybrid relationship only adds to the complexity of the situation.

The precarious consequences emanating from the above assessment are quite visible in the Indian legal context. As mentioned earlier, in India, there exists a dichotomy of substantive standards governing the State entities entering into contracts. Consequently, the breach of a specific standard reflects in the choice of a specific forum. On the one hand, if the State/State entity breaches a

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60 Joseph Minattur, *French Administrative Law*, 16(3) J. INDIAN L. INST. 364, 372 (1974); Ching-Lang Lin, *Arbitration in Administrative Contract: Comparative Law Perspective* 79 (June 30, 2014) (Ph.D. dissertation, Institut d'Etudes Politiques de Paris), *available at* https://spire.sciencespo.fr/hdl:/2441/46qcqc7kdq8klrqco8mqr24l0p/resources/2014iepp0023-lin-ching-lang-these.pdf.

61 *See generally* Claude Goldman, *An Introduction to the French Law of Government Procurement Contracts*, 20 GEO. WASH. J. INT'L L. & ECON. 461 (1987).

62 Tribunal des Conflits [TC] [Court of Conflicts], Apr. 11, 2016, Rec. Lebon 4043 (Fr.); *Administrative Courts and International Arbitration*, CONSEIL D'ÉTAT (Nov. 10, 2016), *available at* https://www.conseil-etat.fr/en/news/administrative-courts-and-international-arbitration.

63 M.P. JAIN, INDIAN CONSTITUTIONAL LAW 14 (Jasti Chelameswar & Dama Seshadri Naidu eds., 8th ed. 2017); H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 260 (2d ed. 2004).

64 Colin Turpin, GOVERNMENT PROCUREMENT AND CONTRACTS 97–98 (1989) *as cited in* Hop Dang, *The Applicability of International Law as Governing Law of State Contracts*, 17 AUSTL. INT'L L. J. 133, 151 (2010); *See also* Gabriela Shalev, *Government Contracts in Israel*, 18(1) PUB. CONT. L. J. 34, 41 (1988).

65 *See* sources cited *supra* note 64.

66 Stavros Brekoulakis & Margaret Devaney, *Public-Private Arbitration and the Public Interest under English Law*, 80 (1) MOD. L. REV. 22, 36–37 (2017).

67 Umakanth Varottil, *Government Contracts*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 975 (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).

68 Tata Cellular v. Union of India, (1994) 6 SCC 651, ¶ 94 (India); Kerala State Electricity Bd. v. Kurien E. Kalathil, (2000) 6 SCC 293, ¶ 11 (India); *see also id.*

constitutional standard, the breach would be justiciable before the Constitutional Courts. On the other hand, if the State/State entity breaches a contractual standard, the breach would be justiciable before the arbitral tribunal. It is accepted that the sole fact that the relationship between the state entity and the private party is contractual should not be a bar for the Constitutional Courts to exercise writ jurisdiction over the matters of gross injustice. To quote Justice Altamas Kabir's words:

> "*Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.*"[69]

At the same time, it is hard to ignore that, despite this dichotomy of standards, the available remedies under writs and arbitration can overlap. Let us take the recent *Unitech* case as an example.[70] In this case, the State entity was ordered to return the contractual payments received with interest. This ruling was based on the grounds that the respondent State entity had refused to fulfil its contractual obligations and it breached the principles of fairness and equality, which form a part of Article 14 of the Constitution. While the reliance on breach of constitutional obligations is accepted, the remedy ordered by the Supreme Court that the respondent shall return the contractual payments with interest is a classic case of damages against the repudiation of the contract.[71] It is argued that the remedy against repudiation was also available and perhaps better suited before the arbitral tribunal.

It is worth mentioning that the Supreme Court has itself previously ruled that Constitutional Courts should not entertain purely contractual matters,[72] particularly in the existence of an exclusive choice of forum such as arbitration.[73] The emphasis here is on the word "*should*". Since writs are a discretionary remedy,[74] the Courts retain the residual power to make the final call on whether to entertain a writ petition on a "*case-by-case*" basis. The *Unitech* judgment is case in point.

The purpose of highlighting this issue is to underline the need to develop an appropriate demarcation between constitutional remedies and contractual remedies and move away from the subjectivity that exists at this point. It is argued that there is a need to filter out the contractual claims at the outset and separate them from constitutional claims to preserve the sanctity of the Constitutional Courts as well as the principles of party autonomy underlying the choice of arbitration as the exclusive contractual dispute resolution forum. Moreover, private parties cannot be allowed to approbate and reprobate on their choice of forum just because the other party to the contract is a state entity and there are alternate forums available to litigate same cause of action.

However, such a demarcation is easier said than done because the lines between the private and public functions of the State entities are not always straightforward. In fact, the Supreme Court

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69 Tantia Constr., (2011) 5 SCC 697, ¶ 34 (India).

70 Unitech, (2021) SCC OnLine SC 99 (India).

71 Indian Contract Act, No. 9 of 1872, §§ 39, 73 (India) [*hereinafter* "Indian Contract Act"]; *see also* DINSHAW FARDUNJI MULLA, THE INDIAN CONTRACT ACT 152, 217 (Anirudh Wadhwa ed., 13th ed. 2011) [*hereinafter* "MULLA"].

72 Kulchhinder Singh v. Hardayal Singh Brar, 1976 AIR 2216, ¶ 12 (India) [*hereinafter* "Kulchhinder Singh"]; Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. R. Rudani, 1989 AIR 1607 (India).

73 Bridge & Roof, (1996) 6 SCC 22, ¶ 21 (India).

74 K.S. Rashid & Sons v. Income Tax Investigation Comm'n, 1954 AIR SC 207, ¶ 4 (India).

has previously acknowledged the hurdles in the process of drawing precise boundaries between the public and private law aspects of the State's functions.[75]

Indeed, the exclusive and non-arbitrable nature of constitutional issues emanating from Article 14 (equality before law) of the Constitution was recently evaluated and settled in the case of *Board of Control for Cricket in India* v. *Deccan Chronicle Holdings Ltd.* ["**Deccan Chronicles**"].[76] Additionally, the recent Supreme Court decision in the landmark *Vidya Drolia* case affirmed the non-arbitrability of public law issues.[77] These recent decisions, in addition to the constantly blurring lines between the public and private characterization of State/State entity contracts,[78] will lead to uncertainty. This uncertainty, in turn, could create trepidations in the minds of the potential arbitral tribunals regarding the issues of arbitrability in matters involving State entities that could potentially cut across or even tangentially touch the public law space.

Notwithstanding the above, it is submitted that the process of demarcation for the purposes of establishing writ jurisdiction has been challenging because, until this point, the Courts have taken an obligation-centric view of the claims i.e., whether the constitutional obligation was violated. It is submitted that there lies an opportunity to also take an object-centric view of the claim, i.e. whether the object of the claim is to obtain a contractual remedy. It is argued that in order to deal with these issues more efficiently, a holistic approach needs to be developed, by considering object and obligation together.

The Indian jurisprudence is not entirely unfamiliar with the holistic approach of combining object and obligations. In *Suganmal* v. *State of Madhya Pradesh*,[79] the five-judge Constitutional Bench of the Supreme Court emphasized on examining the breach of obligation of the State entity together with the object of the claim in order to determine the suitability of writ remedy.[80] In this case, the petitioner's claims were not about the legality of the action or breach of obligation. Instead, the petitioner claimed refunds after the illegality of the State's act was established separately. The Supreme Court ruled that a writ petition must only be maintained when the petitioner challenges the legality of the State/State entity's acts and requests the refund as a remedy for the State/State entity's acts.[81] In essence, the Supreme Court relied on a more holistic way of viewing the claims while entertaining the writ.

In the following part, the author builds upon the idea of combining obligations with objects and proposes a two-step test to filter out purely contractual claims. The demarcation resulting from the proposed test would not only enable the Courts to appreciate the issues more perspicaciously but also provide the arbitrators with some much-needed clarity when faced with the contractual issues intersecting with public law aspects.

VIII. Two-step *prima facie* characterisation test

75 Joshi Tech., (2015) 7 SCC 728 (India).
76 Board of Control for Cricket in India v. Deccan Chronicle Holdings Ltd., 2021 SCC OnLine Bom 834, ¶ 226 (India) [*hereinafter* "Deccan Chronicle Holdings Ltd."].
77 Vidya Drolia v. Durga Trading Corp., (2021) 2 SCC 1, ¶ 35 (India).
78 *See supra* note 27.
79 Suganmal v. State of Madhya Pradesh, 1965 AIR SC 1740, ¶ 9 (India).
80 *Id.*
81 *Id.*

In light of the problems highlighted above, it is proposed that a two-step *prima facie* characterisation test be applied to filter out purely contractual claims and enable the Constitutional Courts to primarily entertain the constitutional matters. This test is to be applied specifically in the cases where a writ petition has been filed despite there being an arbitration clause in a contract between a State entity and a private party.

As per the proposed test, first, the origin of the obligation which has been allegedly breached must be considered, and then the object of the claim must be considered. The test requires answering the following:

1. Whether the obligation relied upon in the writ petition is constitutional?
2. If yes, whether the object of claim in the writ petition is the vindication of contractual rights?

If the obligation is contractual, then the object would clearly be contractual as well. Such claims should be excluded from the first step itself and referred to arbitration. Indeed, this aligns with the settled position of law that contractual obligations should not be enforced through writ petitions.[82]

On the other hand, if the obligation is constitutional, then the second step must be undertaken. This is because the sole application of the first step could potentially result in the success of the claims that rely on the breach of constitutional obligation but result in a contractual remedy. This will have a chilling effect not only on the relevance of arbitration but also on the principles of party autonomy that permit a contractual choice of forum. Hence, the second step of the test is crucial.

Under the second step, after considering the nature of the obligation, the object of the claim must be considered. If the object of the claim is the vindication of contractual rights, then the claim should be characterized as contractual and referred to arbitration. If the object of the claim is the vindication of constitutional rights, then the claim should be characterized as constitutional and be entertained as such.

It is accepted that constitutional law issues are not arbitrable, as clarified by the Bombay High Court in the recent *Deccan Chronicles* case.[83] However, as noted earlier, under Indian law, state entity is governed by dual and concurrent standards of accountability– contractual and constitutional. Therefore, in applying the proposed test, when a writ petition relying on constitutional obligations with an underlying contractual objective is not entertained and an arbitral tribunal is constituted, the tribunal will not adjudicate upon constitutional obligations. Rather, the arbitral tribunal will adjudicate upon the breach of the contractual obligations and grant a contractual remedy.

82 Radhakrishna, (2006) 10 SCC 236, ¶ 19 (India); Kulchhinder Singh, 1976 AIR 2216, ¶ 12 (India).
83 Deccan Chronicle Holdings Ltd., 2021 SCC OnLine Bom 834, ¶ 191 (India).

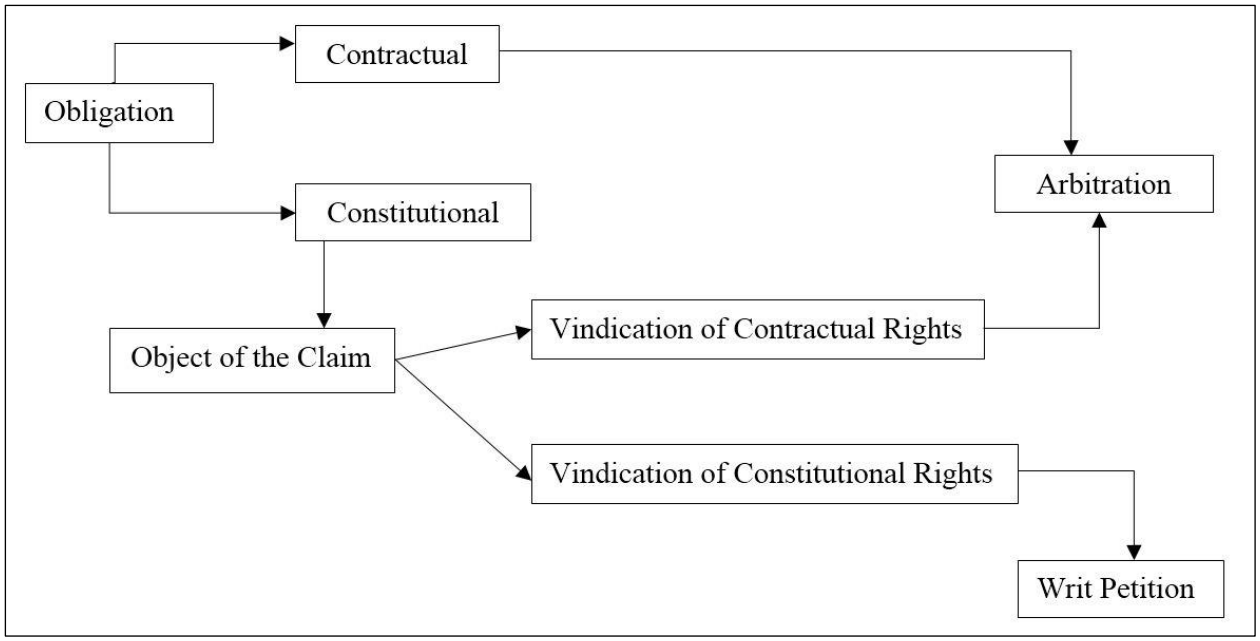

Figure 1: Graphical representation of the two-step prima facie characterization test

Obligation	**Objective**	**Forum**
Contractual		Arbitration
Constitutional	Contractual	Arbitration
Constitutional	Constitutional	High Court/Supreme Court (Writ Petition)

Table 1: Tabular representation of the two-step prima facie characterization test

The proposed two-step *prima facie* characterisation test is an extrapolation of practice that is commonly found in the investment arbitration context, whereby certain investment arbitral tribunals have refused to entertain claims that, even though anchored in an investment treaty, were about the scope of rights and duties in the contract and had a contractual objective behind them.[84] This solution from investment arbitration practice is particularly relevant for the jurisdictional overlap between arbitration and writ petitions because a similar problem exists on the investment arbitration plane.

Many times, foreign investors and entities of the host State have a contract providing for commercial arbitration as a dispute resolution forum.[85] Simultaneously, there exists an investment treaty between the host State and the foreign investor's home State, providing for investment arbitration as the forum for dispute resolution.[86] In such a situation, a foreign investor essentially has two forums to enforce two different obligations between the same parties. Similar to the Indian

84 Compania de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Generale des Eaux) v. Argentine Republic, ICSID Case No. ARB/97/3: Decision on Annulment, 19(1) ICSID REV. – FOREIGN INV. L. J. 89, 130 (2004) [*hereinafter* "Vivendi Annulment"]; Société Générale de Surveillance S.A. v. Republic of Phillipines., ICSID Case No. ARB/02/6, Decision on Jurisdiction, ¶ 155 (Jan. 29, 2004); ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 363 (2009) [*hereinafter* "ZACHARY DOUGLAS"].

85 *See generally* Stephen Donnelly, *Conflicting Forum–selection Agreements in Treaty and Contract*, 69(4) INT'L COMP. L. Q. 759 (2020).

86 *Id.*

constitutional law practice,[87] the prevalent investment arbitration practice suggests that the contract would govern contractual obligations, and the treaty would govern treaty obligations.[88] However, there remains a question of whether the treaty obligations can be enforced by requesting contractual relief?

As a solution to this problem, certain investment tribunals have ruled and certain scholars have argued in favour of only allowing the claims for the vindication of treaty rights to cross the metaphorical bridge to reach an investment tribunal and staying the claims for the vindication of contractual rights.[89]

While it is accepted that the origins of the jurisdiction of the investment arbitral tribunals and Constitutional Courts are fundamentally different, both forums share a common objective, i.e. holding the State or State entity accountable for its acts and omissions.[90] Over and above this common objective, and perhaps partly owing to it, there exists a jurisdictional overlap between the Constitutional Courts and investment arbitral tribunals, which has been the subject of intricate analysis by scholars.[91] Indeed, this overlap is a clear example of similarities between both the forums.[92] Therefore, the transposition of a relevant solution from investment arbitration practice into constitutional practice is logical.

However, one might argue that the application of investment arbitration principles to constitutional law predicaments would not be appropriate because the investment arbitral tribunals have been argued to have a hybrid public-private character.[93] On the other hand, generally, the Constitutional Courts deal with public law issues that are exclusive and non-arbitrable in nature. A response to this argument lies in Article 226 of the Constitution, which makes the constitutional mandate of the High Courts in India unique. As noted earlier, the broad jurisdiction of the High Courts under Article 226 to issue writs for "*any other purposes*" would cover legal issues beyond the public law realm and could entail issues with a mixed public-private character. Therefore, the above

87 Radhakrishna, (2006) 10 SCC 236, ¶ 19 (India).

88 Vivendi Annulment, ICSID Case No. ARB/97/3: Decision on Annulment, 19(1) ICSID REV. – FOREIGN INV. L. J. 89, 130 (2004).

89 *Id.*; *see also* El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 65 (Apr. 27, 2006); *See also* Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 154, 160 (May 29, 2009); *See also* Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶ 202 (Sept. 11, 2009); Berk Demirkol, *Non–treaty Claims in Investment Treaty Arbitration*, 31(1) LEIDEN J. INT'L L. 59 (2017).

90 Stephan Schill, *The Virtues of Investor–State Arbitration*, EJIL:TALK! (Nov. 19. 2013), *available at* https://www.ejiltalk.org/the-virtues-of-investor-state-arbitration; DURGA DAS BASU, *supra* note 3, at 131 *et seq.*

91 GABRIELLE KAUFMANN–KOHLER & MICHELE POTESTÀ, INVESTOR–STATE DISPUTE SETTLEMENT AND NATIONAL COURTS: CURRENT FRAMEWORK AND REFORM OPTIONS 33 (2020); SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION 12 (2009).

92 Stephan Schill, *International Investment Law and Comparative Public Law: An Introduction, in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 15 (Stephan W. Schill ed., 2010); David Schneiderman, *Investment Arbitration as Constitutional Law: Constitutional analogies, linkages, and absences*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 421 (Thomas Schultz & Federico Ortino eds., 2020).

93 Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74(1) BRIT. Y.B. INT'L L. 152 (2003); *see also* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107(1) AM. J. INT'L L. 45 (2013).

argument does not apply to writ petitions before the High Courts under Article 226 of the Constitution.

From a policy perspective, it is emphasised that the Courts, as well as the investment arbitral tribunals, cannot ignore the interests of transnational commerce and, therefore, must give effect to the collective will of the parties and the principle of *pacta sunt servanda* by upholding the contractual dispute resolution clauses.[94] Through the proposed two-step test, the Constitutional Courts will not only be able to enforce the contractual dispute resolution clauses but also preserve the plenary and prerogative nature of the writ remedies.

IX. Conclusion

As stated at the outset, the issue of whether to entertain a writ petition against a State entity in the presence of an arbitration clause, despite being analysed and decided multiple times, still persists. It has been ruled numerous times that the State entity's constitutional obligations would be separate from contractual obligations, which is why an arbitration clause cannot vitiate writ jurisdiction. On the other hand, it has also been ruled that when a *forum specialis* such as arbitration has been designated in the contract, purely contractual claims would be better suited before that forum. However, there remains a gap as to which claims would be purely contractual and which constitutional. This essentially opens the door for contractual claims relying on the breach of constitutional obligations to be entertained through writ petitions.

This gap exists because of the obligation-centric view of the Courts, wherein the origin of the obligation allegedly breached by the State/State entity is the sole driver of the nature of the claim and the choice of appropriate forum. The obligation-centric view can potentially allow writ remedies in the claims which argue breach of constitutional obligations but have a contractual objective behind them. This is particularly concerning in the cases where there is an arbitration clause in the contract with the state entity.

To resolve this problem, a two-step test has been proposed. This test moves away from the traditional obligation-centric approach towards a holistic approach, covering the obligation of the State entity as well as the object of the claim. In the process, the test enables the achievement of the collective purpose of the Indian legislative drive to make India an arbitration hub. At the same time, the test is in line with the extraordinary and discretionary nature of writ remedies, which need to be exercised judiciously.

[94] ZACHARY DOUGLAS, *supra* note 84; Indian Contract Act 1872, § 28, exception 1; *See also* MULLA, *supra* note 71, 126.